

DRAFT FHWA/ODOT NEPA Assignment Program Workshop

November 17-18, 2014

Meeting Summary

In Attendance:

ODOT – Tim Hill, Erica Schneider, Matt Perlik, Kevin Davis, Tom Pannett, Larry Hoffman, Jim Barna, Greg Murphy, Heather McColeman

FHWA – Laurie Leffler, Noel Mehlo, Owen Lindauer, Rob Griffith, Dave Snyder, Carmen Stemen, Leigh Oesterling, Sharon Vaughn-Fair

A two day meeting was held on November 17 and 18, 2014 to discuss ODOT's interest in the NEPA Assignment program with FHWA. The following is a list of Q&A's developed to document the outcome of the meeting and to identify action items:

Question: What is this program and what does it involve?

Answer:

- ❖ The Surface Transportation Project Delivery Program (Program) originated as a pilot program under SAFETEA-LU. Ohio was one of the five states named as eligible to participate in the pilot program, but did not choose to participate. (California is the only state that entered the program during SAFETEA-LU.) Under MAP-21, the program was made permanent and is open to any state.
- ❖ The goal of the program is to streamline project delivery by assigning the NEPA responsibility to the states.
- ❖ In order to apply for the Program, a state must waive its sovereign immunity and agree to be sued in and abide by Federal court decisions for NEPA actions.
- ❖ FHWA will not be involved in any project level decisions related to NEPA, under the Program.
- ❖ After waiving sovereign immunity, a state prepares an application for the program, which must be provided for public review/comment. The state must include the comments received and how they are addressed with their application to FHWA.
- ❖ The application must state what level of actions the state would like assigned (CE, EA, EIS). Ohio will be applying for all actions, including CEs, EAs, and EIS, level of actions.
- ❖ The application should also describe how the state will carry out its additional responsibilities under the Program.
- ❖ A Memorandum of Understanding (MOU) between ODOT and FHWA will serve as the contract for carrying out the provisions of the program.
- ❖ A draft of the MOU will be made available for public comment via the Federal Register.
- ❖ The MOU will be for a term of 5 years and is renewable.
- ❖ FHWA has provided ODOT a MOU template (the Texas MOU) and noted that changes to the MOU template could result in delays to implementation of the program. The MOU template has been reviewed by the Office of Secretary of Transportation (OST – USDOT), Department of

Justice and Council on Environmental Quality. Any changes to the MOU must be reviewed by these agencies, in addition to FHWA.

- ❖ The MOU will specifically list any project that will not be part of the Program, and will per MAP-21 the following will NOT be assigned to the state under the Program:
 - Projects crossing state boundaries
 - Projects led by Federal Agencies other than FHWA (i.e. FTA, FRA, FAA)
 - Project-level air quality conformity determinations
 - Government to Government Tribal consultations
 - Statewide and Metropolitan Planning
 - Project Authorizations
- ❖ FHWA will maintain oversight of the Program through monitoring and auditing described in the MOU. Audits will be conducted twice yearly during the first two years of the Program, followed by yearly audits.

ACTION ITEMS

To help complete the application process it was agreed to:

- ❖ Hold bi-weekly coordination meetings between ODOT and FHWA
- ❖ FHWA Ohio Division will provide a response to ODOT's 10/21/2014 statement of interest letter indicating FHWA's support of ODOT's interest, for ODOT to use in speaking with their state legislature regarding the Program and the sovereign immunity waiver.

Question: ODOT expects the sovereign immunity language to be included in the State of Ohio Transportation budget bill which is signed into law in March or April, but this is not effective until July 1. Can ODOT release the Application once the bill is signed or wait until its effective date of July 1?

Answer:

- ❖ Ohio's AG must certify that ODOT meets the legal requirements of sovereign immunity. If Ohio's AG's agrees that it can be released, FHWA will concur.
- ❖ ODOT has already received a ruling from our legal and Ohio's AG's that once the bill is signed, the Application can be released for public notice.

Question: What process can ODOT expect for the Application/MOU?

Answer:

- ❖ The application describes training procedures, manuals, etc. that ODOT has and explains why we're ready to deliver the NEPA Assignment Program. There is a section of the application that states what will change in order to deliver the NEPA program with Assignment of these responsibilities. Those tasks would have to be taken on and conducted by ODOT.
- ❖ The application is subject to public notice. We must publicly post the application and have a 30 day comment period. Comments must be addressed and included in formal submission of application to FHWA. FHWA reviews and responds with their determination.

- ❖ The MOU is the formalization of the contract as proposed in our application. The MOU lasts 5 years but is renewable. There is no termination date and it will be in effect as long as the state lives up to its responsibilities. .
- ❖ Notice of the MOU will be published in the federal register after the MOU is drafted and agreed upon but prior to execution.
- ❖ If we want any changes to the existing templates the process will go much slower. If we have no changes to the template, things will go much more quickly. The original pilot program was agreed to by all attorneys in HQ and field counsel, DOJ, DEQ, all federal agencies prior to CA and General Counsel's Office – then went to CA. TX went through changes so they are 6 months behind schedule.
- ❖ ODOT OES is shooting for implementation in 2015 – assuming using TX MOU schedule. The schedule calls for application with public notice in March assuming OH's budget bill is signed by the Governor.
- ❖ ODOT will need to assess how many manuals need to change and how much. ODOT will need to see if the TX example of the MOU will work without many changes, etc. There will be two comment periods. One for the application and one for the MOU. We must create a docket for comments to the MOU and allow for a 30 day comment period. FHWA wants to accommodate ODOT as much as possible to expedite the process but the State also needs to be ready to assume the responsibilities, once the MOU is executed.

Question: What is the review process for the Application?

Answer:

- ❖ Based on the TX process: ODOT will submit a draft application to FHWA, FHWA reviews and provides comments, ODOT incorporates comments/suggestions then will post for public review under state comment procedures.
- ❖ Once the Application has been made available for public review and comments for 30 days, ODOT will need to consider all comments received & make edits necessary to address those comments.
- ❖ After this is complete, ODOT will resubmit the now "Final" Application to FHWA.
- ❖ FHWA reviews the Final Application and may have comments.
- ❖ After any comments have been addressed, ODOT and FHWA can begin negotiating the draft MOU.

Question: Will FHWA be willing to look at the MOU concurrent with the application?

Answer:

- ❖ FHWA Legal could do high level review of the MOU and provide comments on glaring items but no official review will be conducted until after the application is approved.
- ❖ FHWA's HQ's, OST, CEQ and DOJ will review the MOU and provide comments. ODOT will address any comments & make edits, submit the MOU for execution.

Question: Would FHWA be willing to look at the draft MOU when the draft application goes out for public comment? That would save us 30-45 days.

Answer:

- ❖ FHWA can provide a high level review of the MOU before the application is approved.
- ❖ ODOT can submit both drafts at the same time. The FHWA team will unofficially provide comments to the Division Office if they see any issues. This should help shorten the process because FHWA's legal teams will have conducted an initial review of this document, early in the process.

Question: What kind of concerns can we expect or plan for during the Application process?

Answer:

- ❖ ODOT doesn't anticipate any objections or reluctance from the majority of our partner agencies.
- ❖ However, USFWS and USACE may have concerns with this program as FHWA will no longer be actively involved in ODOT's projects.
- ❖ Most agencies won't see much change, as our procedures aren't going to change.

ACTION ITEMS

- ❖ FHWA suggested ODOT encourage local/regional resource agencies to notify their headquarters of ODOT's interest in the NEPA Assignment Program.
- ❖ ODOT needs to document efforts to reach out to stakeholders, resource agencies, and Tribes regarding the Program.

Question: What changes can ODOT expect to make as a result of the Assignment program?

Answer:

- ❖ ODOT needs to plan for the time it takes to conduct a legal review. FHWA Legal currently takes at least 30 days for a cover to cover review of a document.
- ❖ ODOT can address the legal review needs with either internal staff or special counsel. FHWA has no preference as long as legal is looking at it from a risk assessment perspective. It is a time-consuming process because the legal review includes the entire document from cover to cover.
- ❖ ODOT's legal team would also need to develop and review statute of limitation claims so FHWA Ohio Division can submit to the federal register (OH can't publish in the federal register as we are a state). FHWA Ohio Division will not get involved in this review; they would simply act as a pass-through agency – administrative only. Federal register reviewers follow very particular standards concerning formatting, etc., so it will fall to ODOT to make sure that the formatting is right.
- ❖ ODOT needs to include training on this in the Legal Sufficiency Training.
- ❖ ODOT needs to prepare to assume responsibilities by updating procedures, manuals, and trainings, as needed.

- ❖ Signature authority—ODOT will need to come up with procedures on signature authority. Application can say we're going to develop the policy but it must be in place before we assume NEPA. Procedure would spell out who can sign for what documents. ODOT's legal (Tom Pannett) needs to look at Federal code and see what it says.
- ❖ Prior concurrence—ODOT cannot have a consultant do that. An outside entity doesn't meet Prior Concurrence definition. It should be known early on if a project is going to be Prior Concurrence.
- ❖ Section 4(f) constructive use—ODOT may consult with FHWA in the case of a constructive use. ODOT would make the 4(f) determination but we would discuss the underlying policy issue with FHWA.
- ❖ Lobbying—there is no prohibition against ODOT lobbying to change laws or complain about other agencies; however, ODOT cannot use federal aid dollars to do so.

ACTION ITEM:

- ❖ ODOT must determine how it will handle Prior Concurrence projects and Legal Reviews.
- ❖ FHWA will provide Legal Sufficiency Training, including limitation on claims, for ODOT.
- ❖ ODOT will meet with resource agencies and stakeholders, etc.
- ❖ ODOT will develop a narrative to walk partners through the application process..
- ❖ ODOT has already scheduled a webinar overview in conjunction with FHWA for the partner agencies December 1.
- ❖ ODOT will conduct follow-up one-on-one meetings with the agencies by holding one on one meetings with partner agencies/stakeholders to hear and address any concerns. (FHWA will be invited to these one-on-one meetings).
- ❖ ODOT will present an overview of the program to the MPOs at a scheduled bi-monthly meeting Friday (11/21/14).

Question: For PA's and MOU's would ODOT have to change the entire agreement or would it be an amendment to the agreement? Can we just use a cover letter?

Answer:

- ❖ It changes from state to state and for each agreement. Outreach with the agencies should address formal agreement documents and the changes we need to those.
- ❖ FHWA recommend that we have a meeting with SHPO to see if it will be necessary to revise 106 agreement or not.
- ❖ For agreements where FHWA has actually signed, they will need to be either updated to reflect the Assignment program or a cover letter will need to be attached and signed by all parties to show agreement with the change.
- ❖ All current agreements that FHWA is involved in will still need to be in place because the process will not change for projects that cross state lines.

- ❖ But we also need an amendment to have old agreements still in place while indicating ODOT's role and responsibilities for projects where ODOT has assumed the NEPA responsibilities. We need to clarify in the application how this would work.

ACTION ITEM

- ❖ FHWA Legal will let ODOT know if agreements need to be updated prior to the MOU being executed, or within a certain time frame thereafter.

Question: How should Tribal consultation procedures be updated for the Program?

Answer:

- ❖ Tribal consultation currently operates under the procedures documented in the 2005 Tribes/FHWA/ODOT consultation meeting notes and through the 2014 FHWA/ODOT letter agreement.
- ❖ FHWA recommends we jointly (FHWA & ODOT) send a letter to the tribes which describes our existing procedures and their origins, ODOT's interest in the Program, including the roles of ODOT and FHWA under the Program, and state that we intend to continue operating under these procedures unless they have specific concerns.
- ❖ The letter should make clear that ODOT does not intend to conduct Government to Government consultation. FHWA would still be responsible for that.
- ❖ FHWA suggests the letter includes a deadline for providing responses.

ACTION ITEM

- ❖ FHWA & ODOT will prepare a joint letter to the Tribes regarding the Program and procedures for consultation on projects.

Question: How are Emergency Repair (ER) projects handled?

Answer:

- ❖ Currently FHWA signs a DSR form that then serves as the categorical exclusion determination. The Environmental section may need to be taken out of DSR and upload into online CE program as supporting documentation.
- ❖ The DSR itself cannot serve as the categorical exclusion determination under the Program

ACTION ITEM:

- ❖ Follow-up discussion between ODOT & FHWA Ohio Division needed.

Question: ODOT's project development process has deliverables that are combined engineering and environmental decision documents (the Alternative Evaluation Report (AER) and Feasibility Study (FS). Will FHWA still review engineering heavy documents like the FS and/or AER? Or will FHWA wait and only look at IMS/IJS?

Answer:

- ❖ FHWA Ohio Division will have to discuss how to approach this. FHWA Ohio Division will only look at PODI/POCI projects noted for engineering/design risk. If the preferred alternative

operationally works, then there is no issue. If it doesn't they may need ODOT to provide context regarding the alternatives dismissed for environmental reasons.

- ❖ FHWA will limit their review to engineering. If ODOT asks for a design exception, for example, to avoid an environmental resource, then FHWA would only comment on the operational concerns, and would not recommend a different way to handle environmental issues.
- ❖ FS and AER may or may not be reviewed- this will need to be discussed more. Design exception on IMS, for example can ODOT request a design exception for shorter ramp to avoid impact to a 4(f) property? In this situation, FHWA would review the design exception request and comment on engineering and operation but not on environmental issues. ODOT will include information on the environmental issues only to provide context to the engineering decisions. Also, ODOT's process for advanced acquisition of ROW needs to be spelled out in the application.

ACTION ITEM

- ❖ Further discussions between FHWA Ohio Division and ODOT are needed to clarify the role of FHWA on design issues for projects, considering the integration of environmental and engineering studies in ODOT's project development process.
- ❖ Ensure ODOT's advanced ROW acquisition process is captured in the application.

Question: When dealing with a multi-modal project would ODOT assume FHWA responsibilities? Or, does ODOT only want FHWA responsibilities and not FTA, FRA, etc. responsibilities.

Answer:

- ❖ For multi-modal projects, such as a highway project with transit components, ODOT would essentially assume the role of FHWA and coordinate directly with FTA; ODOT would not assume FTA's role.
- ❖ In cases of other modes projects, where FHWA may be invited to participate (i.e. a Transit project that may have highway components) ODOT would assume FHWA's role. Under the Surface Transportation Project Delivery Program, ODOT, could assume responsibility for FRA and FTA, but would need to apply to do so. ODOT will consider FRA or FTA roles.

Question: Would FHWA still submit document to EPA's eNEPA system or will ODOT have access to submit documents directly?

Answer:

- ❖ Based on actions in Caltrans, ODOT would be able to work direct with EPA on the eNEPA system, however, for the Federal Register, FHWA will still be the point of contact.

Question: What changes does ODOT have to make to assume the role of FHWA, specifically with Project Recordkeeping?

Answer:

- ❖ ODOT has to certify that their public records act is consistent with the Freedom of Information Act (FOIA) as part of the application.
- ❖ ODOT's legal (Tom Pannett) stated that Ohio's existing law exceeds FOIA requirements. FHWA Legal will have to review the information related to this so ODOT should be sure to submit to FHWA prior to circulating the application for public comment so ODOT can be sure there is nothing glaring.
- ❖ Federal records retention requirements are listed with National Archives.
 - Litigation records should be kept until conclusion of mitigation or "reasonable" time thereafter. This is different from records retention for auditing.
 - Per National Archives requirements, FHWA documents everything that's been destroyed and why (typically because it's past the time needed to retain). If it's not a decision-making document, then keep for one year and there is no need to document when it's destroyed or why.
 - ODOT's retention policy is more restrictive. ODOT would just need to document what was being destroyed. (Example: EIS because it was 6 years old, or inadvertently destroyed, Administrative no longer of any value, etc.).

ACTION ITEM:

- ❖ ODOT Legal should send Ohio public records act information to FHWA Legal.

Question: What is the expected schedule for the NEPA Assignment Program in Ohio?

Answer:

Assignment Schedule

- ODOT to submit first version of working draft application- 11/1/14
- Establish meeting with Executive leadership for briefing- 12/2014
- Meet with agencies and associations- 12/2014
- Send letter to Tribes- 12/2014
- Receive comments from OH-FHWA Division on working draft- 11/28/14
- FHWA provide comments to ODOT on draft CE PA- 12/14/14
- ODOT submit draft application to FHWA- 12/15/14
- CE PA approval- 1/10/15
- Receive comments from FHWA on draft Application- 1/12/15
- Send Section 106 draft revised PA to tribes with additional Assignment information- February 2015
- Legal sufficiency training- the week of February 18 and 19, 2015
- Audit process training- the week of February 18 and 19, 2015
- Limited waiver of sovereign immunity- March/2015

- Public Notice of Application- April/2015
- Final application to FHWA- June/2015
- MOU to FHWA- June/2015
- MOU Public Notice- Sept/2015
- Executed (sending for signature) MOU to FHWA-November/2015
- Effective Date of program- December 1st, 2015

6 months- finalize PA/MOU's that support the agreement

- ACTION ITEM: The schedule will include coordination meetings every two-weeks. It was agreed to have these coordination meetings every other Tuesday at 9am-10am beginning Tuesday December 2. Invite: FHWA: Owen Lindauer, Chip Larson, Sharon Vaughn-Fair, Rob Griffith, Leigh Oesterling, Noel Mehlo, Carmen Stemen; ODOT: Jacque Annarino, Tim Hill, Tom Pannett, Kevin Davis, Larry Hoffman, Heather McColeman,

Question: How does ODOT determine what projects are waived from the Assignment both prior to its approval and after its in place? (Example- 3 years from now.... A really unique EIS is being developed... is FHWA involved or is it ODOT's? Does the MOU ever get revisited to add waiver projects?)

Answer:

- ❖ The determination of project(s) waived from the Program is negotiated between ODOT and FHWA during the application process. After that, any new projects are ODOT's unless they are outside the terms of the MOU, such as projects crossing state borders.
- ❖ ODOT will track what to do with the environmental process and all aspects of the process. For example, ODOT would have to monitor the 10 year payback clause and coordinate with finance on payback requirements. Tracking of EAs and EISs, tracking re-evals, open documents, etc. all will continue to be ODOT's responsibility.
- ❖ The MOU will specify any projects that FHWA will retain. Once ODOT has responsibility and a new project comes along it is ODOT's. There will be no asking FHWA back if a project is complex.

Question: What is FHWA's role in the program? I.e.- does FHWA still review PA, manuals, guidance, trainings, etc. Does FHWA review future updates to manuals?

Answer:

- ❖ Yes for any kind of non-project specific agreements. FHWA would still review manuals as part of program stewardship and oversight. For example, the Public Involvement Procedures would still be approved by FHWA.

Question: Does FHWA continue to assist in training?

Answer:

- ❖ Yes, FHWA will continue to assist in the delivery of program level training as it currently does.

Question: How does ODOT become informed of National changes to rules/guidance, etc?

Answer:

- ❖ Usually when there is a change, FHWA Headquarters sends an email to the Division Offices and asks them to disseminate. FHWA has an obligation to let ODOT know about changes to the program. So, from a *program* standpoint, things would continue as they are today.

Question: Does FHWA have a role in conflict resolution in areas other than tribal coordination?

Answer:

- ❖ Other than tribal, there is not an official role for FHWA in conflict resolution between agencies on a project.
- ❖ At a program level, FHWA can participate. FHWA cannot work on conflict resolution at the project level. For example, FHWA could continue to participate in the Indiana Bat programmatic agreement discussions between ODOT, FHWA, and USFWS.

Question: Since FHWA won't be involved in the day to day project level information and context/background, does that handicap FHWA for program level discussions?

Answer:

- ❖ No major issues are expected as the Ohio Division relies now on expertise from its Resource Center and other experts within FHWA, when needed.
- ❖ Although the Division will not be involved in project activities, they will still be doing risk assessments, audits, and monitoring of the program.

Question: What is the audit and how does it work?

Answer:

- ❖ The Audit is an opportunity to fine tune the program, and identify issues so they can be addressed and hopefully prevent problems.
- ❖ ODOT would prefer to receive audit training in January/February 2015, prior to the application being officially submitted. The more ODOT can learn ahead of time, the sooner they can implement changes to program, record keeping, procedures, etc.
- ❖ FHWA doesn't have a problem with ODOT having the audit training before the application is approved.
- ❖ The ODOT attorneys should attend the audit training, as well as the environmental staff. It is also useful for attorneys from FHWA and ODOT to get together before the MOU is drafted. FHWA's Legal will also provide legal sufficiency training (different from Audit Training).

ACTION ITEMS:

- ❖ Schedule and Conduct Audit & Legal Sufficiency Training.

Question: How should ODOT prepare for the audits?

Answer:

- ❖ Audits are held every six months for first two years. They take about a week on site.
- ❖ Once an audit has begun it has to be completed within 6 months.
- ❖ The auditing process includes interviews, preferably face-to-face.. FHWA will not question if ODOT made the right decision, but instead will look to see if the established procedures were followed. Interviews may include both ODOT and resource agency staff.
- ❖ The audit has quantitative and qualitative aspects. FHWA reviews the documents and conducts interviews to make sure that the results were based on the correct procedures.
- ❖ The MOU identifies the areas that will be subjected to audit. The audits are to determine if ODOT is in compliance with law and with the MOU. The audit is not a legal review (was it arbitrary and capricious?) but a stewardship and oversight review (was the MOU followed?). Audit training will help explain this further.

Question: Is there a risk with putting too much detail into the MOU? If changes occur, does ODOT have to update the application and/or MOU?

Answer:

- ❖ No there is no risk. ODOT needs to include enough information in the application and MOU so that others can understand it.
- ❖ CEQ, DOJ and the public have to review it comment, so you need enough information included so they have a solid understanding of ODOT's process. Too much reference to other documents will make it hard for them to figure out what ODOT is talking about and how FHWA will audit us. The Application and MOU document ODOT's intent and expectations with this program. Changes to the process in the future is expected and acceptable. ODOT can make changes to manuals and guidance without changing the MOU.
- ❖ FHWA stated that ODOT can have changes to our processes without changing MOU. 23 CFR 773.109(a)(3)(i)—summary of state procedures currently in place.

Question: What would prompt a change in the MOU?

Answer:

- ❖ Major changes (such as assuming NEPA for FTA) would require an updated MOU. Auditing for five years then goes to monitoring. MOU is valid for when it is signed.

Question: Are we missing anything in our approach? Training, scope, lessons learned from other states, etc.?

Answer:

- ❖ ODOT is still researching how we expect to address Legal sufficiency. Right now, ODOT recognizes that our current legal staff can't do it all and we will need legal assistance.
- ❖ FHWA requested that ODOT spell out more detail in the application of how ODOT will address the staffing needs of this program and what is being assigned to the District's, if anything.

- ❖ FHWA feels that ODOT needs to revisit the number of FTE's we have and whether or not ODOT can handle FHWA's workload with current staff. If we're assuming all of FHWA's responsibilities how will we handle the work load? FHWA currently uses 3-3.5 FTE's to complete the environmental reviews within Ohio.
- ❖ ODOT will need to spell out how they will be able to absorb this work from FHWA.
- ❖ ODOT needs to reflect in the application that every district has an assigned OES liaison and depending on skill level may receive additional assistance from OES or consultant staff. Need to ensure we can accommodate all work now and additional QA/QC. Currently have 60 FTE. Is that adequate or is it somewhat more than 60?
- ❖ TX – hired attorney, manager for QA/QC, training manager. CA had to hire specialized people as well- 8 in total. Alaska is hiring 5 new staff. ODOT doesn't have to hire, just have to address in application how we will cover additional responsibilities. States must have qualified staff and financial resources.

Question: Are there additional workload requirements that ODOT is not currently aware of? What changes does ODOT expect to make as a result of the Assignment program?

Answer:

- ❖ Assignment will require more time to ensure ODOT conducts the necessary detailed, hard look at documents and adequately fills the backstop that FHWA provides today.
- ❖ If a court looks at actions (4(f) for example) the court will ask if ODOT took a good hard look. Since we assumed NEPA authority, the court will hold us to higher standard.
- ❖ Same true for EJ, Wetland impacts, Wild & Scenic Rivers, etc. Need high level of expertise in all those areas.
- ❖ When project level issues come up, we will need legal counsel to review. This means that legal will have a larger role in the process under Assignment than they do today. Looking at legal sufficiency either with legal staff on board or adding a special legal consultant on retainer.

Question: How do we address "Financial" section in the application? How much detail and what is FHWA looking for in this area?

Answer:

- ❖ ODOT needs to think about what's changing. Will you have enough in the budget to cover extra travel, consulting services, FTEs, etc.
- ❖ Need to disclose our annual budget and whether or not we think it's adequate. If costs are going to go up we'll have to demonstrate how we'll cover the difference.
- ❖ We can show how we've been able to accommodate a lot more work than we currently have with the existing staff or by hiring consultants.
- ❖ We need to document is its ever a chance that legislation would make a decision to cut ODOT's budget and what kind of impact would that have on ODOT's ability to manage this program. In short, Infrastructure funding is bipartisan. ODOT does not expect any issues with

a reduced as ODOT's budget never gets decreased by state action. Therefore, staffing reductions would not occur due to a state budget action.

- ❖ ODOT needs to include in the application how ODOT can address an influx of more funding. Do we add more staff, consultants, etc. List how ODOT has addressed issues like this in the past (turnpike bonding funding influx), etc. May also want to outline that ODOT may delegate more day to day work to an in-house consultant or something so that we can do more of the decision making work.

Question: What changes does ODOT have to make to assume the role of FHWA? What are expectations of FHWA when it comes to all other existing ODOT agreements?

Answer:

- ❖ ODOT has about 18 PA's in place. ODOT will need to check in with all parties to those agreements and see where they stand and how those agreements would operate under Assignment. A draft a letter or clarifying note should be created to make a proposal to the parties, explaining that no changes will occur in terms of tasks and requirements or ODOT will need to update the agreements.
- ❖ Because ODOT already assumes the day to day responsibilities to manage under these agreement, we don't expect a lot of changes to the agreements will be required- other than acknowledge that the responsible party is now ODOT instead of FHWA.
- ❖ FHWA's role changes to an audit focus under the MOU. FHWA role has always been oversight, to ensure adverse effects are being resolved, etc. however, they won't be there for any specific project purposes any longer. ODOT will become the decision maker and responsible party assuming FHWA responsibilities and liabilities.

Question: What PA's need to be updated prior vs after the application/MOU? Does FHWA need to be removed from these agreements or at least their role modified?

Answer:

- ❖ All program level PAs, MOAs, and MOUs need to be updated as part of Assignment. ODOT will have six months after Assignment to have these in place.
- ❖ Do any agreements need to be in place prior to approval? ODOT should work to have the major agreements in place prior to execution of the program. Agreements like: The Section 106 PA, CE PA, Ecological MOU, should all be updated.
 - Top of the list is Section 106. FHWA has an official role in these agreements more than any others. If a final Section 106 PA will not be completed prior to execution of the program, then FHWA suggests that we send a draft 106 PA to tribes along with Assignment information before the application is submitted for public comments and review, as a minimum. The final approval of the Section 106 PA would need to be in place within 6 months of the execution of the program.
- ❖ Some agreements may not be needed any longer, like the Section 4(f) PA with FHWA.

- ❖ The rest of ODOT's agreements probably won't have a lot of changes to them or they can be a lower priority for ODOT to update.
 - Due to the number of agreements we should develop a schedule – start on 106 immediately.
- ❖ Also need to consider ER agreement ODOT is currently working on. We should be able to have most in place prior to approval of Assignment. The ER agreement would still move ahead but may have to work on wording.
- ❖ The biggest concern for ODOT is Tribal consultation and how ODOT's process should be updated prior to execution of the program. ODOT is planning to develop the letter as we discussed earlier to open the door. This will be a joint letter signed from ODOT & FHWA proposing how we are going to move forward. The letter will then be sent to tribes and/or those we don't have an agreement with to see if they have any concerns, etc.
- ❖ To see what comments were made on the TX application or the NEPA Assignment program in general, specifically, see SHPO's comments to know what to expect – go to the docket. Type in FHWA-2014-0024. <O:\Environmental\FHWA Review Folder\NEPA Assignment>.

Question: What manuals or training need to be in place prior to application vs. after the application/MOU? How long do we have to follow up on any changes for after?

Answer:

- ❖ ODOT will have to update all manuals and training to reflect Assignment. Manuals could probably be initially handled similar to agreements with a cover letter for each manual stating that if the project is being done under Assignment then ODOT assumes FHWA's role. If not being done under Assignment then follow the manual. FHWA and ODOT are assuming that most manuals can be addressed with cover letter, however, all need to be reviewed to ensure this approach will work.
- ❖ ODOT needs to look at all of our manuals and prioritize what needs to be updated.
 - PI needs approval so maybe it should be first. Prioritize based on agreements.
 - 106 Manual will need the most revisions, followed by 4(f).
 - Lowest priority is HazMat.
- ❖ EJ Guidance will have to be looked at as well. There was a civil rights assessment that revealed some Title VI weaknesses in the EJ guidance. There were some follow up actions. Several recommendations – one was looking at EJ guidance.
- ❖ FHWA Team includes Carmen (point) & Leigh. ODOT team will include Tim, Erica, Kevin, maybe Veronica and Doug. Erica will let me know. Will start that in early January – should be able to have issues resolved in time.

Question: How do we handle existing project level MOAs, PAs, etc. where NEPA is complete but project isn't built yet?

Answer:

- ❖ For projects that have a project-level PA or MOA in place at the time of Assignment, the terms and conditions of the agreements remain in place. Those agreements will remain in place, unless there is a major change to the agreement. If there is a major change and all the parties agree, the PA or MOU could be updated to reflect the Assignment Program.
- ❖ ODOT feels that a major change to an existing project PA or MOU will not be likely. If that's the case, FHWA will remain in its prescribed role per existing project level PAs, MOAs, etc., unless the project itself changes requiring an update to a project level agreement or NEPA decision.
- ❖ ODOT maintains a list of all the MOU's and PA's in place today. NEPA Assignment doesn't invalidate any existing agreements until we have to modify those agreements at some point in the future. NEPA Assignment is not a cause to change the underlying agreements – FHWA does not recommend that.
- ❖ In the MOU, ODOT should like all agreements are already in place, so that we clearly confirm as to which projects FHWA will be involved in.

Question: Was there any major controversy from national interested parties on Assignment in CA or TX (like Sierra Club)?

Answer:

- ❖ There was no controversy.

Question: What is ODOT's process for educating the agencies?

Answer:

- ❖ ODOT will conduct a series of webinars, one-on-one meetings and other opportunities to educate and inform the various partners and agencies.
 - The first action is a general introduction to the program in an agency Webinar planned for December 1, 2014
 - One on one discussions with agencies through December, 2014 and early 2015.
- ❖ After the one on one's, ODOT will follow up with the agencies that require PA/MOU updates or have changes that need to be made prior to the process moving ahead.
- ❖ The agencies would then have comment opportunities on the Application and on the MOU.

Question: Will FHWA attend future meetings w/agencies after Assignment is approved?

Answer:

- ❖ FHWA may attend meetings with federal/state agencies.
- ❖ ODOT will have quarterly meetings with USACE, and monthly meetings with other agencies.

- ❖ Does FHWA still want to be invited? Yes, FHWA will continue to attend program level interagency meetings. FHWA may attend an occasional meeting where projects are discussed but would be in an observatory capacity only.

Question: How does the QA/QC process need to change and where do we reflect this change in process- the application?

Answer:

- ❖ The Program requires the applicant to include evidence of management of the environmental program to provide the additional staff and training necessary for quality control and assurance.
- ❖ ODOT acknowledged that QA/QC will be more challenging and will take a significant amount more staff time.
- ❖ CE2 that are approved at the District level should be based on the writer not approving his own work.
- ❖ For any CE that involves things up to CE3's or higher impacts, ODOT should have more checking in.
- ❖ Consider peer reviews and legal integration.
- ❖ Entire process was based on not having surprises so it's handled much in the same way as higher level CEs requiring more oversight.
- ❖ Process sounds appropriate to FHWA. Only exception is DEC could prepare and approve very low level CEs.

Question: Should ODOT define how it will perform self-assessments in the application?

Answer:

- ❖ ODOT's internal self-assessments do not need to be detailed out in the application. Alaska did regular mini audits of their districts as part of their self-assessment process, including providing self-assessments to FHWA as agreed to in the MOU and that way FHWA could focus their efforts on other things – no need to look at everything twice.
- ❖ Self-assessments are used to find issues and have a regularly scheduled report out period. Districts liked it because it was helpful to them in fine-tuning and learning.

Action Item:

- ❖ ODOT will develop their self-assessment program and coordinate it with FHWA for review and consideration.

Question: Would ODOT be responsible for the Programmatic Wetland Finding (pursuant to Executive Order 11990) as result of Assignment?

Answer:

- ❖ This needs evaluated further. The Programmatic Wetland Finding is a tool used by Ohio to establish a basis for a finding that there is no practical alternative to construction in wetlands for projects classified as Categorical Exclusions in the State.
- ❖ This Programmatic Finding is in accordance with Executive Order (EO) 11990 on the Protection of Wetlands dated May 1, 1977.
- ❖ The Program indicates that ODOT will assume responsibility for certain Federal environmental laws. The regulations indicate this includes compliance with EO 11990.

Action Items:

- ❖ FHWA will follow-up and provide a determination as to how to proceed with the Programmatic Wetland Finding.
- ❖ ODOT will develop internal controls to assure compliance.