

July 3, 2024

Mr. Michael Leary
Director of Planning and Program Development
Federal Highway Administration
300 E. 8th Street, Rm 826
Austin, TX 78701

Re: Clarification of National Environmental Policy Act (NEPA) Application Responsibilities Requested

Dear Mr. Leary,

This letter is written in response to a request by the Federal Highway Administration (FHWA)–Texas Division, to clarify issues that have been raised by FHWA (email dated June 23, 2014) to avoid inconsistencies between the final Texas Application for Assumption of FHWA Responsibilities and the current draft of the Full NEPA Assignment MOU. The Texas Department of Transportation (TxDOT) understands that this written response will be considered a supplement to the Application, and will form part of the administrative record. The questions received are copied below, followed by TxDOT's response.

1. *On page 6 of the application, TxDOT indicates that TxDOT would not assume projects funded in whole or in part by the Federal Transit Administration (FTA). Does TxDOT mean that it does not intend to assume FTA's responsibilities but that it intends to assume FHWA's responsibilities even if there is a multimodal project? Or does TxDOT mean that a FHWA-FTA multimodal project (with FTA funding) will be automatically reverted back to FHWA Division?*

TxDOT response: TxDOT does not intend to assume FHWA responsibilities regarding FTA projects or other multimodal projects. TxDOT has requested assignment of FHWA's responsibilities under NEPA, in general, for all highway and roadway projects in Texas whose source of federal funding comes from FHWA or require FHWA approvals.

2. *On page 6 of the application, TxDOT indicates that they would not assume projects designated under Executive Order (EO) 13274. Our understanding is that this request is no longer valid and that TxDOT now wants these projects. Could TxDOT confirm this in writing?*

TxDOT response: It is correct that TxDOT is requesting to take assignment of projects designated under EO 13274.

3. *On page 30 of the application, TxDOT indicates that the Record of Decision (ROD) is developed after the approval of the final environmental impact statement (EIS). Could TxDOT provide clarification that their intent is to follow the combined final EIS (FEIS)/ROD guidance issued under MAP-21 sec. 1319? The statement in the third paragraph gives the impression that the documents are being treated separately.*

TxDOT response: TxDOT intends to follow the combined FEIS/ROD guidance issued under Map-21 sec. 1319 in all instances where it is appropriate for the particular project.

4. *On page 33 of the application, TxDOT describes its coordination efforts with Coast Guard. Could TxDOT provide clarification that TxDOT is intending to follow the recently executed Memorandum of Understanding (MOU) on the coordination of FHWA and Coast Guard environmental review responsibilities for projects needing bridge permits?*

TxDOT response: TxDOT intends to follow the recently executed MOU on the coordination of FHWA and U. S. Coast Guard environmental review responsibilities for projects needing bridge permits.

5. *On page 35, last paragraph under Record Keeping and Retention, the statement indicates that emails will be kept as part of the record and attorney-client privileged documents will be kept on a separate file. Could TxDOT provide clarification on what will happen with drafts leading up to the final document? Would these be part of a project's Administrative Record?*

TxDOT response: Internal working drafts of an environmental review document will not be included as part of a project's Administrative Record. Drafts of environmental review documents that are made available for comment to the public or regulatory agencies will be part of a project's Administrative Record.

6. *On page 38, legal sufficiency, the section indicates that legal sufficiency will only be conducted for final EIS and section 4(f) evaluations. Could TxDOT verify that they will conduct legal sufficiency reviews for the Federal Register Notices for limitation of claims pursuant to 23 U.S.C. 139(l)? Currently FHWA has a policy that requires legal sufficiency review of all statute of limitation (SOL) notices.*

TxDOT response: TxDOT will conduct legal review of Federal Register notices for limitation of claims pursuant to 23 U.S.C. 139(l).

7. *On page 39, there is a discussion of projects that will require prior concurrence. Could TxDOT clarify how the prior concurrence process is different from the normal practice of processing EIS projects since all Findings of No Significant Impact (FONSI), draft and final EIS, and RODs are signed by the Director of Environmental Affairs (ENV) in Austin. Could TxDOT elaborate on the expected difference?*

TxDOT response: The prior concurrence process is different from the normal practice of processing EIS projects, in that the environmental review document for projects, as determined by the ENV Director, will be routed to a Deputy ENV Director or designee to personally review elements of the EIS at issue. The normal process for an EIS review does not include a separate review by a Deputy ENV Director or designee. The Deputy ENV Director or designee will seek advice an input, as appropriate, from technical subject matter experts (SMEs) and the Office of General Counsel (OGC) before the EIS that is the subject of prior concurrence is approved by the ENV Director.

8. *On page 17-19 and 28 TxDOT discusses their review process. The TxDOT application omits mention in the application about FHWA's fiscal constraint policy. This policy ensures that the project has met the fiscal constraint requirements prior to an approval of a NEPA decision. Could TxDOT verify that TxDOT will not approve any NEPA decision (Categorical Exclusion (CE) determination, FONSI, ROD) if a project is not in a fiscally constrained Statewide Transportation Improvement Program (STIP) or Transportation Improvement Program (TIP).*

TxDOT response: TxDOT confirms that it will not approve a NEPA decision if a project is not in a fiscally constrained STIP or TIP.

9. *On page 23 in discussing the current process TxDOT indicates that legal reviews occur before submitting the Draft Environmental Impact Statement (DEIS) to FHWA. Could TxDOT clarify that its current legal review practice would continue if TxDOT assumes FHWA's responsibilities? FHWA is*

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assuming that this "legal review" is different from "legal sufficiency" in that it is more informal and does not require a memo to the file, correct?

TxDOT response: It is correct that "legal review," as stated above, is different from "legal sufficiency". Generally speaking, TxDOT intends to continue its practice of having an attorney review a DEIS prior to publication of the notice of availability. However, this is not a legal requirement, and TxDOT reserves the right to forego such review on a case-by-case basis in consideration of timing, staff availability, relative litigation risk, or other factors.

10. On page 37-38 TxDOT indicates that legal sufficiency review training is provided prior to the execution of the MOU. FHWA acknowledges the request for training but FHWA does not feel that this training needs to be provided prior to the execution of the MOU. FHWA can provide technical assistance on the expectations regarding legal sufficiency and administrative records during the first few months prior to delivering a more formalized training on the issue. Please confirm that this is acceptable.

TxDOT response: Yes, this is acceptable.

11. On page 4 of the U.S. Fish and Wildlife Service (USFWS or Service) letter to Mr. Swonke the Service indicates that it presumes that FHWA will maintain the federal action agency legal responsibility for ongoing informal consultations and "no effects" determinations already made under Section 7. The May 22, 2014, response letter from Mr. Swonke did not address this issue. Could TxDOT confirm that the USFWS presumption is incorrect with regards to ongoing informal consultations? If assignment is approved, TxDOT will assume the ongoing consultation responsibilities. Could TxDOT communicate this understanding to USFWS?

TxDOT response: Upon approval of the MOU, TxDOT proposes to assume responsibility for all ongoing consultation activities. TxDOT will communicate this assignment responsibility to USFWS.

12. We did not see a reference in the application to the amended Texas Administrative Code (TAC.) regulations for environmental review. Could TxDOT indicate the status of these amendments?

TxDOT response: The amendments took effect April 16, 2014.

13. There are a few areas of the current version of 43 TAC Chapter 2 where we had concerns with regards to conflicts with Federal requirements. However, FHWA understands that Federal requirements would trump these regulations in the event of conflict. Here are some of the issues:

- A) The current regulations allow the approval of a private entity as a project sponsor. Project sponsors, in turn, have the ability to prepare environmental documents. Pursuant to FHWA regulations a private entity cannot prepare environmental review documents.*

TxDOT response: To correct the above statement, 43 TAC §2.7(b)(2) prohibits a private entity from being a project sponsor. It does, however, allow a private entity may prepare an environmental review document for a TxDOT district's or division's use. Office of General Council (OGC) agrees with FHWA that, for an FHWA project, FHWA's rule at 23 Code of Federal Regulations §771.109(c)(6) would trump 43 TAC §2.7(b)(2). FHWA's rule states, "[t]he role of a project sponsor that is a private institution or firm is limited to providing technical studies and commenting on environmental review documents.

- B) This is more of a clarification. Do the proposed regulations create a fee structure that would allow issuance of NEPA decision even if a project is not identified in a fiscally constrained TIP/STIP?*

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TxDOT response: Payment of an optional fee under §2.46 only allows a local government project sponsor to prepare, and the department delegate to review, an environmental review document or documentation of categorical exclusion for a project that is not otherwise eligible for environmental review under state law because it is not identified in the STIP or unified transportation program (UTP) or in a commission order. As the department explained when it proposed §2.46 in 2011, payment of a fee under this section does not avoid other consequences of a project not being identified in planning documents. See the December 2, 2011 issue of the Texas Register (36 TexReg 8174). The department will not forward to FHWA (or approve post-NEPA assignment) an environmental review document or documentation of categorical exclusion for an FHWA transportation project for which an optional fee is paid under §2.46, if there are applicable federal requirements that have not been satisfied.

14. *On page 25 TxDOT indicates that the MOU under 23 U.S. Code (USC) 326 will be terminated. The application leaves it unclear whether the FHWA/TxDOT Programmatic Categorical Exclusion (PCE) agreement will also be terminated. Currently the PCE agreement is in effect and controls any CEs for projects that were not assumed through the 326 MOU. Could you indicate whether it is the intent of TxDOT to terminate the PCE agreement as well?*

TxDOT response: TxDOT does not intend to terminate the PCE agreement.

15. *Finally, the TxDOT application omits mention of assuming any Federal environmental responsibilities related to Hazardous Materials. These responsibilities were assumed under the CE MOU and have been assumed by other states in their assumption of 23 USC 326 and 327 environmental responsibilities. Could TxDOT clarify why they are unwilling to assume the federal environmental responsibilities for Hazardous Materials?*

TxDOT response: OGC believes there are no environmental review responsibilities under the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act that TxDOT would want FHWA to assign to us. TxDOT does not want to assume any liabilities FHWA may have under those laws.

TxDOT appreciates the opportunity to clarify these issues. Please let us know if we can be of further assistance.

Sincerely,



Carlos Swonke
Director of Environmental Affairs Division

cc: Patrick Lee, OGC