



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**[FHWA Docket No. FHWA-2019-0001]**

**Surface Transportation Project Delivery Program; Ohio Department of Transportation Audit Report**

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

**ACTION:** Notice; request for comment.

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

**DATES:** Comments must be received on or before **[INSERT DATE 30 DAYS AFTER PUBLICATION]**.

**ADDRESSES:** Mail or hand deliver comments to Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12-140, Washington, DC 20590. You may also submit comments electronically at

www.regulations.gov. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard, or may print the acknowledgment page that appears after submitting comments electronically. Anyone can search the electronic form of all comments in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). The DOT posts these comments, without edits, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

**FOR FURTHER INFORMATION CONTACT:** Mr. James G. Gavin, Office of Project Development and Environmental Review, (202) 366-1473, *James.Gavin@dot.gov*, Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, or Mr. David Sett, Office of the Chief Counsel, (404) 562-3676, *david.sett@dot.gov*, Federal Highway Administration, U.S. Department of Transportation, 60 Forsyth Street 8M5, Atlanta, GA 30303. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

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

## **Background**

The Surface Transportation Project Delivery Program, codified at 23 U.S.C. 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's responsibilities for environmental review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of FHWA. The ODOT published its application for assumption under the NEPA Assignment Program on April 12, 2015, and made it available for public comment for 30 days. After considering public comments, ODOT submitted its application to FHWA on May 27, 2015. The application served as the basis for developing the memorandum of understanding (MOU) that identifies the responsibilities and obligations that ODOT would assume. The FHWA published a notice of the draft MOU in the Federal Register on October 15, 2015, at 80 FR 62153, with a 30-day comment period to solicit the views of the public and Federal agencies. After the comment period closed, FHWA and ODOT considered comments and executed the MOU.

Section 327(g) of Title 23, U.S.C., requires the Secretary to conduct annual audits to ensure compliance with the MOU during each of the first 4 years of State participation and, after the fourth year, monitor compliance. The results of each audit must be made available for public comment. The first audit report of ODOT compliance was finalized on July 7, 2017. The second audit report of ODOT compliance was finalized on October 3, 2018. This notice announces the availability of the third audit report for ODOT and solicits public comment on same.

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

Issued on: March 1, 2019.

**Brandye L. Hendrickson,**

*Deputy Administrator,*

*Federal Highway Administration.*

## **Surface Transportation Project Delivery Program**

### **Draft FHWA Audit of the Ohio Department of Transportation**

**August 5, 2017 to August 10, 2018**

#### **Executive Summary**

This is the third audit of the Ohio Department of Transportation's (ODOT) assumption of National Environmental Policy Act (NEPA) responsibilities, conducted by a team of Federal Highway Administration (FHWA) staff (the team). The ODOT made the effective date of the project-level NEPA and environmental review responsibilities it assumed from FHWA on December 28, 2015, as specified in a memorandum of understanding (MOU) signed on December 11, 2015, and amended on June 6, 2018. Within ODOT, the Division of Planning Office of Environmental Services (OES) is responsible to manage and deliver the environmental program. This audit examined ODOT's performance under the MOU regarding responsibilities and obligations assigned therein.

Prior to the on-site visit, the team performed reviews of ODOT's project NEPA approval documentation in EnviroNet (ODOT's official electronic environmental document filing system). This audit consisted of a review of a sample of 39 higher-risk project files out of 1,042 approved documents for Federal projects in ODOT's EnviroNet system with an environmental approval date between April 1, 2017, and March 31, 2018. The team also reviewed ODOT's response to the pre-audit information request (PAIR) and ODOT's Self-Assessment report. In addition, the team reviewed ODOT's environmental processes, manuals, and guidance; ODOT NEPA Quality Assurance and Quality Control (QA/QC) Processes and Procedures; and the ODOT NEPA Assignment Training Plan

(collectively, “ODOT procedures”). The team conducted an on-site review during the week of August 6 to August 10, 2018. The team conducted interviews with ODOT’s central office staff on August 6 and with three district office staffs on August 7. The team also interviewed staff with the Ohio Department of Natural Resources (ODNR) on July 23, 2018, as part of the review.

Overall, the team found evidence that ODOT continues to make reasonable progress in implementing the NEPA Assignment Program based on Audit 1 and Audit 2 observations and demonstrated commitment to success of the program. The team found zero non-compliance observations but did note six general observations.

## **Background**

The Surface Transportation Project Delivery Program (NEPA Assignment Program) allows a State to assume FHWA’s responsibilities for review, consultation, and compliance with environmental laws for Federal-aid highway projects. When a State assumes these responsibilities, it becomes solely responsible and liable for carrying out the responsibilities assumed, in lieu of FHWA.

The State of Ohio represented by ODOT completed the application process and entered an MOU with FHWA on December 28, 2015, and amended on June 6, 2018. With this agreement, ODOT assumed FHWA's project approval responsibilities under NEPA and NEPA-related Federal environmental laws.

The FHWA is obligated to conduct four annual compliance audits of ODOT’s compliance with the provisions of the MOU. Audits serve as FHWA’s primary mechanism of determining ODOT’s compliance with the MOU, applicable Federal laws and policies, evaluating ODOT’s progress toward achieving the performance measures

identified in the MOU, and collecting information needed for the Secretary's annual report to Congress.

The team provided a draft of this report to ODOT for its review and the team considered the resulting comments in preparing this draft, which will be available for public review and comment. The FHWA will consider any public comments on this draft in finalizing the report.

### **Scope and Methodology**

The team conducted a careful examination of the ODOT NEPA Assignment Program through a review of ODOT procedures and project documentation, ODOT's PAIR response, and the self-assessment summary report, as well as interviews with ODOT central office and district environmental staff and resource agency staff. This review focuses on the following six NEPA Assignment Program elements: 1) program management; 2) documentation and records management; 3) QA/QC; 4) legal sufficiency; 5) performance measurement; and 6) training.

The PAIR consisted of 18 questions, based on the responsibilities assigned to ODOT in the MOU. The team reviewed ODOT's response and compared the responses to ODOT's written procedures. The team utilized ODOT's responses to draft interview questions to clarify information in ODOT's PAIR response.

The ODOT provided its NEPA Assignment Self-Assessment summary report 30 days prior to the team's on-site review. The team considered this summary report both in focusing on issues during the project file reviews and in drafting interview questions. The report was compared against the previous year's self-assessment report and the requirements in the MOU to identify any trends.

Between March 16 and May 31, 2018, the team conducted a project file review by identifying and reviewing 39 higher-risk project files out of 1,042 approved documents of Federal-aid projects in ODOT's EnviroNet system with an environmental approval date between April 1, 2017, and March 31, 2018. The selection of these projects was based on a 100 percent sampling of d-listed Categorical Exclusions (CE), as well as all Environmental Assessments (EA) and Environmental Impact Statements (EIS). The team excluded from review those projects approved by ODOT under 23 CFR 771.117(c) (c-listed CEs) based on the review performance of those types of projects since ODOT assumed NEPA responsibilities in 2015. The projects reviewed represented all remaining NEPA classes of action available, including projects representing 9 out of 12 ODOT Districts and the Ohio Rail Development Commission (ORDC).

In addition, the team reviewed ODOT's project file review associated with its Self-Assessment to determine if ODOT evaluated its projects in a similar fashion and using similar standards to that of the Federal portion of this review. The ODOT reviewed projects within the same sampling period as FHWA, however, ODOT samples included Federal-aid and State-only funded projects. The ODOT conducts NEPA on all projects regardless of funding source as they routinely convert funding from State to Federal later via the Advanced Construction (AC) process. The ODOT reviewed 248 projects, including 186 c-listed projects, 61 d-listed projects, and 1 EA. The team determined the State performed a rigorous annual QA review of its own projects.

During the on-site review week, the team conducted interviews with 21 ODOT staff members at the central office and three districts: District 6 (Delaware); District 7 (Sydney); and District 10 (Marietta). Interviewees included ODOT OES management and subject matter experts, Office of Diversity and Inclusion (ODI), District Environmental Coordinators (DEC), environmental staff, and public information officers, representing a diverse range of expertise and experience. These interviews focused on NEPA Assignment with emphasis on items where additional information was deemed necessary to complete the review.

The team conducted interviews 2 weeks prior to the on-site review with personnel from the ODNR. The ODNR staff provided valuable insight to the review team regarding ODOT's performance and relationships with partner resource agencies.

The team identified gaps between the information from the desktop review of ODOT procedures, PAIR, self-assessment, project file review, and interviews. The team documented the results of its reviews and interviews and consolidated the results into related topics or themes. From these topics or themes, the team developed the review observations and successful practices. The audit results are described below.

Overall, the team found evidence that ODOT continues to make reasonable progress in implementing the NEPA Assignment Program based on the Audit 1 and Audit 2 observations and demonstrated commitment to success of the program. The team found zero non-compliance observations but did note six general observations.

The FHWA team urges ODOT to monitor and make additional improvements to the program for continued successes of the program.

## **Observations and Successful Practices**

### **Program Management**

#### **Observation 1: Opportunities exist to strengthen coordination between ODOT OES and ODOT ODI.**

The team encourages ODOT to ensure that a proper level of communication exists between OES and ODI in order to facilitate the coordination of OES guidance and training with the ongoing ODOT-wide Title VI program enhancements. The FHWA recognizes and is supportive of the coordination and partnering efforts between OES and ODI undertaken to date and stands ready to contribute to these efforts, where appropriate.

#### **Observation 2: There are inconsistencies in the communication and management of ODOT policy, manuals, procedures, and guidance.**

The ODOT developed and implemented over 140 procedures to implement NEPA Assignment, manage the program, and provide detailed instruction for completion of environmental actions to document preparers and reviewers. The ODOT shares these documents and other guidance with NEPA practitioners on a quarterly basis via email, NEPA chats and DEC Meetings, and via training. In addition, these documents are saved on a local drive accessible by ODOT environmental staff and posted to ODOT's Web site for consultants and local public agencies.

The FHWA found that policies, manuals, and other guidance documents are readily available. However, interviews with district staff indicate that opportunities exist to improve upon the communication of this documentation in order to ensure more consistent implementation. In addition, there are examples of training materials containing information that is not included in the related guidance documents. In these

cases, some environmental staff indicated they rely on the information in the guidance while others indicated they rely on OES instruction provided verbally or through email. Information prepared for ODOT staff should exhibit consistency, regardless of the form in which its presented.

**Observation 3: Inconsistencies remain in Public Involvement (PI) activities specifically regarding outreach activities to underserved and protected populations.**

The team notes and appreciates ongoing efforts by ODOT in response to previous audit recommendations for improvement and enhancement of the PI process. The team was provided examples of effective PI efforts during the interviews with district staff.

However, as demonstrated in the project file reviews and the interviews, there remain areas of note in application and consistency of public involvement efforts and activities.

During FHWA's review, ODOT stated that the intent of its process regarding Environmental Justice (EJ) is to identify any disproportionately high and adverse impacts and disparate impacts on the associated populations. Although OES staff indicated that they have updated the guidance, developed new training, and provided forums for instructive discussion for all environmental staff, consultants, and Local Public Agencies, it is not clear how ODOT will ensure that outreach efforts and activities are commensurate with the level of impact or potential mitigation, as there is no discussion of outreach efforts in the *ODOT-OES' Underserved Populations Guidance*. It is unclear that the distinctions and specific requirements of protected populations are fully discerned and distinguished from each other in the guidance document, including thresholds and requirements. In addition, interview responses within OES indicated a

difference of opinion in terms of what constituted outreach to underserved and protected populations.

At the district level, ODOT district environmental staff indicated that they had inconsistent information on how to determine if there were protected populations and how to conduct the required outreach activities, even if there were no disproportionately negative impacts. However, OES is trusting the districts, on projects with a lower level of NEPA classification, to ensure full and fair participation by underserved and protected populations in public involvement, NEPA and the transportation decisionmaking processes.

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

##### **Observation 4: Opportunities exist to continue improving documentation in the areas of PI, EJ, and environmental commitments.**

In response to previous audits and self-assessments, ODOT updated many procedures relating to the NEPA process to improve its processes and meet Federal requirements.

The updates included changes to ODOT's internal documentation and filing guidelines and updates to EnviroNet. The review team thinks these changes have positively impacted the program since Audits 1 and 2.

The quality of documentation for projects is trending in a positive direction since Audits 1 and 2, as approximately 50 percent of all projects reviewed had zero deficiencies noted by the team. However, although there were examples of high quality PI, EJ reviews, development of environmental commitments, and documentation for some projects, these same elements were lacking in others. For the projects reviewed, 42 percent of substantive comments made by the team related to EJ, 22 percent to PI, 17 percent to

environmental commitments, 11 percent to QA/QC, and 8 percent to documentation. This demonstrates inconsistencies in practice, which may indicate additional training, guidance, and/or quality controls may be needed to improve consistency in application of documentation statewide.

The team met with ODOT to discuss individual deficiencies noted by both FHWA and ODOT OES during this audit. The ODOT evaluated these deficiencies at OES and then communicated them individually with the districts. The ODOT remains committed to improvements in documentation, with plans to continue updates to EnviroNet and guidance, as needed, and with the training required to deliver results.

#### **Quality Assurance/Quality Control (QA/QC)**

##### **Observation 5: There are variations in awareness, understanding, and implementation of QA/QC process and procedures.**

The inconsistencies and missing information noted in the Documentation and Records Management section are an indication of inconsistency in ODOT's QA/QC process. The team found inconsistencies in awareness and use of peer reviews in the ODOT Districts, as well as use of comments in EnviroNet. Selected ODOT OES and district environmental staff said that they rely on the ODOT Central Office for QC support. No training is provided exclusively for QA/QC.

#### **Legal Sufficiency Review**

The ODOT utilized its guidance for legal sufficiency to review one Environmental Impact Statement Re-evaluation, one EA, and two Individual Section 4(f) approvals.

#### **Performance Measures**

The development of Performance Measures is required in MOU Section 10.2. The ODOT has refined their Performance Measures to provide a better overall indication of ODOT's execution of its responsibilities as assigned by the MOU. The team found evidence that the results obtained through the Performance Measures are beginning to provide actionable feedback, allowing ODOT to make appropriate changes as it manages its environmental program.

### **Training Program**

During the previous audits, it was noted that ODOT has a robust environmental training program and provides adequate budget and time for staff to access a variety of internal and external training. To add to the training program and plan, ODOT has complemented its traditional, instructor-based training courses, quarterly DEC meetings, and monthly NEPA chats with the development of several online courses. During the audit, ODOT reported that 10 online courses are anticipated to be available in August 2018, with an additional 19 online courses anticipated to be developed within the year. As of October 2018, it is not evident that these courses were yet deployed.

**Observation 6: Opportunities exist to expand required and continuous training to additional staff and develop additional instructor-led or online training in NEPA-related subject areas.**

Also, during the previous audit, it was noted ODOT's training plan states that all ODOT environmental staff (both central and district offices) and environmental consultants are required to take the pre-qualification training courses. The ODOT should consider extending this requirement to NEPA project managers and public involvement officers. Extending the training to additional staff may improve public outreach efforts and overall

program delivery. The ODOT should focus on training in NEPA and NEPA-related subject areas such as Limited English Proficiency and Public Involvement. The FHWA encourages ODOT to include specific EJ training opportunities in its training plan, such as the Web-based course currently under development.

### **Next Steps**

The FHWA provided a draft of this audit report to ODOT for a 14-day review and comment period and considered ODOT's comments in developing this draft report. In addition, FHWA will consider comments on the draft report received from the public within the 30-day comment period after publication in the Federal Register, pursuant to 23 U.S.C. 327(g). No later than 60 days after the close of the comment period, FHWA will respond to all comments submitted, pursuant to 23 U.S.C. 327(g)(2)(B). Once finalized, FHWA will publish the final audit report in the Federal Register.

The FHWA will consider the results of this audit in preparing the scope of the next annual audit. The next audit report will include a summary that describes the status of ODOT's corrective and other actions taken in response to this audit's conclusions.

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