



NEPA Assignment – Self-Assessment

February 2021

Environmental Affairs Division

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I. INTRODUCTION

This report presents the results of TxDOT's self-monitoring of its QA/QC process under NEPA assignment, as required by Section 8.2.7 of the December 9, 2019 NEPA assignment MOU between TxDOT and FHWA. Section 8.2.7 requires TxDOT to perform annual monitoring of its QA/QC process to determine whether the process is working as intended, to identify any areas needing improvements in the process, and to timely take any corrective actions necessary to address the areas needing improvement. Section 8.2.7 further requires TxDOT to transmit a report on the results of this self-monitoring to the FHWA Texas Division office and make the report available for public inspection.

Section 8.2.8 of the NEPA assignment MOU requires the following to be included in an annual self-monitoring report:

- Scope of monitoring review
- Compliance areas reviewed
- Description of the monitoring process
- List of areas identified as needing improvement
- Discussion of corrective actions that have been or will be implemented

Additionally, Section 10.1.3 of the NEPA assignment MOU requires TxDOT to monitor its progress toward meeting the performance measures set forth at Section 10.2, and to include its progress in the self-monitoring report provided under Section 8.2.7. Those performance measures are as follows:

- A. Compliance with NEPA and other Federal environmental statutes and regulations:
 - i. Maintain documented compliance with procedures and processes set forth in this MOU for the environmental responsibilities assumed under the Program.
 - ii. Maintain documented compliance with requirements of all applicable Federal statutes and regulations for which responsibility is assumed (Section 106, Section 7, etc.).
 - iii. Maintain and apply internal quality control and assurance measures and processes.
 - iv. Maintain documented legal sufficiency determinations made by counsel; this shall include the legal sufficiency reviews of Notices of Intent and Notices of Final Agency Action as required by law, policy, or guidance.
 - v. Completeness and adequacy of documentation of project records for projects done under the Program.
- B. Relationships with agencies and the general public:
 - i. Assess change in communication among TxDOT, Federal and State resource agencies, and the public resulting from assumption of responsibilities under this MOU.
 - ii. Maintain effective responsiveness to substantive comments received from the public, agencies, and interest groups on NEPA documents and environmental concerns.
 - iii. Maintain effective NEPA conflict resolution processes whenever appropriate.
- C. Efficiency and timeliness in completion of NEPA process:
 - i. Monitor time of completion for NEPA approvals under this MOU and the Original MOU.

- ii. Monitor time to completion for key interagency consultation formerly requiring FHWA participation (e.g., Section 7 biological opinions, Section 106 resolution of adverse effects) under this MOU and the Original MOU.

This report was prepared to comply with the MOU requirements outlined above, and covers the period from December 9, 2019 through December 9, 2020. This report begins by providing the information called-for by Section 8.2.8 regarding TxDOT's self-monitoring, and then provides the information called-for by Section 10.1.3 regarding progress toward meeting the performance measures set forth at Section 10.2.

II. TxDOT's SELF-MONITORING PROGRAM

The information called-for by Section 8.2.8 regarding TxDOT's self-monitoring is set forth below.

A. Scope of monitoring review

ENV's self-monitoring is a year-round effort, not just an annual one-time event. This report describes self-monitoring that occurred between December 9, 2019 and December 9, 2020.

B. Compliance areas reviewed

TxDOT's QA/QC process is primarily contained in Environmental Guide Volume 1: Process, and Environmental Guide Volume 2: Activity Instructions. These volumes provide business processes and instructions for determining when certain analyses are required under various environmental laws; conducting and documenting those analyses using various forms, checklists, templates, and other guidance developed by ENV subject matter experts (SMEs); and assuring that the documentation is complete and correct. ENV relies on compliance with the business processes and instructions in the Environmental Guide Volumes 1 and 2 to ensure compliance with all applicable Federal statutes and regulations. Therefore, compliance with those business processes and instructions is an appropriate measure of compliance with applicable Federal statutes and regulations. However, it is important to note that a failure to comply with a specific business process or instruction does not always mean that compliance with a Federal statute or regulation is lacking, as they contain some elements not specifically required by any statute or regulation, but needed for proper management of the environmental review process.

ENV's self-monitoring covers compliance with all of the various businesses processes and instructions set forth in our Environmental Guide Volumes 1 and 2, and therefore covers all environmental laws applicable to FHWA projects in Texas, including NEPA, Section 4(f) of the Department of Transportation Act of 1966, Section 106 of the National Historic Preservation Act, Section 7 of the Endangered Species Act, Section 404 of the Clean Water Act, and many other Federal environmental laws.

C. Description of monitoring process

ENV's Program Review Section consists of three employees dedicated to constant reviewing of project files, guidance documents, and other materials to assess the adequacy of our QA/QC process. The Program Review Section performs targeted reviews of ECOS files shortly after environmental clearance, records any deviations from the business processes and instructions in the Environmental Guide, and provides direct feedback to district environmental staff and ENV SMEs regarding any such deviations, including instructions on how to correct the file. They also identify parts of the Environmental Guide that are not clear or not correct and recommend edits as needed, as well as issues that require further instruction or explanation during monthly NEPA chats or other statewide meetings.

Additionally, environmental staff and/or external consultants raise issues with ENV managers when they observe any instructions, guidance, etc. that they believe may not be in-line with requirements under current environmental laws or regulations. ENV managers also routinely review existing guidance documents and make changes or develop additional guidance as needed. ENV staff also monitor federal rulemaking changes (e.g., CEQ rules and DOT procedures) and make adjustments to our instructions, guidance, etc. as needed.

D. List of areas identified as needing improvement

For the period from December 9, 2019 through December 9, 2020, ENV identified the following areas as needing improvement:

- Parts of the EA Handbook needed updates and clarifications.
- ECOS was not allowing EAs to be finalized, there was a connectivity problem between ECOS and TxDOT Connect, and ECOS did not allow for consultant/local government representative access
- There is a lack of understanding among some district environmental staff about how to use the emergency open-ended (d) CE process.
- ECOS was not automatically generating the “Perform Historical Studies Project Coordination Request (PCR)” or “Perform Archeology Background Studies” Activities on local government-sponsored FHWA projects that were not on the list of project types that do not require review
- ENV guidance did not account for impact of COVID on public involvement events.
- ENV templates with NEPA assignment disclaimer in footer did not reflect date of renewal MOU (December 9, 2019).
- There may have been a lack of understanding among some district environmental staff regarding where to find the inflation-adjusted dollar amounts for the (c)(23) CE.
- Various parts of the Environmental Guide Volumes 1 and 2 needed updates and revisions.
- TxDOT needed a new noise guidance document to replace the 2011 Guidelines for Analysis and Abatement of Roadway Traffic Noise and the 2018 Environmental Handbook for Traffic Noise.
- Parts of the Endangered Species Act Handbook needed to be revised and updated.
- There was a lack of understanding about the business processes for making Section 4(f) determinations.
- TxDOT needed a standard operating procedure for developing permittee-responsible mitigation under Section 404 of the Clean Water Act.
- TxDOT guidance did not reflect changes made by CEQ to its NEPA-implementing rules in Summer of 2020.
- Various parts of the Section 4(f) toolkit, Chapter 26 toolkit, Natural Resources toolkit, and NEPA and Project Development toolkit needed to be updated to reflect new business processes.
- There is a need for an EIS handbook and outline (we intend to address in the future)
- There may be a lack of understanding among some district environmental staff about the change control process after work plan acceptance in ECOS, and specifically how to document changes to WPD I and II (we intend to address in the future)
- Additional ECOS improvements are needed (we intend to address in the future)

E. Discussion of corrective actions that have been or will be implemented

For the period from December 9, 2019 through December 9, 2020, ENV implemented the following corrective actions:

- ENV updated and revised the EA Handbook in March 2020, August 2020, and September 2020.
- ECOS was updated in February 2020 (version 9.1) to allow EAs to be finalized, improve connectivity between ECOS and TxDOT Connect, and allow for consultant/local government representative access.
- ENV explained how to use the emergency open-ended (d) CE process at the May 2020 NEPA chat.
- ENV instructed staff to manually create the “Perform Historical Studies Project Coordination Request (PCR)” or “Perform Archeology Background Studies” Activities on local government-sponsored FHWA projects that were not on the list of project types that do not require review, as ECOS was not automatically generating these Activities (as of January 2021, ECOS has been updated to automatically generate these Activities).
- ENV revised guidance to allow for virtual public involvement events under certain circumstances in March 2020 (in-person option is still required for public hearings on FHWA projects, if TxDOT Administration approves).
- ENV updated all templates with NEPA assignment disclaimer in footer to reflect date of renewal MOU (December 9, 2019) in December 2019.
- ENV explained where to find the inflation-adjusted dollar amounts for the (c)(23) CE at January 2020 NEPA chat.
- ENV updated and the Environmental Guide Volumes 1 and 2 in January 2020
- ENV updated Environmental Guide Volumes 1 and 2 in July 2020
- ENV issued its Traffic Noise Policy Implementation Guidance in December 2019.
- ENV updated and revised its Endangered Species Handbook in December 2020.
- ENV provided a webinar to district environmental staff and ENV SMEs on Section 4(f) business processes in June 2020.
- ENV issued a Standard Operating Procedure: Section 404 Compensatory Mitigation via Permittee Responsible Mitigation (PRM) in September 2020.
- ENV updated its guidance, instructions, templates, etc. to reflect the Summer 2020 CEQ rulemaking in September 2020
- ENV updated various parts of the Section 4(f) toolkit, Chapter 26 toolkit, Natural Resources toolkit, and NEPA and Project Development toolkit needed to be updated to reflect new business processes in January 2020.

Below is a list of corrective actions that we intend to implement in the future:

- Finish developing and issue an EIS handbook and outline.
- Provide additional instruction to district environmental staff about the change control process after work plan acceptance in ECOS, and specifically how to document changes to WPD I and II.

- Make further improvements to ECOS.

III. PROGRESS TOWARD MEETING THE PERFORMANCE MEASURES IN SECTION 10.2 OF THE NEPA ASSIGNMENT MOU

TxDOT's progress toward meeting the performance measures in Section 10.2 of the NEPA assignment MOU is discussed under the subheadings below, which correspond with the performance measures in Section 10.2.

A. Compliance with NEPA and other Federal environmental statutes and regulations:

- Maintain documented compliance with procedures and processes set forth in this MOU for the environmental responsibilities assumed under the Program.*

TxDOT has maintained documented compliance with the procedures and processes set forth in the MOU. Specific procedures and processes are highlighted below.

Section 6.2, regarding Litigation, sets forth multiple specific procedures and processes.

First, Section 6.2.3 requires TxDOT to notify FHWA and DOJ within seven calendar days of TxDOT's receipt of service of process of any complaint concerning discharge of any responsibility assumed under the MOU. During the period of December 9, 2019 through December 9, 2020, TxDOT was not served with any such complaint. Section 6.2.3 also requires TxDOT to notify FHWA within seven calendar days of TxDOT's receipt of any notice of intent to sue concerning its discharge of any responsibility assumed under this MOU. During the period of December 9, 2019 through December 9, 2020, TxDOT did not receive any such notice.

Section 6.2.4 requires TxDOT to provide FHWA and DOJ with copies of any motions, pleadings, briefs, or other such documents filed in any case concerning its discharge of any responsibility assumed under the MOU within seven days of service, or in the case of documents filed by TxDOT, with seven days of the date of filing. Section 6.2.7 provides multiple ways of providing such documents. During the period of December 9, 2019 through December 9, 2020, TxDOT added FHWA and DOJ email addresses to the document service distribution list for all active court cases relating to responsibilities assumed under the MOU.

Section 6.2.5 requires TxDOT to notify FHWA and DOJ prior to settling any lawsuit. During the period of December 9, 2019 through December 9, 2020, TxDOT did not settle any lawsuit regarding responsibilities assumed under the MOU.

Section 6.2.6 requires TxDOT to notify FHWA and DOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities TxDOT has assumed under this MOU within seven calendar days. During the period of December 9, 2019 through December 9, 2020, there were no such court decisions. Section 6.2.6 also requires TxDOT to notify FHWA and DOJ within five days of filing a notice of appeal of a court decision. During the period of December 9, 2019 through December 9, 2020, TxDOT did not file any such appeal.

Other non-litigation-related procedures and processes specified by the MOU include Section 8.2.5, which requires TxDOT to provide a monthly report to FHWA listing any approvals and decisions TxDOT has made with respect to the responsibilities TxDOT has assumed under the MOU. During the period of December 9, 2019 through December 9, 2020, TxDOT has provided all such monthly reports.

Section 11.2 requires TxDOT to, in consultation with FHWA and other Federal agencies as appropriate, update its training plan annually during term of this MOU. TxDOT has complied with this

requirement by updating our training plan in March of 2020. We updated our training plan again in January of 2021. The January 2021 training plan is being provided to FHWA simultaneously with the submission of this report.

- ii. *Maintain documented compliance with requirements of all applicable Federal statutes and regulations for which responsibility is assumed (Section 106, Section 7, etc.).*

As stated above, ENV relies on compliance with the business processes and instructions in the Environmental Guide Volumes 1 and 2 to ensure compliance with all applicable Federal statutes and regulations. Therefore, compliance with those business processes and instructions is an appropriate measure of compliance with applicable Federal statutes and regulations.

For determining progress towards meeting this performance measure, ENV focused on the following four areas:

- Section 4(f)
- Section 7 consultation under the Endangered Species Act
- Section 106 of the National Historic Preservation Act
- The requirement to make conformity determinations under the Clean Air Act

ENV's Program Review Section reviewed over 300 ECOS project files for projects that were environmentally cleared between December 2019 and September 2020 to determine whether TxDOT correctly complied with the respective business processes set forth in the Environmental Guide.

For Section 4(f), the Program Review Section found the ECOS file demonstrated or was corrected to demonstrate compliance with ENV's Section 4(f) business process for all projects for which Section 4(f) was triggered.

For Section 7, the Program Review Section found the ECOS file demonstrated or was corrected to demonstrate compliance with ENV's Section 7 business process for all projects for which Section 7 was triggered.

For Section 106, the Program Review Section found the ECOS file demonstrated or was corrected to demonstrate compliance with ENV's Section 106 business process for all projects for which Section 106 was triggered, with the exception of five projects. For those five projects, the lack of documented compliance was discovered and reported in the January – March 2020 time frame. ENV has since established a new procedure for correcting issues identified by the Program Review Section, by which Program Review Section personnel assume responsibility for "closing the loop" on observations such as these, to better ensure that TxDOT follows-through with any needed corrective actions.

For air conformity, the Program Review Section found the ECOS file demonstrated or was corrected to demonstrate compliance with ENV's air conformity business process for all projects for which air conformity was triggered.

- iii. *Maintain and apply internal quality control and assurance measures and processes.*

In August 2019, ENV issued an Environmental Guide. This was the result of many months' worth of internal meetings with subject matter experts and district environmental specialists. It consists of two volumes:

- Environmental Guide Volume 1: Process explains how to use ECOS to environmentally approve transportation projects.

- Environmental Guide Volume 2: Activity Instructions, contains individual instructions for completing each of the Activities Reviews and Coordinations generated in ECOS that may be required to environmentally approve a given transportation project.

Taken together, Environmental Guide Volumes 1 and 2 are nearly 500 pages long. They set forth comprehensive business processes, documentation requirements, and instructions for complying with environmental laws applicable to FHWA transportation projects in Texas. They also direct users to the appropriate resource area-specific templates, checklists, forms, and guidance documents developed by ENV SMEs and contained in the various resource area-specific toolkits on txdot.gov.

The Environmental Guide is a “living document,” in that it is updated on a regular basis as improvements to business processes and instructions are identified by subject matter experts and district environmental staff. It was first updated in January 2020, and again in July 2020.

Additionally, ENV’s Program Review Section performs regular monitoring of compliance with the business processes and instructions in the Environmental Guide. As explained above, Program Review performs targeted reviews of ECOS files shortly after environmental clearance, records any deviations from the business processes and instructions in the Environmental Guide, and provides direct feedback to district environmental staff and ENV subject matters regarding any such deviations, including instructions on how to correct the file.

The Program Review Section conducts its reviews of project files on a quarterly basis. For the period covered by this report, ENV’s Program Review Section reviewed over 300 ECOS project files for projects that were environmentally cleared between December 2019 and September 2020 and provided feedback to district environmental staff regarding compliance with ENV’s business processes. Projects environmentally cleared in October, November, and December of 2020 will be reviewed by the Program Review Section in early 2021.

ENV also provides training on the business processes and instructions in the Environmental Guide. Shortly after the Environmental Guide was issued in August 2019, ENV conducted multiple rounds of a 2-day training class in multiple areas of the state. This training covered both new business processes and instructions in the Environmental Guide, and new features introduced with the August 2019 ECOS update. ENV continues to provide training to external users of ECOS, such as environmental consultants and local government representatives, on a monthly basis. ENV regularly addresses any issues regarding interpretation of the Environmental Guide at monthly NEPA chats and other Webex meetings as needed.

- iv. *Maintain documented legal sufficiency determinations made by counsel; this shall include the legal sufficiency reviews of Notices of Intent and Notices of Final Agency Action as required by law, policy, or guidance.*

Legal sufficiency determinations are required for the following four actions:

- Notice of intent for an EIS project
- FEIS
- Individual Section 4(f) determination
- Section 139(l) notice

The Environmental Guide Volume 2 Activity Instructions for each of these actions contain instructions regarding obtaining and documenting GCD’s legal sufficiency review for that action.

TxDOT issued two notices of intent during the period from December 9, 2019 through December 9, 2020. For both of those projects, ECOS contained documentation of the legal sufficiency determination for the notice of intent.

TxDOT issued one FEIS during the period from December 9, 2019 through December 9, 2020. For that project, ECOS contained documentation of the legal sufficiency determination for the FEIS.

TxDOT completed two individual Section 4(f) determinations during the period from December 9, 2019 through December 9, 2020. For both of those projects, ECOS contained documentation of the legal sufficiency determination for the individual Section 4(f) determination.

TxDOT issued three batch Section 139(l) notices during the period from December 9, 2019 through December 9, 2020. For all three of those Section 139(l) notices, TxDOT maintained documentation of the legal sufficiency determination for the Section 139(l) notice.

v. *Completeness and adequacy of documentation of project records for projects done under the Program.*

See the discussion above under III.A.ii, regarding maintenance of documented compliance with requirements of Federal statutes and regulations. Additionally, as explained above, ENV has detailed instructions for uploading appropriate documentation for various activities in ECOS, and the Program Review Section performs targeted reviews of ECOS files shortly after environmental clearance, records any deviations from the business processes and instructions in the Environmental Guide, and provides direct feedback to district environmental staff and ENV SMEs regarding any such deviations, including instructions on how to correct the file. As also explained above, ENV's Program Review Section reviewed over 300 ECOS project files for projects that were environmentally cleared between December 2019 and September 2020 to determine whether TxDOT correctly complied with the respective business processes set forth in the Environmental Guide. Some of this feedback related to incomplete documentation. Where documentation has been noted as missing, the Program Review Section provides instructions regarding how to address the issue and complete the file. ENV believes this QA/QC process is properly functioning to minimize the potential for incomplete or inadequate documentation.

B. Relationships with agencies and the general public:

i. *Assess change in communication among TxDOT, Federal and State resource agencies, and the public resulting from assumption of responsibilities under this MOU.*

TxDOT places a strong emphasis on having a high level of communication with resource agencies and the public. TxDOT has not received any complaints regarding changes in communication resulting from TxDOT's participation in the NEPA assignment program. NEPA assignment has only improved TxDOT's ability to be responsive to resource agencies and the public by allowing TxDOT to be solely responsible for compliance.

ii. *Maintain effective responsiveness to substantive comments received from the public, agencies, and interest groups on NEPA documents and environmental concerns.*

Our Environmental Guide Vol. 2 Activity Instructions for various public involvement activities require preparation of a comment/response matrix, in which TxDOT documents its responses to comments it receives as part of the environmental review process. Additionally, instructions for activities that involve coordination with outside agencies require exchanges of information appropriate for that activity.

ENV's Program Review Section reviewed over 300 ECOS project files for projects that were environmentally cleared between December 2019 and September 2020 to determine whether they

contained comment/responses matrices as required our Environmental Guide Volume 2 Activity Instructions. All required comment/response matrices had been properly uploaded.

iii. Maintain effective NEPA conflict resolution processes whenever appropriate.

TxDOT has not had to enter into conflict resolution as part of any NEPA review.

C. Efficiency and timeliness in completion of NEPA process:

i. Monitor time of completion for NEPA approvals under this MOU and the Original MOU.

TxDOT has only started and completed one EA since the new MOU was signed on December 9, 2019. The total duration of the NEPA review was 291 days.

The last NEPA Assignment Self-Assessment submitted under the original MOU was dated April 23, 2018, and reported a median start-to-finish duration for EAs started and completed under the original MOU of 533 days (see page 56 of 59).

Therefore, the first EA started and completed under the new MOU had a total start-to-finish duration of 242 days less than the median duration for EA started and completed under the original MOU. Of course, this is a very limited sample size, as we are still relatively early in the time period covered by the new MOU. We anticipate that by the time of the next annual report, we will have started and completed multiple EAs under the new MOU, and therefore will have a greater sample size to make the comparison called for by this performance measure.

ii. Monitor time to completion for key interagency consultation formerly requiring FHWA participation (e.g., Section 7 biological opinions, Section 106 resolution of adverse effects) under this MOU and the Original MOU.

TxDOT started and completed six formal Section 7 consultations since the new MOU was signed on December 9, 2019. The average time for completion was approximately 61 days (based on a start date of when TxDOT sent the consultation packet to USFWS).

As for the original NEPA assignment MOU, the April 23, 2018 self-assessment report (at page 56 of 59) contained a table showing the average time of completion for formal Section 7 consultations in the years 2011 through 2017. As explained in that report, in 2015 the average time for formal consultation was 137 days, in 2016 the time for formal consultation was 34 days, and in 2017 the average time for formal consultation was 154 days.