



U.S. Department  
of Transportation

**Federal Highway  
Administration**

# 23 U.S.C. § 326 Monitoring Report



Federal Highway Administration  
Texas Division,

## **A Review of the Performance of the Texas Department of Transportation under the MOU for State Assignment of Responsibility for Categorical Exclusions**

For the period between February 12 and August 12, 2014

**August 2014**

**FINAL REPORT**



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## EXECUTIVE SUMMARY

Pursuant to the Moving Ahead for Progress (MAP-21) Section 326 Memorandum of Understanding (MOU), codified in 23 U.S.C. § 326, the Texas Department of Transportation (TxDOT) was assigned the Secretary of Transportation's (Secretary) authorities and responsibilities for determining if a transportation project qualifies for a Categorical Exclusion (CE), listed in 23 CFR § 771.117. Under Section 326, TxDOT was assigned the authority and responsibility for approving activities on the "c" list (23 CFR 771.117(c)), and activities listed as examples in the "d" list (23 CFR 771.117(d)). For the CE Assignment, the State of Texas was assigned the legal responsibility for its NEPA decisions, and it is subject to Federal court jurisdiction. In enacting Texas Transportation Code, §201.6035, the State has waived its 11th Amendment to sovereign immunity against actions brought by its citizens in Federal court for the purpose of NEPA Assignment. On December 6, 2013, TxDOT entered into the formal 213 U.S.C. Section 326 MOU with the Federal Highway Administration (FHWA) to implement the CE Assignment Program in Texas for a period of three years. The MOU became effective on February 12, 2014.

The purpose of this CE Assignment program compliance review is to satisfy the requirement of 23 USC 326 for monitoring TxDOT's compliance with the provisions of the CE MOU. The project records for each of the 60 identified CEs in the sample were reviewed electronically through a desk audit. The CE determinations and the supporting technical studies were examined by the review team (team) to verify that the CE determinations were appropriate, and to see if they were appropriately supported by the technical studies and the administrative record. The team completed interviews that included TxDOT staff from a sample of Districts and from the TxDOT Environmental Affairs Division (ENV) headquarters office in Austin. The team also interviewed all of the FHWA Texas Division Office area engineers responsible for highway projects. Together, these interviews provide information for the consideration of the adequacy of TxDOT's provision of financial and staff resources and the training programs associated with the CE Assignment Program; implementation of TxDOT CE processing procedures including QC/QA procedures; and verification that staff qualifications and expertise are commensurate with decision making capacity.

There were seven best practices noted, two observations and six findings as a result of the teams efforts as detailed below. FHWA finds TxDOT to be in substantial compliance with the Section 326 CE MOU executed on 2/12/2014. FHWA requires TxDOT to take the necessary corrective actions related to the findings in a timely manner. FHWA will be required to review and approve both the proposed TxDOT corrective actions and the proposed time frame to implement the same.

## **BACKGROUND**

Pursuant MAP-21 Section 326 MOU, codified in 23 U.S.C. § 326, TxDOT was assigned the Secretary authorities and responsibilities for determining if a transportation project qualifies for a CE, listed in 23 CFR § 771.117. For assigned projects categorically excluded from the requirement to prepare an Environmental Assessment or an Environmental Impact Statement under the NEPA.

TxDOT also has been assigned, for the CE determinations they make, the Secretary's authorities and responsibilities for coordination and consultation with Federal resource agencies for all associated Federal environmental laws. These authorities and responsibilities include Endangered Species Act Section 7 consultations with the U.S. Fish & Wildlife Service and NOAA National Marine Fisheries Service, Section 106 consultations with the State Historic Preservation Officer and the Advisory Council on Historic Preservation, with the exception of coordination with the U.S. Environmental Protection Agency for project-level air quality conformity findings. Under Section 326, TxDOT was assigned the authority and responsibility for approving activities on the "c" list (23 CFR 771.117(c)), and activities listed as examples in the "d" list (23 CFR 771.117(d)).

For the CE Assignment, the State of Texas was assigned the legal responsibility for its NEPA decisions, and it is subject to Federal court jurisdiction. In enacting Texas Transportation Code, §201.6035, the State has waived its 11th Amendment to sovereign immunity against actions brought by its citizens in Federal court for the purpose of NEPA Assignment. On December 6, 2013, TxDOT entered into the formal 213 U.S.C. Section 326 MOU with the Federal Highway Administration (FHWA) to implement the CE Assignment Program in Texas for a period of three years. The MOU became effective on February 12, 2014. The MOU outlines specific terms that describe TxDOT's roles and responsibilities under the CE Assignment. The FHWA reserves any responsibility for any environmental review, consultation, or other related action that is not expressly assigned under the MOU including, government-to-government consultation with Indian tribes as defined in 36 CFR 800.16(m).

Stipulation IV(F)(5) establishes that a review of the State's performance under the MOU in Texas will be conducted by FHWA within the first six months from the effective date of the CE MOU. This review covers the period between February 12, 2014 and August 12, 2012.

This is the first CE Assignment program compliance review and is being performed to satisfy the provision of the 23 USC 326 of MAP-21 that commits the Texas Division Office to monitor the State's performance according to the provisions for assignment of CE responsibilities in the same and stipulations in the CE MOU. These review findings will be considered at the time either the CE MOU expires, TxDOT requests that the MOU be renewed or Full NEPA Assignment under 23 USC 327 is executed- whichever comes first.

## **PURPOSE AND OBJECTIVE**

The purpose of this CE Assignment program compliance review is to satisfy the requirement of 23 USC 326 for monitoring TxDOT's compliance with the provisions of the CE MOU. This review will also serve to evaluate the State's performance in carrying out the procedures established for the CE Assignment, and to evaluate the effectiveness of those procedures in achieving compliance.

This review considered the initial and ongoing success of TxDOT's assignment of CEs and focus on six performance areas defined in the Section 326 MOU:

1. Compliance with governing laws, regulations, and the CE MOU.
2. Processing projects assigned under the MOU: State identification, documentation, and review of effects.
3. Excluded projects: Determination and documentation of CEs excluded from the CE Assignment Program, and retained by FHWA.
4. Adequate State resources (including provision of financial resources), qualifications, expertise, standards, and training.
5. Effective State quality control (project level).
6. MOU performance monitoring and quality assurance (program-related); self-assessments.

The team correlated these performance areas with the following measures of assessment:

- CE decisions are appropriately and timely documented, based on the regulatory criteria in 23 CFR 771.117 (c) and (d).
- CE decisions are factually and legally supportable at the time the decision is made.
- CE decision-making procedures comply with NEPA, 23 CFR 771.117, and the MOU.
- The State has adequately met the provision of financial resources, staffing and has practiced quality control requirements sufficient to fulfill the requirements of the MOU.

- The State has complied with other Federal and State requirements.
- The State has complied with recordkeeping requirements.

## **SCOPE AND METHODOLOGY**

The scope of this year's review differed from previous process reviews in that the team will act autonomously without TxDOT being members of the team.

- FHWA reviewed several different samples of project records in ECOS prior to site visits in preparation for the same.
- FHWA reviewed TxDOT quarterly Self-Assessments one year prior to CE MOU monitoring for findings and trends.
- FHWA reviewed related guidance, policy and training relevant to CE MOU implementation up to and after execution of CE MOU prior to interviews.

### Description of the Project File Sample

The overall goal for the project file review was to identify for performance areas one and two (see above) any potential issues associated with relatively high-risk projects. Routine, low impact, low risk projects were considered as well.

In order to identify any trends the team planned to incorporate judgmental, stratified, and random selection elements in the drawing of projects to make up the sample of project reviewed. By this process, the sample is proposed to be both statistically-valid and representative of relatively-high risk projects within the overall population of CE's across all Districts.

Based on project lists reported by TxDOT for CE determinations from February, March and April 2014, there were about 354 projects. The calculation of sample size will assume a normal distribution with a 90% confidence level and a 10% margin of error. Based on these assumptions, the recommended sample size is at least 54 projects. The team reviewed 60 projects.

The team began by identifying relatively high-risk projects from monthly lists based on project descriptions or prior knowledge. These included projects processed under C22 and C23, with a specific focus on added-capacity projects as well as documented (d-list) CEs. Twenty-five projects were drawn from team reviewer discretion as the judgmental sample.

Also, in an attempt to sample the variety in how individuals across the TxDOT Districts process CEs, we also wanted a stratified sample according to TxDOT Districts: Metro (large), Urban (medium), and Rural (small) with 5 randomly selected projects for each location. The goal of the stratified sample for large, medium and small-sized Districts, was

to compare Districts that might not have the same level of internal staff expertise or resources as the urban/metro Districts. The fifteen projects drawn came from a Metro District - San Antonio, Urban District - Waco, and a Rural District - San Angelo.

In order to randomly select the projects for review, all projects will be assigned a sequential integer and a random number generator will be used to select projects until the target sample size is achieved. There were fifteen projects drawn from Districts [Dallas, Houston, Austin] that included both c-list and d-listed projects (5 projects from each location). A separate random sample of five projects was drawn from the set of all d-list projects. The following Districts were included in the random sample: Amarillo, Atlanta, Austin, Dallas, El Paso, Fort Worth, Houston, Paris, Pharr, San Antonio, Tyler, and Yoakum.

TxDOT provided Environmental Compliance and Oversight System (ECOS) database management system access to the team. ECOS information is noted by ENV as the project file of record. All project reviews relied upon information in ECOS. Follow up visits to Districts incorporated consideration of project information in ECOS with District staff. The teleconference with San Angelo District included consideration of project information in ECOS.

#### ECOS Project Audit

The project records for each of the 60 identified CEs in the sample were reviewed electronically through a desk audit.

The CE determinations and the supporting technical studies were examined by the project team to verify that the CE determinations were appropriate, and to see if they were appropriately supported by the technical studies and the administrative record.

#### Interviews

The team completed interviews that included TxDOT staff from a sample of Districts and from the TxDOT ENV headquarters office in Austin. The team also interviewed all of the FHWA Texas Division Office area engineers responsible for highway projects. Together, these interviews provide information for the consideration of the adequacy of TxDOT's provision of financial and staff resources and the training programs associated with the CE Assignment Program; implementation of TxDOT CE processing procedures including QC/QA procedures; and verification that staff qualifications and expertise are commensurate with decision making capacity.

Interviews were conducted for the following staff categories:

- TxDOT ENV Management
- TxDOT ENV Mid Management
- TxDOT ENV staff
- TxDOT District Management

- TxDOT District Environmental Coordinator
- TxDOT District Environmental staff
- FHWA Texas Division Office Area Engineer

The report follows with a discussion of all observations and recommendations made by the team. A determination on the overall implementation of the CE Assignment in Texas is presented in the conclusion.

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## **TEAM MEMBERS**

### Review Team

Tom Bruechert, FHWA Texas Division Environmental Team Leader, served as the Review Team Co-Leader. He was responsible for coordinating the Team's activities, keeping the review on schedule, ensuring the team was "trained" in audit techniques and alerting management to any issue that may affect the completion of the review.

Owen Lindauer, FHWA HQ Project Development Specialist served the Review Team as Co-Leader from the FHWA Office of Project Development and Environmental Review. He brings extensive knowledge of the SAFETEA-LU Sec. 6004 provisions in that he led the development of the preparation of all Sec. 6004 guidance and the Sec. 6004 template MOU. He has oversight in the implementation of Sec. 6004 in California and Utah as well, and brings a national perspective to this program review. He is also a recognized NEPA, Section 106 of the NHPA, and Section 4(f) expert.

David Grachen, FHWA Resource Center Environmental Specialist served the Review Team as a Co-Leader from the Resource Center's Environmental Technical Services Team. He brings extensive knowledge of SAFETEA-LU Sec. 6005 provisions and experience conducting audits of Caltrans' assumption of environmental responsibilities under the pilot program. He is also a recognized NEPA project development, Section 4(f), Section 106, and monitoring environmental commitments expert.

Greg Wood, FHWA TX Environmental Specialist is a member of the Review Team who assisted in completing ECOS project file records reviews, conducted interviews and was in charge of developing the master list of interview questions.

Casey Carlton, FHWA TX Environmental Specialist is a member of the Review Team who assisted in completing ECOS project file records reviews, conducted interviews and was in charge of developing the random sample for the team to review the records used during audit.

Michele Palicka, FHWA RC Environmental Specialist is a member of the Review Team who assisted in completing ECOS project file records reviews, conducted interviews and was in charge of compiling best practices.

Anita Wilson, FHWA TX Urban Engineer is a member of the Review Team who assisted in completing ECOS project file records reviews, conducted interviews and contributed to the teams overall success.

Justin Ham, FHWA TX Urban Engineer is a member of the Review Team who assisted in completing ECOS project file records reviews, conducted interviews and contributed to the teams overall success.

Sean Wheeler, FHWA TX PDP (trainee) is a member of the Review Team who assisted in completing ECOS project file records reviews, conducted interviews and was in charge of audit checklists development and data management.

Mike Leary, FHWA TX Director of Planning and Program Delivery is a team sponsor, approver of the work plan and final report and team member of the Review Team who assisted in completing ECOS project file records reviews, conducted interviews and oversaw the program review, providing FHWA TX Leadership team direction and updates.

### **Definitions**

Best Practice - An action or procedure observed by the team that whose results are superior to those achieved with other means, and is recommended as a benchmark for broader TxDOT wide application.

Recommendation – The team’s suggestion on how TxDOT may improve a process or procedure based on a finding and/or observation.

Observation - Circumstances where FHWA believes a process or procedure may need to be improved.

Finding – An action pertaining to compliance with a regulation, statute, FHWA guidance, policy, or TxDOT procedures, or the MOU that requires TxDOT to develop and implement a corrective action. All findings will identify a cause and effect to the best of FHWA’s ability.

Corrective Action – An action required by TxDOT (within a specified timeframe) to address a deficiency identified in a finding. FHWA will determine if the TxDOT corrective action is sufficient or not.

## **BEST PRACTICES, OBSERVATIONS AND FINDINGS**

The best practices, observations and findings of this review were based on facts found during ECOS project file reviews and interviews with TxDOT management and staff located in ENV headquarters and several intentionally selected District Offices. TxDOT ENV stated in their June 2014 application to the NEPA assumption program and confirmed at the outset of this CE MOU monitoring task, that ECOS, a relational electronic database, should be considered to be the file of record for decisions made by TxDOT. TxDOT provided ECOS access to the team and the team relied exclusively upon information in ECOS in its review of project files.

The organization of this report is as follows. Best practices are described first in Section I. These are actions that could improve TxDOT's performance under the MOU through improved documentation, quality control, training or procedures. Observations, which are circumstances where FHWA believes a process or procedure may be improved, are presented in Section II. Findings are instances pertaining to compliance with a Federal regulation, statute, guidance, policy, TxDOT procedures, or the MOU and are described in Section III. FHWA requires TxDOT to develop and implement corrective actions with associated time frames to address all findings. TxDOT may consider implementing FHWA recommendations based on observations.

### **I. Best Practices**

Best Practices are based upon examples shared by TxDOT staff during interviews and ECOS project file reviews. A best practice is a method or technique that has consistently shown results superior to those achieved by other means, and that is used as a benchmark. Best practices are used to maintain quality as an alternative to mandatory legislated standards and can be based on self-assessment or benchmarking.

FHWA encourages TxDOT to consider further integrating the best practices noted below. The team commends TxDOT District staff in applying innovation and also recognizes many ongoing improvements that TxDOT ENV has implemented concurrently with this review that have corrected and enhanced existing practices to further improve compliance related activities under the CE MOU.

The team did not try to associate a best practice with a CE MOU stipulation, however – that may prove useful in TxDOT deliberations as they consider these for potential implementation.

From the team interviews with TxDOT staff, and from our ECOS project file documentation, we found in priority order of importance:

1. FHWA views the retooling and adaptation of a self-assessment branch, already in existence at ENV, to continuously monitor the CE documentation process as part of quality assurance as a best practice. The self-assessment branch has been operating for at least one year prior to CE MOU execution and was viewed by the team as TxDOT taking initiative to improve their own processes and procedures before formally being assigned responsibilities for CEs. The team appreciates that TxDOT was very forthcoming with sharing the results of their self-assessments (identified trends and areas in need of improvement). Just as the team was able to recognize initiative and best practices in TxDOT Districts, the self-assessment branch should be able to detect “best practices” that will make NEPA review more efficient and improve the quality of environmental decision making.

2. The team views TxDOT’s use of the “environmental certification” process as a best practice to assure their staff is both competent and qualified, as stipulated in the MOU. All environmental District staff are required to have a standard knowledge base. There also is a requirement for staff to have continuing education to ensure their skills continue to be adequate to review & approve NEPA documentation. Although TxDOT instituted this certification as a result of State law, the overall goal remains: to ensure TxDOT staff across the State have appropriate qualifications to perform their jobs, which include either CE preparation and/or approval based upon written policy and procedure.

3. The team learned through interviews with Dallas District staff that they took initiative to develop a quality control task to assure CE documentation was complete and adequate. They created an “audit file checklist” to ensure completeness of the ECOS project file as a step before making a CE determination. This initiative differs from the self-assessment branch review, which occurs after the approval of the CE determination. The team views this as a best practice in that it helps the District approving officials ascertain that all required tasks have been completed prior to approving a CE determination.

4. The team learned through several TxDOT headquarters and District staff interviews of a best practice of environmental staff resource sharing. Many rural Districts have limited staff who must occasionally seek outside technical environmental expertise. Often rural District staff call on staff of other Districts for help. The best practice recognized by the team was formalized resource sharing via a rural District Environmental Coordinator group led by Bryan Ellis in headquarters. This group set up and improved upon the sharing of personnel resources already in use at TxDOT; utilizing knowledgeable personnel in one District to aid others. This includes the utilization of subject matter expert staff (i.e. a biologist) in one District to aid other Districts that may lack that expertise to assist in project processing or ensure consistency in guidance and policy interpretation. The team views this practice as an effective and efficient use of TxDOT staff overall. TxDOT clarified that they also apply this resource sharing statewide amongst all Districts and staff.

5. The team learned through interviews of a best practice of rural District workshop/training. TxDOT has conducted small-scale workshops that also provide networking opportunities for rural District environmental staff to share advice and guidance with their rural District co-workers. FHWA recommends that TxDOT develop similar small scale workshops for urban and metro District staff.

6. The team learned of a concern to ensure that environmental commitments were implemented through final design through interviewing Dallas District staff. Dallas District staff conduct reviews of project plans through final PS&E to ensure all environmental commitments made during the environmental process have been included. FHWA views this as a best practice because progressive reviews of project plans as they evolve helps ensure that all environmental commitments do not fail to be implemented. This additional review assures the inclusion of EPIC (Environmental Permits, Issues, & Commitments) sheets and notes in plans.

7. The team noted in their review of projects in ECOS of the efficient use of batching multiple projects (grouped type activities – for planning purposes) with identical scopes under a single CE determination/approval. This is related to a “Parent”/Control CSJ and having “Child”/Associated CSJs listed in ECOS by reference for projects of identical scope with little to no change in project setting, context and/or intensity. This avoids the need to document redundant information but also streamlines the contracting process to allow like activities to be let in one contract (for example - countywide seal coats by one contractor). FHWA recognizes this approach as a best practice that achieves consistency in the review and processing of CE actions while also promoting cost savings too.

## II. Observations

### 1. Observation – Stipulation IV(B)(7) “The State shall document in the project file the specific categorically excluded activity, the CE Finding . . . “

Stipulation IV(B)(7) requires the State to document the specific categorically excluded activity and the CE determination, among other things, in a project’s record. The team review of the project records in ECOS found that the categories or terms used for many CE determinations were outdated and erroneous. It was not unusual to find CE determinations recorded either as a Programmatic Categorical Exclusion (PCE) or Blanket Categorical Exclusion (BCE), which are terms from the now superseded PCE agreement. Including these now outdated and incorrect terms in the official file of record is confusing and may lead some to think TxDOT staff are still applying the PCE agreement provisions for decision making rather than the CE MOU. To address this, TxDOT should remove all outdated CE terms and categories and utilize the power of ECOS to record the specific d-list and c-list activity, as specified in the MOU. TxDOT clarified later in discussions that they

also had a SOP, put in place, before the MOU was effective on 2/12/2014 requiring the proper current CE determination to be placed in the comment field of ECOS. Based on our observations, it did not yet appear to be implemented as effectively as intended.

The team learned from headquarters staff interviews that even though they recognized this issue, the current TxDOT IT consulting services is unable to correct ECOS errors in a timely manner. FHWA was specifically informed by TxDOT staff that any proposed changes they provide to consultant contractors were not treated as a high priority to implement. FHWA expects TxDOT to ensure that its project records are complete and correct, utilizing the appropriate terms as cited in the MOU, law, regulation, or executive order. The development of ECOS as a file of record is a major achievement for TxDOT and one that could serve as a best practice for any other State DOT. The team recommends that TxDOT reassess the priority it assigns to assuring its ECOS database is fully up to date and operational. While this is a period of transition for TxDOT staff in applying new processes and terminology in NEPA processing, making updates to ECOS a high priority should demonstrate TxDOT's ability to comply with the CE MOU as well as its readiness to assume responsibilities for the full NEPA program.

**2. Observation – Stipulation IV(E)(3) “The State shall implement training to meet the capability requirements of this MOU or as a corrective action.”**

Stipulation IV(E)(3) requires the State to implement training to meet the capability requirements of the CE MOU. According to interviews with Districts, the team learned that, at least initially, many District staff were not fully prepared to process proposed actions according to the MOU. Several District staff stated in their interviews it was only after an intensive training in May, that they understood the expectations for documentation, review and approval, according to the provisions of the MOU. Even though ENV hosted webinars, face-to-face (CE MOU related) and “i-Way” training prior to February 12, 2014 (the effective date of the CE MOU) that provided information, the team learned through interviews that this training was not adequate, especially in comparison with training that followed 3 months later. The May 13-15, 2014 statewide training in Waco, the team learned in several interviews, filled the informational gaps left from the initial training. The team recommends that training, especially regarding changes in ECOS procedures, be ongoing. Interview notes with District staff suggest that in preparing training ENV staff should experience what it is like to process a CE action in ECOS as might occur in a District. The team recommends that TxDOT consider the experience of individual tasks in uploading information and all necessary processing for ECOS in developing training and/or workshops.

Based on interviews with most of the District Engineers (DEs) and Transportation Project Directors (TPDs), the team found a real lack of training for those positions ( cursory introduction at best) and only a slight understanding of what the CE MOU and what

compliance therewith entailed. Although other DEs indicated that they rely heavily on their own environmental staff to ensure compliance that the approval authority did rest within the District instead of ENV.

The team acknowledges the extensive and diverse training that was completed from 2012, through early 2014 for staff level TxDOT employees. FHWA also recognizes that TxDOT has recently fulfilled its commitment in the CE MOU to training in hiring an individual to coordinate all training related to environmental review. The team recommends that the goal of the training program in general and the training coordinator in particular ensure that all TxDOT staff (including DEs and TPDs when appropriate) involved in processing CEs are prepared in that they understand the expectations for documentation, review and approval, according to the provisions of the MOU.

### **III. Findings**

#### **1. Finding- Stipulation IV(F)(1) “The State shall submit to FHWA a monthly list of CE determinations made by TxDOT in the previous month. The State shall ensure that all determinations of categorical exclusion will be approved prior to submitting a Federal Project Authorization and Agreement to FHWA.”**

Stipulation IV(F)(1) requires that the State to make regular submittals of lists of CE determinations for Federal-Aid (FA) projects to FHWA and to ensure that all CE determinations would be approved. The team identified five projects TxDOT reported as FA approved CE determinations in monthly reports that ECOS shows were actually approved as “State Cleared” projects. During the monitoring review, Texas FHWA Division office staff reported these projects to TxDOT as errors in the monthly reports, assuming the ECOS file of record was correct. TxDOT confirmed these five projects (and others not audited) as monthly list errors and submitted revised monthly lists for February through April, removing 24 “State Cleared” projects. The reason for this reporting error is unknown. TxDOT should have only reported federally funded and/or federal nexus projects for which it had made CE determinations pursuant to the MOU. The team confirmed all but one of the 24 projects as State funded by inspection of project financial information. The one exception had federal PE funds associated with it. Reporting projects to which the provisions of the MOU do not apply is confusing and implies TxDOT may not have ensured that all their CE determinations (and coordination/consultations made therein) were appropriately made. TxDOT should ensure that all project FA CE determinations reported to FHWA are made for projects that TxDOT intends to apply either Federal aid or would require a FHWA approval. TxDOT should consider corrective action that might entail establishing a quality control check (in relation to funding) on the CE monthly list, for accuracy and completeness, prior to submittal of a monthly list to FHWA.

**2. Finding- Stipulation IV(B)(5) “The State shall document its approval of the determination using, at a minimum, the printed name, title, and date of the State official approving the determination. “**

Stipulation IV(B)(5) requires that the State document its CE approvals with certain specified information. The team identified all 60 projects records reviewed in ECOS showed an absence of the printed name and title of the individual making the CE determination in the signature block. A total 16 of the 60 projects reviewed had some error or omission regarding proper signature on the CE determination form. TxDOT should have recorded the minimal information specified in the MOU regarding the state official approving CE determinations. The reason why TxDOT did not record the information could be a result of the initial form utilized during this timeframe, which omits a space to record the printed name and title of the State official approving the determination. TxDOT should modify its procedures to ensure that, for any CE determination made, documentation is prepared that clearly indicates the printed name, title, and date of the State official approving the determination. The team notes that TxDOT independently recognized the omission of the printed name and title for the approving official and has already taken steps to address this finding with its’ own corrective action. In further refining the required corrective action for this finding, TxDOT may want to consider applying the power of ECOS to document approvals electronically rather than by scanning in paperwork. Alternatively TxDOT could implement a new procedure for ENV Program Delivery (PD) reviewers or others to perform a quality control check prior to granting approval for a project to proceed to letting.

**3. Finding - Stipulation IV(B)(1-4) requires the State to institute a process to identify and review the environmental effects of proposed projects; carry out other responsibilities assigned under the MOU; document in the project file the CE findings and completion of all applicable FHWA responsibilities assigned; and carry out a peer review of the CE documentation.**

Stipulations IV(B)(1-4) address the identification, documentation, and review of effects of proposed projects under the CE MOU. The team noted several instances of non-compliance with this stipulation; each is described separately below. After many years of honing a process where TxDOT Districts and ENV have had clearly defined roles under the Programmatic Agreement for CEs, the State’s assumption of NEPA responsibilities for CEs under the MOU has additionally modified the roles and actions of people in the Districts and ENV. This new process is still in the implementation phase, which means that staff are becoming familiar with new procedures and making adjustments to new procedures. The team found several instances where these procedures were not followed.

During interviews with District and headquarters staff there was confusion whether a peer review and approval was required for c-list and d-list CEs. TxDOT staff should understand

that the MOU requires that d-list CEs require a peer review approval before a TxDOT official may make a CE determination. The reason for this may result from the establishment of new procedures, derived from the MOU. FHWA understands that TxDOT is addressing this issue by adding information to the CE determination form as well as provide specific training.

The team learned from interviews with District staff that there are differing understandings of who is empowered with the approval authority for CE determinations. FHWA was told that approval authority assigned to District Engineers was able to be delegated to other staff, which contradicts the most current TxDOT procedures. One DE said in an interview that in their absence they would delegate the approval authority to a TPD or Deputy DE so that projects could meet a letting schedule. The team also learned that a DE may provide signature for the d-list project after the fact. TxDOT staff should clearly understand who has the authority to make CE determinations and that such determinations be completed before a project may proceed to letting. The reason for this may result from the establishment of new procedures as well as pressures to meet letting schedules. If TxDOT decides that the authority to make CE determinations may be delegated, FHWA recommends that TxDOT's procedures be modified to reflect this change and that a written memo for making that delegation be prepared and retained for FHWA inspection.

The team found justification in ECOS for projects qualifying as a CE by having less than \$5M of Federal funds. However, information gained from interviews revealed that TxDOT does not have a process to ensure the project costs remained under the \$5M threshold. Because the suitability of this new CE lies largely with the application of less than \$5 million of federal funds, the team considers the monitoring of the project through design to letting as important to ensure the CE determination is appropriate. The cause of this issue is likely because this is a newly designated CE with no experience in its application. While the team acknowledges that TxDOT staff made the correct CE determination at the time it completed its NEPA processing, the FHWA reviewers were unable to confirm that the CE determination was appropriate at the time the project went to letting. A corrective action TxDOT could implement to address this finding could be a final quality control check for the allocation of Federal aid to ensure it is less than \$5 million prior to letting, for projects with C23 CE determinations.

- 4. Finding- Stipulation IV(B)(7) document in the project file the specific categorically excluded activity, the CE finding, including the determination that the project has no significant impacts on the environment, there are no unusual circumstances, and completion of all applicable FHWA responsibilities assigned under Stipulation I & II**

Stipulation IV(B)(7) requires TxDOT to include in a project's file, documentation that supports the CE determination, that no unusual circumstances exist that would make a CE inappropriate, and that all applicable FHWA responsibilities assumed under the CE MOU have been completed. The team identified five instances of the 60 projects reviewed of resource impact considerations not being adequately documented in the project file. Two project files contained unclear or conflicting information regarding whether a noise analysis was required. One project lacked adequate documentation to support the Section 4(f) applicability and use determinations. Another project lacked documentation to support the Threatened and Endangered Species Act determination of no effect. In reviewing projects in ECOS, FHWA staff found the use of technical reports to support the CE determination to be varied and inconsistent. The team learned from Houston interviews that because there was no uniform file naming convention for uploading files into ECOS that it is difficult to determine what information should be retained in an ECOS project file. FHWA also found the location of uploaded documents in project files to be varied and inconsistent in part possibly due to there being no naming conventions for uploaded files in ECOS. The reason for what appears to be incomplete documentation for some project files may be a result of TxDOT instituting new procedures and staff not fully understanding or implementing those procedures. Based on statements in interviews, the team noted staff gained understanding documentation expectations for ECOS as a result of the May 2014 training in Waco. TxDOT may consider implementing corrective actions that standardize expectations on what supplementary documentation is expected for certain categories of projects or when there are certain project impacts. FHWA recommends standardizing file naming conventions and where they may be found in ECOS project files.

**5. Finding - Stipulation IV(E)(2) At a minimum, the State shall monitor its process relating to project determinations, environmental analysis and project file documentation, and check for errors and omissions. The State shall take corrective action as needed.**

Stipulation IV(E)(2) requires the State to monitor its' process relating to project determination. FHWA interprets "monitoring" to occur prior to a project being allowed to proceed to letting in order to engage a contractor. The team found several errors and omissions in project ECOS files with CE determinations (see Finding 2 above), where the project was allowed to proceed to letting. The team acknowledges the efforts of the self-assessment branch whose efforts occur primarily before and sometimes after a project has proceeded to letting and to date focuses on a mix of limited and full reviews. With the exception of peer reviews of documented CEs and a checklist independently developed by Dallas District staff, the team was unable to confirm that TxDOT has developed reliable quality control measures that correct errors and omissions prior to letting. The cause of this is unknown however there is a cursory ENV LOA review that is performed prior to a project proceeding to letting. ENV PD may need to assign additional staff to perform this check before issuing the LOA clearance approval. TxDOT may consider assigning

additional staff to correct any errors and omissions and/or implementing the checklist developed in the Dallas District as a corrective action. Alternatively, the self-assessment branch could regularly recommend to the decision maker that corrective actions for omissions and errors be applied by the appropriate staff so as to serve as quality controls for active projects.

**6. Finding- Stipulation IV(B)(1) the State shall institute a process to identify and review the environmental effects of the proposed project.**

Stipulation IV(B)(1) requires that the State, as part of its process to advance and approve CE projects, to institute a process to review and identify environmental effects of proposed projects and document in the project file the CE findings and completion of all applicable FHWA responsibilities assigned. The team found it very difficult to assess whether or not the CE action applied to a project was appropriate, whether all project impacts had been considered, and whether a reviewer should have an expectation for documentation in a specific area for a certain project. The cause of this issue is inadequate project descriptions and project scopes provided in ECOS.

The team generally found it difficult to determine a project's scope or to find a complete and detailed description of the project and the proposed actions that could impact the environment. ECOS project descriptions often were not more than a two or three word label imported from TxDOT's DCIS mainframe computer (i.e., bridge replacement, landscape development, or widening). FHWA reviewers were unable to determine whether all necessary environmental analyses were completed and all project impacts were considered. This was especially true for 13 projects determined to be classified as C22 actions, which are for projects within the existing operational right-of-way. Project descriptions in ECOS were inadequate or scope descriptions missing such that reviewers were unable to confirm that all work would be confined to the operational ROW and whether any project impacts resulted. In addition, on one of the project files reviewed, the project description in ECOS was entered as "widen pavement." Based on information in ECOS, the widening was connected to a bridge replacement project. In another example, the team found the project description entered into ECOS was "landscape development." But during interviews with District staff, the team learned District staff could provide no additional information regarding the scope of the proposed project.

The team acknowledges that striking the proper balance between adequate documentation and too much or unnecessary documentation is difficult. The manager of ENV remarked in his interview that having adequate project documentation to demonstrate technical issues have been adequately addressed is an area of TxDOT concern.

He said "How much documentation is necessary for a striping project versus an added capacity or more substantial project? Our policy says what the

documentation is expected. But it has been a struggle in finding the documentation in the Districts. Getting the documentation on a systematic level is a struggle. There is a challenge in having the Districts understand the expectations for what should be in the (ECOS) files.”

The team learned from interviews that some TxDOT District office staff occasionally use the journal tab of ECOS to document consideration of unusual circumstances or elaborate on project description and details pertaining to the operational ROW for C22 projects.

There are likely several causes of this problem of ill-defined project descriptions and scopes. These could include applying newly designated CE’s whose documentation expectations have yet to be established. Or perhaps ECOS procedures that may overly rely upon inadequate sources of project descriptions (i.e., DCIS). This issue demands broad scale corrective actions. On the one hand, TxDOT may be able to address this issue through targeted staff training and quality control efforts. On the other hand, the statement by the ENV manager states clearly that TxDOT is struggling to balance what is required record keeping and preclude unnecessary documentation. But before any training or quality control efforts get underway, the team urges TxDOT to reconsider its process and/or Standard Operating Procedures to review and identify environmental effects of its projects and to document its compliance with all applicable laws, regulations and executive orders.

The team urges TxDOT to apply best practices and experiences they have gained from the many years of implementing their programmatic CE agreement. In particular, best practices and experiences could include:

1. Applying knowledge and experience about CE actions in categorizing those actions according to the expected project impacts and then requiring less record keeping and review for actions with little or no impacts (the old c-list activities), and require increasing more environmental analysis and record keeping for actions that have increasing likelihoods of impacts (d-list activities) or additional review/documentation expectations (new c-list activities).
2. Brief one or two word “project descriptions” are only adequate for the most routine and benign of actions such as “chip seals,” or “pavement overlays” where the use of such labels is only applied to projects where construction can be confirmed to be limited to the existing pavement.
3. The act of compiling a detailed project description compels an ordering and scoping of a project (via TxDOTs risk assessment in ECOS) that needs to be evaluated when assessing possible impacts and any necessary environmental analysis. The team found such detailed descriptions in documented CEs with assessments for archeological impacts. The enhanced description needs to be a part of the ECOS project record. In doing so, any review would more easily assess the need for more

or less record keeping (see item 1 above), as well any evaluation of whether later change orders would require additional actions.

Right-sizing the analyses and documentation is critically important for TxDOT to perform the compliance activities that they are required to continue to perform under the CE MOU. TxDOT needs to apply its experience and best practices to what too often during this review that, the team found to be inadequate project descriptions in ECOS. Ultimately the best corrective action for this and any other issue is for there to be a dialogue between TxDOT and FHWA staff. The team is willing to engage in discussions with TxDOT on this issue in developing any corrective actions and the associated time frames to implement the needed changes.

## **CONCLUSION**

The team completed our review based upon the goals set out in the Purpose and Objective of this report and the six performance areas defined in the Section 326 MOU correlate to best practices and findings as noted below.

1. Compliance with governing laws, regulations, and the CE MOU. TxDOT is in substantial compliance with this performance area.
2. Processing projects assigned under the MOU: State identification, documentation, and review of effects. TxDOT is in substantial compliance with this performance area. See finding 1, 4 and 6 above for details regarding needed refinements.
3. Excluded projects: Determination and documentation of CEs excluded from the CE Assignment Program, and retained by FHWA. FHWA Texas Division has continued to process excluded CE projects in a timely manner.
4. Adequate State resources (including provision of financial resources), qualifications, expertise, standards, and training. TxDOT is in substantial compliance with this performance area. Please see best practices.
5. Effective State quality control (project level). TxDOT is in substantial compliance with this performance area. See finding 2, 3 and 5 above for details regarding needed refinements.
6. MOU performance monitoring and quality assurance (program-related); self-assessments. TxDOT is in substantial compliance with this measurement. Please see best practices. Please see finding 1 above for details regarding needed refinements.

This review considered the initial FHWA assignment of CEs to TxDOT under the MOU and their ongoing success of carrying out those responsibilities. The team correlated these performance areas with the following measures of assessment as noted below.

- CE decisions are appropriately and timely documented, based on the regulatory criteria in 23 CFR 771.117 (c) and (d). TxDOT is in substantial compliance with this measurement. See finding 2 above for details regarding needed refinements.
- CE decisions are factually and legally supportable at the time the decision is made. TxDOT is in substantial compliance with this measurement. See finding 3 and 4 above for details regarding needed refinements.
- CE decision-making procedures comply with NEPA, 23 CFR 771.117, and the MOU. TxDOT is in substantial compliance with this measurement. See finding 5 above for details regarding needed refinements.
- The State has adequately met the provision of financial resources, staffing and has practiced quality control requirements sufficient to fulfill the requirements of the MOU. TxDOT is in substantial compliance with this measurement please see best practices.
- The State has complied with other Federal and State requirements. TxDOT is in substantial compliance with this measurement please see best practices.
- The State has complied with recordkeeping requirements. TxDOT is in substantial compliance with this measurement. See finding 6 above for details regarding needed refinements.

The content presented above in this report identifies best practices, observations and findings in regards to TxDOT's overall compliance with the CE MOU.

In conclusion, FHWA finds TxDOT to be in substantial compliance with the Section 326 CE MOU executed on 2/12/2014. FHWA requires TxDOT to take the necessary corrective actions related to the findings above in a timely manner. FHWA will be required to review and approve both the proposed TxDOT corrective actions and the proposed time frame to implement the same. FHWA would like TxDOT to fully consider the recommendations from the observations above. FHWA acknowledges the best practices that TxDOT has implemented to further enhance their processes to carry out the Section 326 CE MOU. Finally FHWA appreciates TxDOT's cooperation and willingness to assist us in accomplishing this review and values the openness and honesty of all the TxDOT staff that were interviewed during this review. It is clear that TxDOT realizes that decision making is

within their control and they are now fully responsible and accountable for federal CE decisions. At least one DE mentioned this and was appreciative of the CE MOU being put in place. ENV and Districts appear to understand the importance and gravity of proper documentation and process related to compliance with the Section 326 CE MOU.

FINAL

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