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**Improving Transportation Project Delivery with NEPA Assignment:
Lessons Learned from California and Texas**

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**Improving Transportation Project Delivery with NEPA Assignment:
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by

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Report

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Abstract

Improving Project Delivery with NEPA Assignment: Lessons Learned from California and Texas

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The Surface Transportation Project Delivery Program, or *NEPA Assignment*, authorizes the delegation of federal powers under the National Environmental Policy Act (NEPA) to State Departments of Transportation (DOTs) for project reviews, permitting, and approvals. This program builds on past legislative efforts to streamline environmental reviews and documentation for the purposes of expediting federally funded highway projects by state DOTs. This research provides an interpretation of key roles, responsibilities, and requirements following the state's assumption of the Federal Highway Administration's (FHWA) responsibilities for NEPA reviews, decision-making, and formal consultation with resource agencies. The report draws exclusively from the California and Texas' NEPA Assignment programs and progress made to date. In doing so, the report highlights the checks and balances of the NEPA Assignment program through monitoring performance management by both the DOTs and the FHWA, and addresses key administrative challenges during implementation from the state's perspective. The report concludes with recommendations and lessons learned from the both states.

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Chapter 1: Introduction

The Surface Transportation Project Delivery Program under Section 327 of Title 23 of the United States Code (23 U.S.C. § 327) authorizes the formal delegation of the National Environmental Policy Act (NEPA) review and approval processes to state Departments of Transportation (DOTs). This program, referred to as *NEPA Assignment*, entrusts the State DOT with the U.S. Federal Highway Administration (FHWA) responsibilities to oversee and conduct project-level environmental reviews, perform direct consultation with federal resource agencies, and all other project-level environmental regulatory compliance actions pertaining to the timely approval of complex environmental documentation as required under NEPA. Accordingly, this program has potential to offer significant time saving benefits, but requires the states to shoulder additional responsibilities and legal liabilities.

Despite the potentially significant benefits offered by the program, there is a general reluctance by states to participate as the program requires the state to waive its right to Sovereign Immunity under the Eleventh Amendment for actions brought against it under NEPA. This holds the DOT accountable for ensuring full compliance with all NEPA requirements, and, in lieu of the FHWA, must defend itself against all claims brought in Federal court. Thus, participation requires close adherence to and compliance with the broad-ranging responsibilities, roles, and requirements assumed, while also making a stronger commitment to stewardship to ensure that all federal environmental laws and rules are upheld.

Under NEPA Assignment, all federal environmental laws, regulations, and policies remain in place. The program simply eliminates an iterative layer of government review by the FHWA for projects receiving federal aid. This allows the DOT to focus on

more efficient use of agency resources by significantly cutting back on the time it takes to get a highway and major transportation project from conception to construction.

PURPOSE

This exploratory research report examines procedural and organizational changes that occur with the assumption of federal NEPA responsibilities from the perspective of the state transportation department. Although the inception of NEPA Assignment officially began in 2005, there are currently very little resources, research, and guidance on how states transportation agencies can successfully implement NEPA Assignment. As such, this report attempts to fill this gap, and to address challenges and opportunities related to a state's transition with NEPA Assignment.

The waiver of sovereign immunity and a general push for increased efficiency in the environmental review process present a number of potential liabilities stemming from a state DOT's general unfamiliarity with the newly assigned federal roles, responsibilities and requirements under the NEPA Assignment program. At the same time, transportation decision-making is likely to grow more complex and costly with the advent of disruptive vehicle technologies (e.g., autonomous vehicles), changes in population growth, land use, and travel patterns, and recognition of the transportation sector's contribution to global warming (FHWA, 2015; p. 153). To meet these ongoing challenges, state agencies will need to streamline standard review processes and required documentation to optimize limited public resources while also remaining vigilant in upholding federal standards of environmental stewardship.

While many DOTs and agency districts are familiar with the development of environmental documentation for standard and routine projects, this report demonstrates that this is not always the case for complex projects that traditionally fall under the

jurisdiction of the FHWA. Under NEPA Assignment, project-level errors evident in environmental documents can have very serious consequences for a DOT due to the potential for these errors to misinform decision makers and the public, escalate costs from delays with a project's approval, and reduce the benefits accrued from overall time savings (FHWA, 2007). Most importantly, these errors can open the door for opposition, conflict, and litigation following the state's waiver of sovereign immunity.

Only two states, California and Texas, have successfully entered into the program. The California Department of Transportation (Caltrans) was the first state agency to assume NEPA Assignment in 2007 when the program was in its pilot phase. Following the passage of MAP-21, the program was made permanent and any state may apply for NEPA Assignment under 23 U.S.C. § 327. Thereafter, in 2014, the Texas Department of Transportation (TxDOT) became the second state transportation agency to obtain NEPA Assignment. Accordingly, the impetus behind this study originally began as research to assist the Texas Department of Transportation and its Environmental Division with: (1) the interpretation of the new roles, responsibilities, and requirements in the NEPA Assignment Memorandum of Understanding (MOU) with the FHWA, and (2) to assist with the refinement of program performance measures.

This report demonstrates the importance of checks and balances put into place by the FHWA and the DOT under the NEPA Assignment Memorandum of Understanding (MOU). In particular, the report highlight three areas which warrant close attention by DOTs and NEPA practitioners: (1) a strict adherence to and knowledge of the MOU; (2) external and internal program monitoring through formal public audits by the FHWA and self-corrective actions by the DOT; and (3) a demonstration of improvement made overtime with the refinement of program performance measures.

The implementation and execution of the program requires a substantial commitment on behalf of the DOT to minimize delays through stringent internal monitoring, staff training, and corrective actions. Under the MOU, the FHWA will perform regular audits to ensure the DOT is meeting its specified program performance measures and complying all federal environmental regulations, policies, and formal guidance. An outline of key provisions in NEPA Assignment MOU for both states is presented in detail in Chapter 3.

It is important to note that this report does not review the nature of environmental concerns as they relate to transportation planning. Nor does this report explore the nature of such projects. Rather, it reviews various project-level issues arising in environmental documentation and reviews from a programmatic perspective and how these issues are addressed administratively by the DOT.

Lessons learned from California and Texas can better inform states who are about to enter NEPA Assignment by identifying areas of noncompliance and misinterpretation of newly assumed roles and responsibilities by the state DOTs and their respective districts. Errors and omissions in environmental documentation and a project's administrative record are often addressed late into the environmental review process, increasing the potential for prolonged delays with project reevaluations, revisions, and supplemental reviews. Subsequently, these areas of noncompliance can increase the risk of potential litigation.

Experiences from both states demonstrate that the transition to NEPA Assignment require ongoing refinement of NEPA training, program guidance, and program monitoring. While focusing on these actions alone is not guaranteed to create a strong, robust program, they illustrate a key finding echoed throughout the study: district and local staff will become NEPA experts unto themselves.

METHODOLOGY

As the first and only state DOT to undergo full implementation of NEPA assignment, Caltrans was chosen as the baseline example for assessing issues arising in NEPA Assignment implementation over the eight-year trial period. Key findings were selected from the six individual program audits of Caltrans conducted by the FHWA, as well as from seven program self-assessments carried out by Caltrans between 2007 and 2013. The two audits of TxDOT made available at the time of this study were reviewed as well. The findings were synthesized and then correlated with key responsibilities, roles, and requirements as stipulated in each state's MOU.

Using these findings, the report provides a qualitative assessment of California and Texas' experience with NEPA Assignment implementation. An extensive review of existing environmental guidance, toolkits, and training materials was performed to understand the procedures and commitments in place by the DOT.

Eight interviews were conducted with environmental specialists and program managers with the Environmental Affairs Division (ENV) of TxDOT over a sixteen month period from 2014–2015 to address the goals and objectives of the DOT as it progressed through the first years of implementation. Interviews with TxDOT consultants, or "NEPA practitioners," were performed as well to better understand issues arising from an external point of view. The interviews and accompanying questions were designed to gauge the execution of the MOU and agency's performance over time.

Each interview was focused on approaches to conducting NEPA Assignment considered to be: (1) a weakness and requiring improvement, (2) a strength and area of best practice, and (3) an uncertainty and potentially litigious. Further evaluation and follow up from issues brought forward throughout the interviews helped to establish the central focus on program performance, monitoring, and improvement. From the

interviews it was found that due to the complexity of NEPA, in general, and NEPA Assignment, DOTs must stay engaged and involved in all aspects of program implementation, including continuous training of staff, local governments, NEPA consultants, and stakeholders.

Lastly, a literature review of existing materials on environmental streamlining was performed to understand the context and need of environmental streamlining provisions as presented in Federal transportation legislation. A key point of inquiry for the study was to understand the motivation behind the development of the NEPA Assignment Pilot Program, its permanency under MAP-21, and continued efforts to delegate federal NEPA authority to state agencies. This literature review provided the foundation for understanding the history and development of the NEPA process and key efforts to modernize the statute for the purposes of expediting project delivery.

STRUCTURE AND CONTENTS

Beginning in Chapter 2, the report presents an overview of NEPA, environmental streamlining, and legislation leading to the enactment of the NEPA Assignment program. From there, Chapter 3 presents an outline of the Texas and California MOUs and highlights the key provisions which relate to program monitoring, oversight, and performance. Chapter 4 provides a detailed overview of common findings present in the internal audits of Caltrans and subsequent lessons learned. Chapter 5 reviews the program performance measures and provides recommendations for further refinement. Chapter 6 concludes with key recommendations for improving program performance based on a synthesis of findings present in the report.

Chapter 2: Environmental Streamlining and NEPA

Since its passage in 1969, the National Environmental Protection Act (NEPA) has been significantly shaped by numerous administrative, legislative, and judicial actions aimed directly at expediting the time it takes to ensure a project's compliance with state and national environmental laws (Luther, 2007). In short, NEPA mandates that federal agencies consider the potential environmental consequences of their proposed actions, document the analysis, and make this information available to the public for comment prior to implementation. These requirements form the basic framework for federal decision making and the NEPA process.

This chapter provides a brief overview of the NEPA statute, process and environmental documentation. It begins with a short introduction into the impetus behind the NEPA statute and the need for environmental documentation. It then discusses legislative actions and programs designed to streamline the NEPA process for transportation related project planning and delivery. Efforts to reduce the time of the NEPA process have been the subject of an ongoing and prolonged national debate between environmental advocates, practitioners, stakeholders, and lawmakers. The contentious politics surrounding environmental regulation and transportation planning demonstrate the importance of the law, but also highlight key constraints related to the implementation of the NEPA Assignment program by state Departments of Transportation (DOTs).

THE NATIONAL ENVIRONMENTAL PROTECTION ACT OF 1969

The 1960s was a decade of major action and activism at the federal legislative level, with the passage of the Civil Rights Act in 1964, along with other Great Society

legislation and environmental discussions after John Kenneth Galbraith's *The Affluent Society* (Galbraith, 1952) and follow-up book *The New Industrial State* in 1967 (Galbraith, 1967). These books highlighted the links between poverty and environment. At the same time, public awareness of humanity's impact on the environment grew, due to industrial activities that led to poor air quality and polluted rivers. Rachel Carson's *Silent Spring* (1962) led to the nationwide ban on use of DDT and changes in the use of pesticides. Earth Day in April 1970 was also a seminal event that highlighted public perception of the environment (Vig and Kraft, 2003). Finally, imagery played a strong role in legislative activity: in August 1969, a picture of a burning Cuyahoga River in Northeastern Ohio was on the cover of *Time Magazine* and the edition's article reported on the dismal state of America's polluted rivers and estuaries (*Time Magazine*, 1969).

These nascent beginnings of a new environmental movement led to federal debate regarding the federal/state role in infrastructure impacts and the position that legislative changes were needed to ensure that pollution would be controlled uniformly and not in a piecemeal state-by-state fashion (Friedman, 2006). The genesis of this theory was that there should be no pollution havens, and that federal enforcement power—which had historically been weak—should be strengthened (Friedman, 2006). These policy discussions led to the passage of NEPA in 1970.

Title I of NEPA requires federal agencies to integrate environmental values into decision-making processes using a systematic, interdisciplinary approach that considers the environmental impacts of proposed agency actions and reasonable alternatives for those actions. NEPA is a procedural statute as opposed to a substantive statute, "*NEPA does not mandate particular substantive results, but instead imposes only procedural requirements*" (Laguna Greenbelt, Inc. v. United States Dep't of Transportation, 9th Cir., 1994). The procedural requirement of NEPA is that federal agencies analyze the

environmental impact of their proposals and actions. *“NEPA requires agencies to follow a set of action-forcing procedures that require that agencies take a hard look at environmental consequences and that provide for broad dissemination of relevant environmental information”* (Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 1983). NEPA does not require that the lead federal agency reach any particular conclusion, but it requires agencies to engage in an environmentally-conscious process that would reach an environmentally friendly result (Luther, 2007).

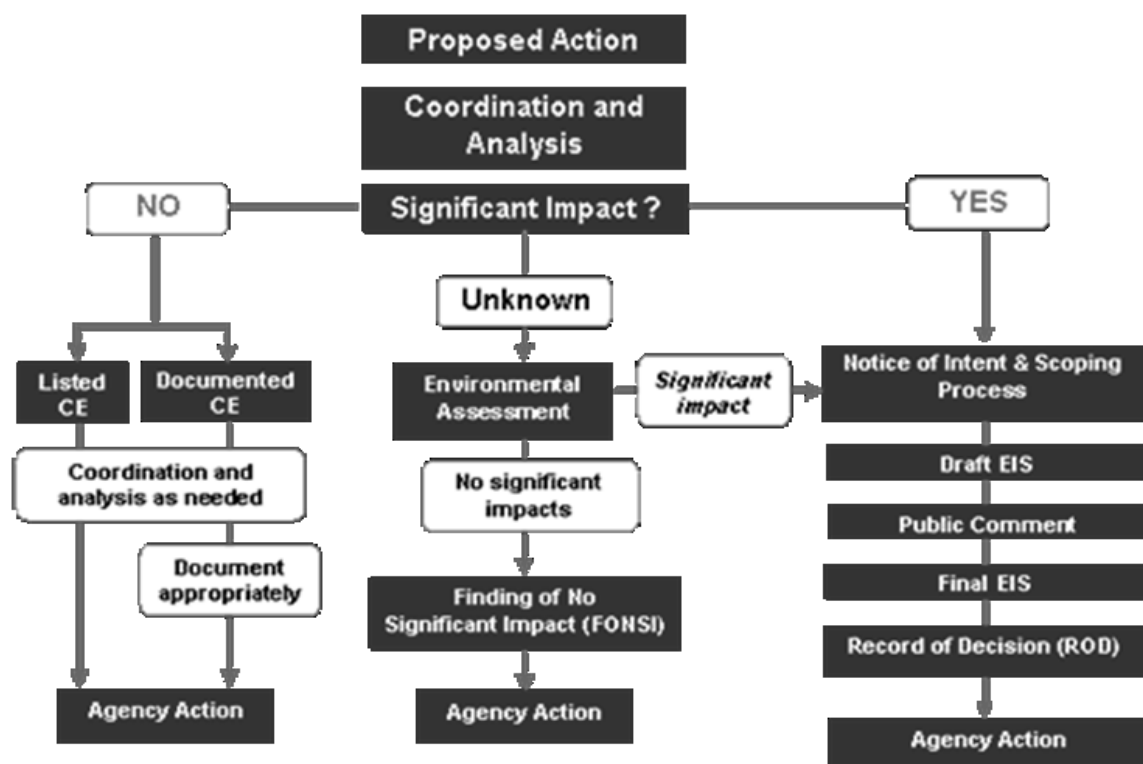
NEPA legislation established the Council for Environmental Quality (CEQ) within the Executive Office of the President. The CEQ oversees federal agency implementation of environmental impact assessment and also acts as a referee if agencies disagree over the adequacy of assessments. In 1978, the CEQ issued binding regulations that set the requirements for agencies to fulfill their NEPA obligations (Center for Environmental Quality [CEQ], 2007). The principal goals of the CEQ regulations are to reduce paperwork and delays, and to produce better environmental decisions by focusing on process improvements in four key areas: (1) early coordination and planning, (2) thorough completion of the environmental impact assessment and review processes, (3) uniform, consistent, and integrated environmental document processing options for all agencies, and (4) efficient and timely completion (FHWA, 1992). The CEQ required agencies to develop and create their own procedures to supplement these requirements based upon each agency’s mandates, obligations, and missions (Luther, 2012).

THE NEPA REVIEW PROCESS

The NEPA statute established a broad national framework for incorporating a number of environmental considerations and laws into the planning, design and decision-making processes. Under NEPA, transportation projects, programs, and plans receiving

federal aid must undergo an environmental review – referred to as the “NEPA Process” in this report. In general, the NEPA process has two principal purposes: (1) to ensure that an agency carefully considers information concerning potential environmental effects of proposed projects and actions, and (2) to ensure that the information pertaining to these impacts is available to the public (Governmental Accountability Office [GAO], 2008).

Illustration 2.1 NEPA Process and Project Determination



Source: TxDOT Environmental Compliance Toolkit, 2014

Once an agency has developed a proposed action, it will enter into an analytical approach to determine whether the agency will conduct project scoping¹ to collectively

¹ Federal agencies are required to go through a public “scoping process” in order to determine the scope of issues that should be addressed in an EA or EIS. Scoping also helps the agency determine the likely significance of an action’s impacts, and whether an EA or an EIS will be required (CEQ, 2014).

determine whether or not an undertaking significantly affects the environment and coordination of parties to participate in the analytical review. There are numerous federal environmental laws that an agency must address, but NEPA provides the umbrella process for all of these laws. It incorporates several other federal laws that address specific environmental resources, such as endangered species, water and air and laws that address certain human resources. At the same time, each state also has its own environmental laws and regulations that apply to infrastructure projects.

To account for the variability of proposed project impacts, three basic "classes of action" are allowed and determine how compliance with NEPA is carried out and documented. Illustration 2.1 provides an overview of the NEPA process and the sequence of decision making and outcomes. These three options include: categorical exclusion (CE), environmental assessment (EA), and environmental impact statement (EIS).

ENVIRONMENTAL DOCUMENTATION AND PROJECT DETERMINATIONS

Environmental documentation is an essential component of the project development process, which supports and complements the need for public involvement and interagency coordination. NEPA sets forth a formalized interdisciplinary process requiring federal resource agencies and interested parties to prepare a detailed and thorough written statement documenting the analyses of a project's potential effects. This detailed statement is commonly referred to as an Environment Impact Statement (EIS), which the NEPA statute defines as detailing "the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] alternatives² to the proposed action."

² The term analyzed alternative refers to an alternative for which the potential environmental impacts are assessed in detail. The terms impact and effect are synonymous and used interchangeably, consistent with 40 CFR Part 1508.8. One term, however, may be favored in a particular context (e.g., health effects, transportation impacts).

While the EIS is the most well-known of the environmental documents of NEPA, it is merely a fraction of all environmental documents produced under NEPA. Implementing regulations under NEPA allow for different thresholds, or levels, of environmental review and documentation based on the magnitude, context, and potential controversy surrounding a project. A project that may have either a lesser impact or potentially unknown significant impact, either individually or cumulatively, is subject to an environmental impact assessment. In this case, an Environmental Assessment (EA) is performed prior in order to identify, document, and determine if the impacts from the proposed actions warrant a more substantial and detailed EIS. If not, it is most likely the case that the EA document will present a Finding of No Significant Impact (FONSI).

For the most part, however, routine transportation projects may not have any significant impacts, or may have impacts that can be effectively avoided and mitigated, on the surrounding environment. In this case, a determination is made by a Federal agency to document the action as a Categorical Exclusion (CE). A Categorical Exclusion is a category of actions that meets the broad definitions contained in 40 CFR Parts 1508.1(c) through (e) and, based on an agency's past experience with similar actions, is known to not induce significant impacts (CEQ, 2015).

In general, a determination of proposed action as a CE is based on an agency's experience with a particular kind of action and its environmental effects. Common examples of CEs include routine transportation improvement projects, such as safety or highway maintenance. For proposed actions where such minor impacts are either not present or can be avoided and mitigated, the CEQ directs all federal agencies to adopt procedures which include identifying common actions that are easily classified as categorically excluded. However, these guidelines are not static and change as a result of federal legislation aimed at streamlining the NEPA review process.

It should be noted that in a given year, nearly 95 percent of all environmental documents produced are classified as CEs (FHWA, 2008). This is compared to EISs and EAs/FONSIIs which comprise an estimated 2 percent and 3 percent of all environmental documents, respectively. A project or action usually considered to be categorically excluded does not mean that any specific project is precluded from the NEPA process. Table 2.1 provides a brief description of appropriate NEPA documentation and the activities required for project-level determinations.

Table 2.1 Classification of Environmental Documents

Classification	Description of Activities and Documentation
Categorical Exclusion (CE)	Activity that the agency determines does not individually or cumulatively have a significant effect on the quality of the environment. <i>Agencies must check to ensure no extraordinary circumstances exist that can cause the proposed action to have a significant effect in a particular situation</i> (CEQ, 2002). If there are no such effects, the agency can proceed with the action. If the proposed activity does not fall in the CE list, the agency must prepare either an EA or EIS.
Environmental Assessment (EA)	Required to determine the significance of the environmental effects and review alternatives that can be undertaken to achieve an agency's objective. The EA is usually a concise document and must provide analysis and evidence to determine whether or not it is necessary to prepare an EIS. If cumulative and direct impacts do not warrant an EIS, then a Finding of No Significance (FONSI) is issued.
Environmental Impact Statement (EIS)	Required when the activity proposed is a major federal action that will significantly affect the quality of the human environment. Key elements within the EIS include the (1) purpose and need statement, (2) identification and analysis of alternatives that could meet the purpose and need of the proposed action, and (3) analysis of direct, indirect, and cumulative impacts (CEQ, 2002).

When disclosing information in the form of environmental documents, NEPA requires that a lead agency present the information in a way that is understandable to the public. In common practice, however, the breadth and nature of environmental documents have evolved into expansive, bulky reports extending into the thousands of pages.

Throughout the 1970s, the CEQ monitored environmental processing of all federal agencies and found that the NEPA process would result in EISs that were too long with less important issues being discussed at great length (Luther, 2007). Many practitioners and advocates, including the Federal government, rightly point out that this goes against the original principle of NEPA to inform and include the general public throughout all milestones in the decision making process. On the other hand, lead agencies and practitioners often fear potential litigation under NEPA, leading to excessive documentation and analysis in order to cover any known or unknown legal deficiencies (CEQ, 1997).

Transportation officials point to a variety of circumstances that contribute to the growing size and complexity of environmental documents, including changing expectations from regulatory agencies, legal concerns related to court challenges and information requests from the public or special interest groups. As a result, potentially negative outcomes which arise under these circumstances lead an agency to over analyze an outcome or issue in an attempt to *'dot every i and cross every t,'* an issue commonly referred to as "analysis paralysis (Luther, 2007)."

Moreover, the CEQ found there was poor or no early coordination among the agencies in charge of implementation and those collaborating in the review, and that this process led to unnecessary delays caused by confusion over differing terminology and

procedures among Federal agencies. To improve early coordination and avoid confusion, CEQ regulations introduced the concept of "lead agency" and "cooperating agency."

FEDERAL ROLES AND RESPONSIBILITIES

Under CEQ guidelines, the "lead agency" is the Federal agency which is responsible for the proposed action. As such, the lead agency is responsible for a range of activities pertaining to project scoping, inviting cooperating agencies, developing consensus among a wide range of stakeholders with diverse interests, resolving conflict, and ensuring that quality transportation decisions are fully explained in the environmental document (CEQ, 2007).

For highway and state transportation projects, the FHWA is the lead agency in charge of all environmental documents and reviews for all federally funded transportation projects and improvements. These responsibilities require the FHWA to work closely with cooperating agencies and governments to balance project needs, costs, environmental resources, safety, and public input in order to arrive at objective and responsible decisions through the NEPA process. As the lead Federal agency and "owner" of the resultant environmental document, the FHWA assumes legal responsibility for the integrity of the NEPA process and its outcome (CEQ, 1997). This includes the technical analyses and environmental assessments produced by state DOTs and local governments under the oversight of the FHWA.

The cooperating agencies are those with specialized expertise in particular resource area (e.g., the US Fish and Wildlife Service (USFWS), the Department of the Interior (DOI)) or through jurisdiction by law (e.g., the Army Corps of Engineers (COE) or the Coast Guard (USCG)). A state or local agency with similar qualifications may, through a formal programmatic agreement with the lead agencies, also become a

cooperating agency. A distinguishing feature of a cooperating agency is that the CEQ regulations permit a cooperating agency to "assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise (40 CFR Part 1506.3)."

Federal Courts and NEPA Litigation

With respect to litigation under NEPA, Federal courts have jurisdiction over NEPA under the Administrative Procedure Act (APA) (5 U.S.C. §§ 551-59 & 701-06). The APA sets forth that any agency decision found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" shall be set aside (5 U.S.C. § 706(2)(A)). Under the APA, the court cannot substitute its own judgment for that of an agency when reviewing a NEPA document and must rely on the project's administrative record to ensure the agency performed its due diligence and all procedural requirements are met.

The Administrative Record provides the reader (i.e., the judge) with clear documentation and a process to understand how the decision was made, allowing for rational, evidence-based decision-making processes. This includes everything from correspondence, meeting summaries to project alternatives and technical reports. As such, a strong Administrative Record leads to a defensible decision on the agency's part, a weak or incomplete record, on its face, renders a decision less confident.

TRANSPORTATION LEGISLATION AND ENVIRONMENTAL STREAMLINING

For transportation projects requiring an EA or EIS, the NEPA process can be particularly onerous. A typical highway project can take anywhere from 10 to 15 years to complete (Luther et al., 2012). This includes up to six years for completing the

environmental review process, and up to nine years or more for planning, design, and construction. These multiyear delays have very real consequences for the public-at-large: inadequate and congested highways cost drivers thousands of hours of lost time, and cost businesses millions of dollars in productivity, delayed highway safety improvements literally cost lives in crashes that could have been avoided (AASHTO, 2006).

In an attempt to avoid these deficiencies, project acceleration through environmental review streamlining has emerged as one successful channel to invigorate and support investments in America's transportation infrastructure. While no regulatory or legal definition of environmental streamlining exists, agencies each have their own interpretation of the process. According to the FHWA, streamlining consists of completing all necessary environmental reviews, documentation, and permitting in a timely way, while also ensuring projects and decisions are environmentally sound and compliant with all applicable laws, regulations, and executive orders (FHWA). However, due to the complex nature of transportation projects and broad range of NEPA, streamlining efforts are often fragmented and employed on an ad-hoc, project-by-project basis (AASHTO, 2002).

There have been a number of propositions and programs designed by federal legislators and state governments to cut back on the amount of time it takes from planning and initiating a project to its release for construction. Recent transportation legislation, including the Moving Ahead for Progress in the 21st Century Act of 2012 (MAP-21) and the Fixing Americas Surface Transportation Act of 2015 (FAST Act), explicitly call for accelerated project delivery and streamlined environmental review procedures for all highway and transportation projects. The following sections will explore several key legislative initiatives for environmental streamlining under the Transportation Efficiency Act for the 21st Century (TEA-21), Safe, Accountable,

Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) and MAP-21, and how these laid the groundwork for the establishment of the NEPA Assignment program.

Transportation Efficiency Act for the 21st Century

The issue of environmental streamlining received considerable national exposure in 1997 and 1998 following the congressional reauthorization of Intermodal Surface Transportation Efficiency Act (ISTEA) with the Transportation Efficiency Act for the 21st Century (TEA-21). By enacting TEA 21, Congress sought to address the delays that all too often plagued the planning process for transportation projects. In particular, Section 1309 of TEA-21 was introduced with the explicit intent to establish formal mechanisms to move transportation projects through the NEPA process as quickly as possible without compromising the integrity of national environmental standards and requirements.

In short, these streamlining provisions under Section 1309 directed the Secretary of the USDOT to develop a coordinated environmental review process whereby *“all environmental reviews, analyses, opinions, and any permits, licenses, or approvals that must be issued or made by any federal agency...shall be conducted concurrently and completed within a cooperatively determined time periods (23 U.S.C. § 139(c)(7)).”* This provision was later amended under 23 U.S.C. § 139. Accordingly, the statutory provision for efficient, coordinated environmental review process focuses on concerns related to project delays during project implementation from the unnecessary duplication of efforts, as well as the added costs often associated with obtaining all necessary permits and approvals for proposed actions on the national highway system.

Despite efforts to increase greater cooperation between the USDOT and other federal resource agencies, the implementation of Section 1309 was largely seen as unsuccessful. In 2001, then President George W. Bush signed Executive Order (EO) 13274³, “Environmental Stewardship and Transportation Infrastructure Project Reviews,” to further the concept of and national commitment to environmental streamlining in light of the USDOT’s failure to implement Section 1309 successfully (Luther, 2007).

Dan Flowers, former chairman of the American Association of State Highway and Transportation Officials (AASHTO) in Congressional testimony on environmental streamlining in 2000 argued, “to make streamlining work, we recognize the need to improve the level of trust and communication between States and the Federal agencies and the concerned environmental groups (AASHTO, 1999; pp. 48-49).” Flowers pointed out that despite federal efforts to improve efficiency, the most successful and innovative approaches to streamlining the NEPA process were conducted at the state-level by DOTs. To further such practices, AASHTO, FHWA, and EPA began initiated a pilot study of collaborative approaches by states and local governments on joint project reviews to demonstrate “the art of the possible in environmental streamlining (AASHTO, 1999; p. 51).”

Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users

SAFETEA-LU represents the largest surface transportation investment in United States history and builds on the foundation of previous transportation laws under to refine, among other things, the transportation planning and project development processes. SAFETEA-LU retained and increased funding for the environmental programs

³ E.O. 13274 charged the Secretary of the US DOT to create a list of high priority projects for “expedited environmental reviews.” From this, FHWA established the national task force on environmental streamlining and began regular reporting on such efforts and results (Musselman, 2006).

of TEA-21 and added new programs focused on the environment. Similar to previous national transportation legislation, the purpose of the environmental streamlining provisions contained in SAFETEA-LU were to coordinate Federal agency involvement in major highway projects under the NEPA process and to address concerns relating to delays in implementing projects, unnecessary duplication of effort, and added costs often associated with the conventional process for reviewing and approving surface transportation projects (AASHTO, 2007; Luther, 2007).

Critically important to the SAFETEA-LU legislation are Sections 6003(a) and 6004(a), which established the creation of the Surface Transportation Project Delivery Pilot Program (“Pilot Program”) for CE’s and full NEPA Assignment. Under the 23 U.S.C. § 326 *CE Assignment* and the 23 U.S.C. § 327 *NEPA Assignment* programs, state DOTs were offered, for the first time, the opportunity to assume the FHWA responsibilities under NEPA, as well as FHWA’s consultation and coordination responsibilities under other Federal environmental laws for most highway projects (AASHTO, 2008). To obtain these individual authorities, both statutes require a state to waive its Eleventh Amendment right to sovereign immunity against actions brought by its citizens under NEPA in federal court for the narrow purposes of the pilot program.

Moving Ahead for Progress in the 21st Century

The enactment of MAP-21 in 2012 brought a substantial change to streamlining transportation project delivery by states by establishing a performance-based federal program to accelerate projects related to highway and transit systems. First, 22 provisions introduced with MAP-21 address the need for expedited project delivery and provide opportunity for promoting innovative approaches which successfully builds on this goal. Second, MAP-21 established a performance-based approach to surface transportation

planning and programming. This important item, including its impact on NEPA Assignment and project delivery, is explored in depth in Chapter 5.

In doing so, MAP-21 advances the use of new approaches and best practices to accelerate project delivery in order to reduce costs across all modes, and expedite the deployment of technology and innovation. For instance, Section 1301 of MAP-21 declares that, “it is in the national interest to expedite delivery of surface transportation projects by substantially reducing the average length of the environmental review process (23 U.S.C. § 139).” One of the Act’s provisions was to make permanent—as well as to extend to eligibility to all fifty states—the option to participate in the Surface Transportation Project Delivery Program.

SURFACE TRANSPORTATION PROJECT DELIVERY PROGRAM

23 USC § 326: CE Assignment

Section 6004(a) of SAFETEA-LU provided state DOTs with the opportunity to assume responsibilities and signature authority for Class II actions, or Categorical Exclusions (CEs), that have been listed by the US DOT Secretary for federal-aid highway projects under 23 U.S.C. § 326. Under this “CE Assignment,” DOTs are able to make project-level determinations, as well as oversee the production and approval of environmental documentation for CEs listed in 23 CFR Parts 771.117(c) and (d). Since 1989, FHWA Division Offices and state DOTs have entered into programmatic agreements⁴ that establish procedures for expeditious and efficient approval of CEs.

⁴ Programmatic agreements (PA) are a formal document that spells out the terms of a legally binding agreement between a transportation department and another state or federal agency. A programmatic agreement can establish a process for consultation, review, and/or compliance with one or more federal laws. It can also function as an expression of collaborative intent between agencies. (FHWA, 2015)

However, SAFETEA-LU and MAP-21 greatly increased the scope of CE processing responsibilities to include formal delegation of federal authorities for all CE types.

While all State DOTs are allowed to obtain CE Assignment, the program requires a formal application and agreement with the FHWA for responsibility similar to that of the NEPA Assignment program under 23 U.S.C. § 237. Four states have entered into a Memoranda of Understanding (MOU) with the FHWA to assume or continue responsibility for CE determinations between 2007 and 2011 under SAFETEA-LU: the Alaska Department of Transportation and Public Facilities, in 2009, California Department of Transportation in 2007, and the Utah Department of Transportation in 2008 (FHWA, 2013, 2012, 2014). Each of these MOUs only assigned the state responsibility for CE determinations, though Texas has since entered an agreement for CE Assignment authority in 2013 as well as a new agreement for full NEPA Assignment in 2014.

These agreements also establish expectations and responsibilities for the FHWA and State DOT parties involved and identify processing and documentation expectations for all CE actions, quality control and quality assurance (QA/QC) processes, and FHWA oversight. The FHWA oversight role under 23 U.S.C. § 326 is to monitor compliance by the State with the MOU and the provision by the State of adequate financial and staff resources to carry out the MOU.

23 USC § 327: NEPA Assignment

Section 6003(a) of SAFETEA-LU authorized the Secretary of the US DOT to initiate the Surface Transportation Project Delivery Pilot Program for FHWA NEPA authority of EAs and EISs pursuant to 23 USC § 327. Beginning in 2007, the pilot program allowed five states to assume full NEPA Assignment authority, but California

was the only state to participate in the pilot program. Four states (Texas, Ohio, Oklahoma, and Alaska) were provided the opportunity to participate but were unable to fully comply with the requisites and obtain the waiver of sovereign immunity necessary for the delegation of federal authority (GAO, 2012). Following the passage of MAP-21, the Surface Transportation Pilot Program was made permanent and open to all states.

Unlike the CE Assignment program, NEPA Assignment greatly expands the scope of a state's authority and flexibility to streamline the environmental review process. As stated previously, the program allows a state DOT to take on the traditional role of the FHWA by assuming all federal responsibilities for environmental review, resource agency consultation, and all other environmental regulatory compliance-related actions pertaining to a project's environmental review, required permitting and approval (GAO, 2014). Table 1b in Appendix B provides a comparison of the key responsibilities assumed under 23 U.S.C. § 326 with those under 23 U.S.C. § 327.

Streamlining the NEPA process is not achieved by shortcutting legal requirements and regulations, but rather by removing the iterative secondary layer of government review by the FHWA (TxDOT, 2015). Generally speaking, a state DOT will submit to the FHWA draft environmental documents on federally funded actions, or projects otherwise requiring federal approval and permitting, prior to proceeding to construction. These draft documents are reviewed and commented on by the FHWA and all relevant federal agencies with specialized expertise and jurisdiction (e.g., USFWS), and then given back to the DOT for revision before a second final draft is posted.

Not only does this repetitive sequence of review-comment-revise create prolonged delays, but exhausts limited public resources and staff with both agencies performing duplicative roles (AASHTO, 2008). With NEPA Assignment, the state is afforded the opportunity to significantly cut back on these overlapping and time

consuming reviews to accelerate project delivery. This allows for increased certainty with project timeframes and costs and, at the same time, provides an opportunity to refocus staff, time, and agency resources on other critical needs.

Moreover, by obtaining NEPA Assignment, the DOT is no longer reliant on the FHWA to initiate formal consultation and collaboration with participating federal agencies on complex documents and reviews. The state is deemed lead federal agency, as compared to cooperating agency, and direct project involvement by the FHWA on is eliminated. However, this includes direct involvement by the FHWA on a project with respect to project-level technical assistance and support. The FHWA will not step in to provide technical assistance on projects since this responsibility now lies with the state DOT (FHWA, 2012, 2014). While this enables more opportunities to make independent decision making at the DOT's discretion, the agency is held to a higher degree of accountability.

The FHWA and DOT determine the scope of responsibilities and mutually established standards and expectations by entering into a Memorandum of Understanding (MOU). With this agreement, the DOT must ensure that all procedures, guidance, and resources are updated to reflect wide range of newly assumed federal NEPA responsibilities, roles, and requirements. Importantly, the MOU outlines the mutual agreement for stringent, recurrent formal audits by the FHWA and the criterion for implementation by the DOT will be assessed.

Aside from the FHWA, there is a growing trend by federal transportation agencies, with the Federal Transit Administration (FTA) and the Federal Railroad Administration (FRA), to devolve authority from project-level obligations under NEPA and delegate formal NEPA authority to state agencies. At the same time, the NEPA Assignment program is evolving with the passage of the Fixing America's Surface

Transportation (FAST) Act of 2015. Although final rulemaking has yet to be promulgated at the time of this report, Section 1309 of the FAST Act creates a new 12-year pilot program for DOTs with NEPA Assignment to utilize state environmental laws for documenting project reviews and decision making by local governments to satisfy NEPA requirements (23 U.S.C. § 330).

The next chapter will discuss essential provisions contained within the MOU. In particular, the chapter will review the commitments by the DOT to maintain the financial and staffing resources necessary to support NEPA Assignment training and project-level support, internal oversight and program monitoring, and NEPA Assignment performance measures and program management.

Chapter 3: The Memorandum of Understanding

The Memorandum of Understanding serves as the contract and framework for carrying out the provisions of NEPA Assignment. It grants states the authority to conduct the federally mandated environmental reviews of certain designated highway projects with the stated objective of “simplifying and expediting the environmental review process for transportation projects (FHWA, 2012; p. 53712).” Accordingly, the agreement permits the FHWA to shift its environmental review responsibilities and liabilities under NEPA onto the DOTs of participating states and assume a programmatic role through monitoring and oversight.

The importance of the MOU should not be understated. The agreement between the FHWA and state DOT is a critical component and important tool for ensuring the overall success of the NEPA Assignment program and its ongoing implementation by a DOT. In the absence of formal guidance or technical assistance from the FHWA, the MOU acts as a central framework for delineating the scope of authority and the coordinated process for achieving environmental compliance for all federally funded projects located on or along the national highway system (NHS) under NEPA Assignment (FHWA, 2007). In this regard, the MOU sets the direction of how the FHWA and DOT will work together, as well as individually, to ensure that the state is able to perform the Secretary of the US DOT’s responsibilities for NEPA and other actions required under federal environmental law.

This chapter discusses the changes in roles, responsibilities, and requirements under NEPA Assignment and the checks and balances to ensure that the state DOT is able to effectively enforce the provisions contained in the MOU. As the only two states with NEPA Assignment, the chapter will draw from California and Texas agreements.

Both are divided into fourteen parts, and an outline of the major sections is provided in Table 3.1. While the agreements by the FHWA with TxDOT and Caltrans are similar in structure and content, there are some distinctions in the MOUs related to program training, clarification, and monitoring that highlight lessons learned by the FHWA throughout Caltrans' participation in the pilot program. Accordingly, the chapter will end with a discussion of key observations and differences between MOUs.

Table 3.1 MOU Framework and Topics

Part 1: Purpose of MOU	Part 8: Involvement with the FHWA
Part 2: <i>[Reserved for Future Use]</i>	Part 9: Withdrawal of Assigned Responsibilities
Part 3: Assignments and Assumption of Responsibility	Part 10: Performance Measures
Part 4: Certifications and Acceptance of Jurisdiction	Part 11: Audits
Part 5: Applicability of Federal Law	Part 12: Training
Part 6: Litigation	Part 13: Term, Termination, and Renewal
Part 7: Involvement with Other Agencies	Part 14: Amendments

MOU CONTENTS AND STRUCTURE

The following section outlines the important areas of the MOU as they relate to a DOT's implementation of NEPA Assignment. After reviewing literature, audits, and speaking with program specialists and NEPA practitioners in Texas, it became increasingly evident that the MOU was the primary mechanism used by both the FHWA and the DOT for their interpretation of individual roles and responsibilities. As such, adherence to and knowledge of the NEPA Assignment MOU by all parties and staff is paramount for the continued justification and renewal of the NEPA Assignment program by the FHWA.

Purpose and Responsibilities

In very succinct terms, part 1 of the MOU lists the key purpose of the agreement in confirming a state's application to participate in the NEPA Assignment Program pursuant to 23 U.S.C. § 327. Immediately upon signing the MOU, the DOT must enforce and uphold all federal roles and responsibilities assumed in the agreement. From the perspective of the FHWA, the decision to enact the MOU draws largely from the detailed information and commitments provided in the state's formal application to participate in the NEPA Assignment Program.

In short, the formal application contains key information detailing the DOT's approach to implementing the NEPA Assignment program. The detailed information contained within the application provide both the FHWA and the public with insight into the organizational and management capabilities, as well as the procedural changes, by the DOT for assuming and implementing the FHWA environmental review responsibilities. This, in turn, provides an opportunity for the FHWA to determine if there are any procedural elements that may be inconsistent with federal law and regulations which may elevate potential risks or non-compliance by the DOT.

NEPA Assignment requires that the DOT maintain the capacity to carry out, comply and enforce all federal environmental laws, requirements and regulations. Specifically, Parts 3 and 5 of the MOU addresses the responsibilities and roles assigned to the DOT and the FHWA, and assign the DOT "all of the USDOT Secretary's responsibilities for environmental review, reevaluation, consultation, or other action pertaining to the review or approval of highway projects" (Part 3.2.1) (FHWA, 2012, 2014). Table 2.3 lists the numerous federal environmental laws for which the DOT becomes responsible for following execution of the MOU under 23 U.S.C. § 327.

Table 3.2 Key Environmental Laws and Statutes Assumed

Topic	Federal Environmental Laws and Statutes
Noise	23 C.F.R. 772; Noise Control Act of 1972, 42 U.S.C. 4901-4918
Wildlife	Marine Mammal Protection Act, 16 U.S.C. 1361-1423h
Historic and Cultural	Archeological Resources Protection Act, 16 U.S.C. 470aa-mm
	Native American Grave Protection and Repatriation Act, 25 U.S.C. 3001-30131, 18 U.S.C. 1170
Water Resources and Wetlands	Clean Water Act, 33 U.S.C. 1251-1387 (Sections 404, 401, 402, 408)
	Coastal Zone Management Act, 16 U.S.C. 1451-1466
	Safe Drinking Water Act (SDWA), 42 U.S.C. 300f-300j-26
	General Bridge Act of 1946, 33 U.S.C. 525-533
	Rivers and Harbors Act of 1899, 33 U.S.C. 401-406 (all)
	Emergency Wetlands Resources Act, 16 U.S.C. 3921
	Flood Disaster Protection Act, 42 U.S.C. 4001-4130
Parklands	Land and Water Conservation Fund (LWCF) Act, 16 U.S.C. 4601
FHWA Specific	Planning and Environmental Linkages, 23 U.S.C. 168
	Programmatic Mitigation Plans, 23 U.S.C. 169

Source: TxDOT NEPA Assignment MOU, 2014

Compliance and Monitoring

Under NEPA Assignment, DOTs are responsible for making independent environmental decision and are fully accountable for these decisions under the assumed authority of the FHWA. To ensure that these federal laws are enforced by a state agency, Parts 4 and 5 detail the substantial organizational commitments by the DOT for maintaining both the monetary and personnel resources necessary to perform the responsibilities assigned. Personnel requirements specifically listed are “environmental, technical, legal, and managerial expertise,” as well as qualified staff to oversee consultation activities related to complex reviews (4.2.3) (FHWA, 2007, 2012, 2014). For instance, duties required by Section 106 of the National Historic Preservation Act, require that specific standards must be met. In particular, the review must be carried out or

supervised by someone who meets the Secretary of Interior's Professional Qualifications Standards.

The MOU holds the DOT to a higher degree of in-depth knowledge with the practice of NEPA. Parts 8 and 11 of the MOU significantly expand the ability of the FHWA to assess a DOT's performance through rigorous monitoring and oversight. Given this substantial increase in scope, performance and success will be measured differently under NEPA Assignment. Under this stipulation, if the level of resources is inadequate or there is a loss of funding, the DOT must notify the FHWA, and the FHWA will then amend the MOU to scale back responsibilities (Part 8.2) (FHWA, 2012, 2104). At the same time, if the DOT is unable to adhere to the responsibilities listed in the MOU, or if the FHWA feels the DOT is not in full compliance with the terms of the agreement, then the FHWA retains full authority to revoke the program at any point in time (Part 11.3.1) (FHWA, 2012, 2014).

As a baseline standard for NEPA Assignment compliance, the FHWA regularly conducts statewide program audits to review a DOT's compliance with the MOU.⁵ The scope of the audits is determined by the responsibilities assumed and the level of resources committed by the agency to ensure the successful execution of the MOU. For NEPA Assignment, the intensity of formal auditing by the FHWA will greatly expand to include consultants, districts, local governments, and other relevant non-DOT personnel (Part 8.2.2) (FHWA, 2012, 2014). FHWA may also invite other federal or state resource agencies to participate in audits to assess whether the DOT is meeting federal procedural and substantive requirements (Part 11.3.1) (FHWA, 2012, 2014).

⁵ Pursuant to 23 CFR Part 771.1, 'formal' reviews are conducted by FHWA on a required basis and "informal" auditing or reviews are in-house, self-assessments done by the Agency HQ or District staff on a less routine and ad-hoc basis.

Training and Commitments

The FHWA will maintain a strong interest in an agency's success. For many DOTs, the assumption of Federal environmental responsibilities and liabilities for conducting environmental assessments and impact statements involve tasks not previously performed or familiar to its staff and consultants. This presents a critical challenge for implementation as DOTs operate in a decentralized manner. For example, the Texas Department of Transportation has 25 state Districts with differing levels of expertise and staffing for the respective regions that the Districts' serve.

From the perspective of the MOU, the training planning and implementation is a partnership effort amongst the DOT, FHWA, and other federal resource agencies. This is the reason why training is a component of a DOTs qualifications and readiness to assume FHWA's NEPA responsibilities and is addressed in a separate section as Part 12 of the MOU (FHWA, 2016). It places a strong emphasis and higher expectation for process standardization, consistency, and uniformity for all levels of environmental documents and review by the DOT, its Districts, and local governments.

Beyond a commitment for increased spending and resources for program implementation, the DOT must increase its legal counsel and managerial staff to oversee environmental documentation produced out-of-house. This was an explicit requirement added to the MOU by the FHWA due to the substantial number of environmental documents produced and approvals made in any given year. DOTs rely heavily on the support of outside NEPA practitioners to oversee the coordination, development, and review for many of their environmental documents. For example, in 2013, TxDOT awarded \$6 billion in highway and roadway construction projects which amounted to 1,796 environmental documents (Swonke, 2014, p. 3). Thus, if an error were to be made on an approved environmental document that was prepared out-of-house and brought to

court under NEPA, the state will still be held liable to defend the its decision for a given action despite not having produced the documentation and information contained within.

THE CALIFORNIA AND TEXAS MOUS

In general, the MOUs largely differ based on the timeframe for each agreement. Both agreements were negotiated with the FHWA to determine the scope of responsibilities and activities assumed by the DOTs, but demonstrate differences in their approach to implementing NEPA Assignment. Caltrans' MOU was enacted under SAFETEA-LU and outlines a higher degree of collaboration directly with Federal Agencies to closely monitor the pilot status of the NEPA Assignment program. TxDOT's agreement, on the other hand, was enacted under MAP-21 and focuses more on a performance based approach to state accountability and procedural applications with interagency affairs (TxDOT, 2014). This is most evident in the length of the Texas MOU as compared to that of California.

The Texas MOU provides much more explicit detail than the California MOU. This difference implements the lessons learned from trial and error under Caltrans' pilot performance and subsequent audits. Language pertaining to the MOUs indicates a critical need for better clarification on the differing responsibilities and roles between a DOT headquarters and its internal departments, particularly when it comes to understanding the newly assumed responsibilities and the corresponding signature authority. The following section discusses the key differences in the MOUs.

Clarification and Consistency

By assuming federal responsibilities, the DOT must make a concerted effort to clarify its new roles among all stakeholders and increase transparency in the NEPA

process. Part 3 of the MOU regarding “Assignments and Assumptions of Responsibility” differs between the two states with particular provisions covering transmitting environmental documents between corresponding districts, local governments, interested stakeholders and the general public (FHWA, 2007, 2012, 2014). In particular, subpart 3.1.2 was introduced in the Texas MOU and requires that a standard clause regarding the agreement to assume signature authority be conspicuously placed for all readers. This was added to the MOU to ensure that TxDOT extended this clause to all NEPA-related public involvement procedures, including any notices of intent (NOIs) or notices for project scoping. This clause states:

The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried-out by TxDOT pursuant to 23 U.S.C. §327 and a Memorandum of Understanding dated December 16, 2014, and executed by FHWA and TxDOT (FHWA, 2014).

The California MOU lacks this subpart. Rather, the agency’s *Standard Environmental Reference* (SER) states that this clause should be placed upon all environmental documents related to NEPA Assignment instead of being explicitly stated in the MOU. The FHWA noted that environmental documents with interagency agreements, particularly with the U.S. Fish and Wildlife Service (USFWS) on Section 7 consultation and coordination, lacked identification of the NEPA responsibilities assumed by Caltrans despite explicit instructions in the program guidance (FHWA 2007, 2010, 2012).

Furthermore, the FHWA noted that this lack of supervisory direction led to several critical errors by district and local government personnel in terms of project tracking, billing, and the transmittal of environmental documents between the appropriate

project managers and project billing codes (FHWA, 2010). Adjustments in Part 3 of the MOU for Texas relate directly to challenges of clarifying NEPA Assignment responsibilities among state and federal agencies and the general public. In contrast to California, Part 3 of the Texas MOU outlines the need for a more robust public engagement program, a key issue that was not addressed effectively in the pilot by Caltrans.

The CEQ, in a recent memo dated January 25, 2015, made a priority recommendation that “agencies [should] refine and develop their NEPA management and public engagement IT tools by leveraging existing tools and working collaboratively across the Federal Government to ensure compatibility (CEQ, 2015, p.14).” Simple identification and boilerplate text, as exemplified in the Texas MOU, can not only help to avoid such small errors, but can improve the DOTs ability to track and monitor the timely progression of projects and resources throughout the NEPA process. This can also help to foster a strong working relationship between agencies by clarifying individual roles early on, while also promoting effective responsiveness when addressing critical concerns raised by federal agencies and public stakeholders.

Sovereign Immunity and Conflict Resolution

Part 6 regarding litigation differs in that the Texas MOU contains further clarification on the procedural steps required in the event of legal actions or notices taken against the Agency. The language is particularly unique between both MOUs, as Caltrans’ agreement authorizes the agency to collaborate closely with U.S. Department of Justice, Environmental Protection Agency, and the FHWA California-Division in the event of a complaint or notice to sue under NEPA. Conversely, the Texas MOU contains

the addition of subparts which provide direct clarification on step-by-step legal procedures to be taken post-settlement (TxDOT, 2014).

In 2011, Caltrans reported throughout the pilot program that the agency received on average one NEPA-related lawsuit per year—a trend seen in years prior to the initiation of the pilot program (Caltrans, 2011). However, following the first NEPA Assignment lawsuit in 2008, *Lotus et al. v. Caltrans* the courts brought to light the failures of state-level agency cooperation and sequential disagreements resulting from a lack of full clarification between subject matter experts and district-level coordinators. To correct this, the MOU with TxDOT introduced a stipulation that, in the event of disagreement between the Agencies, Federal action will be undertaken by CEQ for determining any pre-decision referrals (FHWA, 2014). This includes CEQ’s involvement in all environmental review responsibilities that TxDOT has assumed under Assignment (FHWA, 2014).

Following the waiver of sovereign immunity, maintaining compliance with all aspects of the MOU and responsibilities assumed is imperative to reduce any potential legal liabilities. Inevitably, NEPA Assignment will increase the workload for DOT staff and require more time to ensure that the DOT conducts the necessary detailed, hard look at environmental documents before proceeding with a project decision. Stronger internal monitoring can help to identify, isolate, and mitigate potential liabilities stemming from this transition. However, it is critical to provide staff with an understanding of the importance of adhering to duties and obligations when developing and signing off on NEPA documentation (FHWA, 2009).

With NEPA Assignment duties and obligations, a DOT must ensure that staff members at all levels are cognizant of how their actions may impact litigation, as litigation can impact project outcomes. As evidenced by the audits in the following

chapter, this will ultimately come from staff understanding and enforcement of the MOU's provisions.

Chapter 4: NEPA Assignment Program Audits

The following chapter discusses audit findings from California and Texas. It begins with an overview of the purpose and scope of audits as stipulated in the MOU and by the FHWA. From 2007 to 2012, six formal audits were conducted by the FHWA for Caltrans participation throughout the agency's participation in the Surface Transportation Project Delivery Pilot Program and follow a five-year renewal in 2012. Two formal audits of TxDOT's NEPA Assignment program have since been conducted by the FHWA since 2014.

As the NEPA Assignment program matures, a department's environmental review processes and organizational capacities are expected to mature – in some cases significantly. Thus, assessing issues identified by FHWA during its Caltrans and TxDOT audits is a strategic approach to ensure that a department is successful in adapting and complying with the federal responsibilities outlined in its MOU with minimal disruptions to its activities. Furthermore, early recognition of project-level issues and red flags under NEPA Assignment will assist departments and districts with targeting key program areas where additional staff training may be needed.

PURPOSE AND SCOPE OF AUDITS

In general, formal audits are the primary mechanism used by the FHWA to evaluate: (1) the department's compliance with responsibilities outlined in the MOU, and (2) the department's progress in meeting performance measures, and (3) compliance with environmental documentation and records as "needed for the USDOT Secretary's annual report to Congress" (FHWA, 2015; p. 50,905). The FHWA will carefully review the monitoring and oversight procedures that are in place to assure unbiased decision making

and that all applicable provisions of Federal environmental laws, regulations, and processes have been met before a decision is made.

The scope of FHWA's auditing will review staff knowledge regarding the changes made to agency processes and procedures following the execution of the MOU (FHWA, 2007, 2012, 2014). The FHWA will assess how the DOT is operating the new program and whether the agency is meeting the commitment for ensuring consistency and compliance with assumed responsibilities statewide. This information is essential for justifying the continuation of the NEPA Assignment program, as well as for providing a national clearinghouse of best practices and lessons learned for interested DOTs seeking NEPA Assignment.

THE CALIFORNIA DEPARTMENT OF TRANSPORTATION

As the first and only DOT to undergo full program implementation of NEPA assignment, the California Department of Transportation (Caltrans) was chosen as the baseline example for assessing the presence of issues over an eight-year period. Inconsistencies identified through Caltrans self-assessments and audit findings serve as a source to identify areas which require additional training and oversight. Key findings were selected from a total of six audits conducted by the FHWA and seven self-assessments carried out by the DOT between 2007 and 2013. Table 4.1 outlines selected findings of issues throughout Caltrans' pilot program that occurred on more than one occasion and required the agency to take corrective action.

Table 4.1: Common Errors Evident in California’s NEPA Assignment

MOU Part/Heading	Noted Issues by FHWA in Caltrans Audits
Part 1: Purpose	<ul style="list-style-type: none"> • General confusion over appropriate signature authorities at local, district, and department level. • General confusion on procedural requirements for projects initiated prior to the execution of the MOU.
Part 3: Federal Laws other than NEPA	<ul style="list-style-type: none"> • Incorrect determination of CEs types and thresholds for review. • Incorrect use of reevaluation and recertification resulting in time-delays and conflict.
Part 4: Commitment of Resources and Training	<ul style="list-style-type: none"> • NEPA Assignment training program could not keep up with demand for local and district level training. • Staff competency levels varied between districts. • Training plan was not adequate for consultants/practitioners.
Part 5: Procedural and Substantive Requirements	<ul style="list-style-type: none"> • Project errors and lack of knowledge with Section 7 (ESA), Section 4(f), and Section 106 procedures and requirements • Limited scope of self-assessments and internal program reviews.
Part 8: Monitoring and Oversight	<ul style="list-style-type: none"> • Confusion over roles for coordination, consultation, and collaboration. • Incorrect QA/QC procedures and missing forms (most commonly evident with Local Assistance projects). • Production of FHWA Quarterly Reports contained inaccuracies, missing information, and missing files.
Part 9: Record Retention and Project Files	<ul style="list-style-type: none"> • Required project files missing from the Administrative Record, or found to have wrong signatures, dates, and forms. • District methods varied when transmitting project files between agencies, departments, and staff. • Districts used different project tracking methods, rather than utilizing a standardized method for monitoring progress.

The findings suggest that as a DOT's NEPA Assignment program matures, routine process improvements will be necessary for existing NEPA guidance. Outlining and clarifying the expected changes to districts and local governments, as well as NEPA practitioners, before these changes are enacted is especially important given the increasing resource demands associated with managing more complex and controversial projects during the first years of NEPA Assignment.

Procedural and Substantive Requirements

Under 23 U.S.C. § 327, the state DOT is responsible for carrying out all procedural and substantive requirements that apply to the Secretary of the USDOT when conducting NEPA reviews. As mentioned, compliance with procedural and substantive requirements in this area concerns all applicable state and federal environmental laws, executive orders, policies, regulations, and interagency agreements.

During Caltrans' implementation, the FHWA remarked on 26 separate occasions in which District and local government staff expressed general confusion regarding compliance with these newly assumed responsibilities the revised procedures for working with third parties on such reviews (FHWA, 2008, 2009, 2011). This issue arising in the audits primarily concerns federal requirements to initiate formal consultation with resources agencies that hold specialized expertise and jurisdiction over specific permits and approvals.

For most highway projects, federal requirements for consultation typically include: (1) Section 7 permits required under the Endangered Species Act (ESA), (2) Section 404 permits required by the Clean Water Acts (CWA), and (3) Section 4(f) technical evaluations for a range of public parklands, refuges, and historic and cultural sites pursuant to 23 U.S.C. § 138 (FHWA, 2014; Luther, 2007).

According to the FHWA and CEQ, these highly technical reviews and analyses should be integrated the environmental review process as early as possible to reduce iterative and duplicative work (FHWA, 2002). As lead agency, the DOT must take into consideration specific constraints, such as time and staffing, from the perspective of the participating federal agency when initiating project level consultation.

Furthermore, the departments and their respective districts will need to have a better understanding of project and agency specific roles with concurrent reviews, including agreement on the timeframe for key decisions points and early issue identification. This includes any potential conflicts between agencies which may arise in the decision-making process.

Federal statute and guidance by CEQ do not mandate specific procedures for interagency consultation. Rather, the CEQ recommends that lead agencies promote timeliness in the NEPA process by establishing guiding principles for the development of interagency consultation implementing procedures and process integration (CEQ, 2014). Accordingly, the DOT should integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts between agencies.

This includes, to the extent practical, the implementation of 23 U.S.C. § 139 requiring the lead agency (e.g., the DOT) to determine an appropriate timeframe to initiate early consultation and collaboration with relevant participating third parties (e.g., resource agencies) and for the purposes of programmatic environmental reviews (23 U.S.C. §§ 139(a)-(h)).⁶ Prior to NEPA Assignment, this responsibility was as project intermediary typically held by the FHWA as project sponsor and lead agency.

⁶ A programmatic environmental review is used by lead agencies in order to cut back on repetitive reviews of multiple, but similar, actions, policies or programs.

The FHWA noted a significant variation between districts on the timing and methods for initiating and obtaining consultation with agency required participating agencies (FHWA, 2008, 2009, 2010, 2011, 2012). Despite numerous efforts by Caltrans' to increase awareness of the federal authorities assumed, the following errors were observed in the audits:

- Failure to issue formal letters of invitation for collaboration and cooperation with the required resource agencies, including early efforts for coordination as required under Section 6002 of SAFETEA-LU and 23 U.S.C § 139.
- Failure to retain all coordination plans, letters of invitation, electronic correspondence, and documents as mandated by resources agencies and federal regulations.
- Failure to incorporate newly issued/revised requirements and regulations, such as Section 7 and Section 4(f) guidance, into environmental review protocols.
- Failure to correctly adhere to individual agency responsibilities in project duration and proper sequencing of the environmental review process under NEPA Assignment.

In addition to ESA Section 7 biological opinions, there was a noted lack of overall staff competency on CWA Section 404-related permitting procedures. The most common mistakes observed were the lack of appropriate documentation outlining the plan for coordination, their use of invitation letters to request consultation and collaboration with resources agencies, and inadequately responding to comments by resource agencies and the public in a timely fashion (FHWA, 2010, 2012).

Upon interviewing staff at multiple districts across the state of California, the FHWA noted that the districts seemed generally knowledgeable of when Section 4(f) applies, but did not understand the substantive requirements and purpose of the technical

review as stipulated under 23 CFR Part 774 for Section 4(f) reviews of federal parkland takings (FHWA, 2009, 2010). The FHWA noted multiple occasions statewide in which staff did not know, or were unclear, of changes made under SAFETEA-LU and MAP-21 to synchronize and consolidate procedures for Section 4(f) and Section 106 reviews. Particularly, compliance with *de-minimis* determinations made under Section 106 evaluations for both Section 4(f) and Section 106 resources.

The most common irregularity observed in projects requiring Section 4(f) evaluations was confusion over the appropriate use of an individual project and programmatic-level evaluation when preparing a *de-minimis* finding (FHWA, 2009, 2010, 2011). A *de minimis* impact is one that, after taking into account avoidance, minimization, mitigation and enhancement measures, results in no adverse effect on either parkland or historic properties.

Overall, the FHWA noted that beyond basic knowledge of Section 4(f) and Section 106 resources, clarifications of procedural requirements by the DOT should address requirements set under 23 CFR Part 774 for determining the level of documentation required by both federal and state resource agencies and the DOT when determining *de-minimis* findings with Section 4(f) and Section 106 resources (AASHTO, 2006).

Based on this, it was strongly recommended that a working plan and tracking sheets be developed for standard use by the districts responsible for third-party coordination with resource agencies or with projects requiring local assistance (FHWA, 2010, 2011). For instance, Caltrans districts located in the central region of the state were noted as having best practices for standardizing the tracking of Section 4(f) and Section 106 reviews to ensure that all projects are entered into the system and tracked appropriately. Spreadsheets include data validation features such as color-coded items to

identify upcoming deadlines and responsibilities by individual performing parties (FHWA, 2010, 2011).

Additionally, it was recommended that the DOT conduct a general Section 4(f) and Section 106 district-wide survey as early as possible in program implementation in order to reiterate the importance of Sections 106 and 4(f) linkages for expediting approvals and permits. It is important early on to ensure that all staff is able to access proper guidance on pre-emptively assessing resource impacts for early determination of project class. This will help to identify sensitive issues inherent to the project size and context, as well geographic location that may trigger an automatic escalation in project review due to conflict and controversy surrounding the proposed action.

Project Reevaluations and Delays

Project reevaluations can arise at any point in the NEPA process from any number of changes, errors, or omissions, contained within environmental documents and are a common reason for inefficiencies in environmental documents and result in project delays. The general purpose of a reevaluation is to determine the validity of NEPA documents, decisions, or determination following a fixed period of time (FHWA, 2002).

For example, modifications to a project design or changes in the surrounding environment, such as changes in the land uses from development, may arise periodically throughout a prolonged and complex NEPA review, even after the original documentation is completed. As a result, changes arising from time will require the DOT and the FHWA to revisit the original NEPA document and decision to determine whether information is still relevant and supplemental studies are necessary before proceeding forward with approval and construction (AASHTO, 2008).

Depending on the nature of the issue, reevaluations can be a simple procedural task or more substantive, resource-intensive challenge. With a re-evaluation, a lead agency must document that consultation occurred and what or how changes occurred and include an assessment of the validity of the original NEPA decision (23 CFR Part 771.129(c)). Reevaluations can commonly result uncertainty in funding due to the prolonged review times, and may cause inter-agency disputes over the content and level of specificity required in supplemental evaluations (AASHTO, 2008)

Throughout the pilot program, Caltrans' saw project reevaluations steadily rise from being a minor issue to the top reason for NEPA-related project delays. In particular, there was a consistent trend in project approval delays due to modifications to project design and revisions to environmental documents at the final quality certification phase prior to approval (Caltrans, 2007, 2009, 2011). Many of these delays stemmed directly from small, simple omissions, such as missing signatures from the appropriate authority, to larger, more potentially litigious issues, such as missing sections of project analyses. Notably, these delays were most common in environmental documents prepared at the district level and by agency consultants (Caltrans, 2007, 2011).

Table 4.1 outlines the top reasons for project delays by frequency of occurrence when processing EAs/FONSI and EISs/RODs based on information provided by Caltrans' self-monitoring program evaluations. The delay factors noted by Caltrans correlate directly with general program deficiencies reported by the FHWA in their yearly audits of the agency (California Governor's Office of Planning and Research [OPR] 2007, 2009, 2011; CEQ, 2015).

Table 4.1 Top Reasons for Project Delays by Caltrans

	2007-2008	2009-2010	2011-2012
1	Section 7 consultation and coordination	Section 7 consultation and coordination	Modifications to project design
2	Revisions and coordination to local agency or consultant prepared documents	Modifications to project design	Revisions and coordination to local agency or consultant prepared documents
3	Modifications to project design	Revisions and coordination to local agency or consultant prepared documents	Section 7 consultation and coordination
4	Incomplete draft project reports for public circulation	Funding-related delays	Extensive Agency or public comments on documents
5	Coordination with agencies for approval on project specifics	Section 404 NEPA integration	Coordination with agencies for approval on project specifics

Data sources: First, Second and Third Reports to the California Legislature Pursuant to Section 820.1 of the California Streets and Highways Code, Caltrans, and CA Governor's Office of Planning and Research [OPR]: January 2007, 2009, and 2011.

Time delays mostly occur when modifications to project design and revisions to consultant prepared environmental documents occur sequentially and during the last of the QC phases – known as the “review for readiness”. DOTs will need to increase and modify the intensity of existing training and process certifications, as well as clearly defined responsibilities and roles for districts, state and federal resource agencies, and local governments, to proactively mitigate such risks during project scoping and document preparation phases. Caltrans has initiated programs for online certification, as

well as the required annotated documents, but modifications to project design continue to rise as the agency finds that the final “review for readiness” QA/QC measure is often neglected at the district or local level (CEQ, 2014; OPR, 2014).

To prevent such segmentation and errors from occurring, it was recommended that clarification be issued on identifying and flagging pre-NEPA Assignment projects under review or not assigned a classification. In particular, an agency should clarify and reiterate the procedures for environmental documents and review conducted prior to obtaining NEPA Assignment in order to avoid any potential re-classification or re-validation of completed environmental documents (FHWA, 2008).

This also includes the administrative and procedural requirements of the reevaluation process at each major milestone in the environmental review process for all project classifications. Specifically, determining and documenting whether a portion or all of original environmental documentation remains valid for projects initiated prior to obtaining NEPA Assignment (FHWA, 2008). Doing so will help to prevent project-level confusion by staff as they transition into revised processes and procedures following the formal execution of the MOU.

Quality Assurance and Quality Control

On a total of 27 separate occasions throughout the six Caltrans audits, FHWA remarked that the DOT’s QA/QC processes and procedures required substantial improvement due to the high number of persistent deficiencies (FHWA, 2008, 2009, 2010, 2011). The most frequent findings were that internal QC forms, which are used sequentially by decision makers to sign-off from one NEPA milestone to the next, were either incomplete, filled out incorrectly, not signed, or signed by the wrong person. Despite continued efforts on a monthly basis to address such simple errors and numerous

resources and toolkits available to their staff, these problems still remained prevalent throughout implementation. An outline of a standard QA/QC process and performing parties is provided in Appendix Item B.

Throughout the audit, the FHWA noted a general lack of understanding by Caltrans staff on the purpose and importance of the document QC assumed by the Agency. The FHWA critiqued Caltrans on multiple occasions for incomplete and incorrectly completed QC certification forms identified during each audit. During the first year, the FHWA recounted eight instances with QC certification containing the wrong signature authority or were missing signatures altogether (FHWA, 2008, 2009, and 2011). The FHWA reported that staff did not understand the overall reasoning and logic for the sequential progression of reviews as required for signatures and certification forms (FHWA, 2009).

Time delays and general trends occurring at the QA/QC levels indicate that the performance at district levels substantially impacts the overall performance of the State. Additionally, they put the Agency at risk of litigation that could arise from the decision-making process (Caltrans, 2011). The FHWA found that district-level staff held differing levels of understanding and compliance with NEPA procedures under full Assignment. It was the FHWA's conclusion that this error ultimately led to improper use of documentation and simple style errors for serving another purpose rather than the intended project evaluation (FHWA, 2012).

Other critical, project-level issues identified were that QA/QC checklists, peer reviews, and the final environmental documents were completed and signed outside of the proper procedural sequence of the Agency's QA/QC process (FHWA, 2008, 2010, 2011). For instance, the FHWA and Caltrans determined that legal sufficiency reviews were happening too early and using limited documentation, or that staff was not fully

clear on when the legal sufficiency reviews were necessary or not required per class of action (FHWA, 2010). The legal sufficiency review of NEPA documents is an important element of the overall NEPA project development process for federally funded transportation projects. The review is conducted as part of a final quality certification for complex documents (e.g., EAs and EISs) prior to listing the record of decision. It involves identifying and addressing potential legal risks of proposed highway projects, many of which can be addressed early on by improving the overall quality, clarity, and reasoning of NEPA documents (FHWA, 2015).

Administrative Record and File Retention

It is a crucial that a DOT staff understand the importance of an organized, complete Administrative Record. The consistent and uniform retention of project files requires that the DOT, their Districts and local governments follow a standard guide for retaining all relevant project files and documents, such as agreements, certifications and correspondence, to be included in the Administrative Record and with project transmittals (Caltrans, 2009). These files must conform to specifics of the Uniform Filing System (UFS) used by the federal government. Consistent use and knowledge of the UFS is addressed in the audits.

The UFS, which is important for internal record keeping of all project files and documents, appears to be a repeating issue for documents prepared by districts and local governments. For example, project checklists and corresponding documents requiring approval were found to be missing from Caltrans' project files on a regular basis (Caltrans, 2007, 2009, 2011). While these errors can be addressed individually, the frequency of their appearance result in multiple project delays due to the necessary, but out of sequence, corrective actions required prior to obtaining a final approval at key

milestones and decision making points in the NEPA process (FHWA, 2008, 2009). The FHWA noted varying opinions among districts, as some believed the record should include only the main documents that were actually used by the decision-maker, while others thought that the record should contain only the minimum requirements set by the DOT in their standard environmental guidance (FHWA, 2009).

It is important that the DOT clarify the necessary procedures for projects or related technical studies, which had been initiated to the authorization of NEPA Assignment. NEPA Assignment requires files be checked and re-checked thoroughly throughout the NEPA process at each milestone in order to ensure that all relevant and required documents are present (Caltrans, 2011). This requires a dedication of agency resources to development, implement, and standardize a tracking system to ensure that documents are circulated at key milestones, and that the transmittal of required project files across districts and governments is consistent and uniform for all projects (FHWA, 2009). Furthermore, the FHWA may call on the DOT at any point to review project files, particularly in the event of conflict and litigation, and will rely on the organization of project documentation and records contained in the UFS.

Given the potential for errors, the DOT must work in tandem with the agency's legal assistance team to issue guidance and information on inherent risks associated with the Administrative Record. It is important that staff recognize the legal implications and necessity of compliance with the Administrative Record. Apparent internal inconsistencies in the Administrative Record should be identified by a DOT prior to formal audits and, if possible, the documents that explain these inconsistencies have to be located and included in the Administrative Record (Luther, 2008).

THE TEXAS DEPARTMENT OF TRANSPORTATION

Since receiving Assignment authority in December 2014, TxDOT has undergone two audits by the FHWA in April 2015 and September 2015. The outcomes and comments from the FHWA during the audits are summarized below.

Non-Compliance Observations

The FHWA defines non-compliance observations as “instances of being out of compliance with a Federal regulation, statute, guidance, policy, state DOT procedure, or the MOU”. The first observation of non-compliance was related to the requirement to incorporate mitigation efforts into the project action a noise abatement barrier was needed to mitigate the impacts of a larger project, but it was not incorporated into the larger project. Instead, the barrier was processed as a separate project classified as a CE. The TxDOT noise abatement guidelines approved by the FHWA in 2011 do not have provisions for processing mitigation efforts as separate projects, and as such TxDOT cannot approve the project as an independent action. The FHWA recommends knowledge and application of FHWA policy and regulations before approving any NEPA decision document (FHWA, 2015).

The second instance of non-compliance was in violation of the FHWA’s policy to coordinate compliance with all environmental requirements under the NEPA statute. TxDOT staff provided conditional approval to a project that was not correctly listed in the Statewide Transportation Improvement Program (STIP) and did not yet have a required air quality conformity determination. Conditional approval violates the FHWA’s policy by allowing projects to advance in development before meeting environmental requirements under the umbrella of NEPA (FHWA, 2015).

Program Management

The FHWA audit team found four primary strengths at TxDOT in the area of program management: (1) highly qualified staff, (2) strong communication between DOT headquarters and district, (3) strong efforts to create tools and guidance, and (4) district ownership and pride in independent environmental decision-making and NEPA documents (FHWA, 2015). In support of these particular strengths, the FHWA took note of the many opportunities for feedback available to district staff, such as reviews by TxDOT's Self-Assessment Branch (SAB), NEPA Chats, and the development of the Core Team approach.

The weaknesses identified in program management are not substantial enough to warrant audit findings, but could lead to findings in the future. Interviews with resource agency staff revealed that while agencies had no formal complaints, there were concerns about communication between TxDOT and agencies. Specifically, agencies were unsure that they were being "kept in the loop" on project decision-making and felt that there was pressure from TxDOT to rush through the agency's review process (FHWA, 2014, 2015).

Interviewees also expressed "occasional quality concerns" related to information provided by TxDOT (FHWA, 2015). The audit team recommended improved communication protocols to address potential disputes before they escalate to conflicts. The FHWA also found that districts were not consistent in their treatment of local public agency projects. Some districts confirmed that local projects were reviewed using the same processes as TxDOT projects. However, others felt that local projects received lower priority than TxDOT sponsored projects (FHWA, 2015). Since the audit, TxDOT has published handbooks and standard operating procedures for locally sponsored EAs that will improve standardization across districts (TxDOT, 2015).

Environmental Documents and Records Management

TxDOT uses an environmental management system and project database for its NEPA program referred to as the Environmental Compliance Oversight System (ECOS). The FHWA found ECOS to be a theoretically adaptable and flexible system to meet evolving needs under NEPA Assignment. However, the FHWA noted that the benefits gained from flexibility may be lost in the inability to ensure consistency of use across the department. Furthermore, the FHWA found that the state of project files in ECOS in April 2015 made it difficult to determine whether environmental commitments were made and kept, whether CEs were applied appropriately, whether all necessary documentation was attached to the ECOS file, and how TxDOT would be able to disseminate project information to the public using the system (FHWA, 2015).

Most importantly, the FHWA was unable to determine whether the constraints relevant to certain CEs were met through the documentation in ECOS, similar to a finding in the August 2014 audit of TxDOT's CE Assignment. The FHWA 'urged' TxDOT to improve the organization and accessibility of files in ECOS so that it is easier to determine the completeness of the file of record (including by internal actors working on the project) (FHWA, 2015). This observation may have been exacerbated by concerns from the audit team that project documentation was difficult to find due to complexity in ECOS and the absence of a file naming convention (FHWA, 2015). However, if the rationale behind selecting a specific CE is in fact absent from the project file, the decision will be vulnerable to legal action.

Quality Assurance and Quality Control

The FHWA identified four successful environmental document quality assurance and quality control practices in place at TxDOT which may be helpful for other Departments and Agencies. Notably, the QA/QC measures identified span efforts

vertically and horizontally from DOT headquarters, districts, and across both. For example, after obtaining Assignment, TxDOT initiated the creation of a NEPA Self-Assessment Branch (SAB) and the Corrective Action Team (CAT) to provide timely feedback to districts regarding environmental documents and to headquarters regarding forms, guidance, and handbooks (FHWA, 2015; TxDOT, 2014). District-led QA/QC processes, such as smart PDFs and peer review programs, provided innovative approaches which took into consideration the limited staff and resources available in a certain district (FHWA, 2015).

Program Performance Measures

TxDOT did not begin reporting on the four performance measures identified in the MOU until the second audit in September 2015. During the first audit, baseline and testing data were being gathered by the FHWA for future evaluations. After reviewing TxDOT's planned performance measures, the FHWA audit identified gaps in two of the four performance areas: QA/QC and relationships with other agencies and the public.

In its February 2015 plans for monitoring compliance with QA/QC standards, the DOT stated that it would report percent of EAs and EISs with completed document review checklists, but it did not list CEs, Section 4(f) evaluations, re-evaluations, or other important documents in the environmental process (FHWA, 2015; TxDOT, 2015). The auditors urged TxDOT to examine a broader range of project and decisions made under these standards.

The FHWA audit identified methodological shortcomings in measuring relationships with other agencies and with the public. The performance measure proposal establishes a polling method to gauge agency satisfaction with TxDOT's execution of responsibilities under the MOU; however, the audit team expressed concern that the

content of the polls had not been developed yet (TxDOT, 2015). Public satisfaction was set to be measured by the number of complaints received. The FHWA determined that this method was too narrow and did “not appear to be appropriate for gauging effectiveness at this time” (FHWA, 2015).

NEPA Assignment Training Plans

NEPA Assignment requires that a DOT to make significant adjustments to its environmental policies and review procedures to ensure that its NEPA determinations and approvals are consistent with all applicable laws and with the scope of the MOU. In the first review, the FHWA commented that TxDOT’s newly adopted training model was not appropriate for statewide training because the training model was, in part, adopted from Caltrans, the only other state operating under full NEPA Assignment.

The FHWA expressed concern that the differences in culture and regulatory frameworks between the two states rendered the Caltrans model inappropriate for Texas. Interviews revealed that existing online training resources were outdated, referring to topics and sessions that are no longer offered (FHWA, 2015). The training plan was found to be unclear on which topics were mandatory for different roles, resulting in inconsistent interpretations of requirements across districts. The FHWA suggested providing clarification in light of NEPA Assignment in the form of a “progressive training plan” (FHWA, 2015).

As DOTs continue to assess and address staff training needs during the first years of NEPA Assignment, it critically important for the agency to continue to monitor: (1) how District staff training needs are being assessed, and (2) the method for demonstrating consistency among and within Districts in the delivery of training (FHWA, 2015). This can provide a clear method for standardizing the tracking of programmatic training

among Districts to prescribed staff training in order to carry out responsibilities under the MOU.

Chapter 5: NEPA Assignment Program Performance Measures

To assess and monitor the ongoing implementation of the NEPA assignment program, the FHWA and DOT mutually establish a set of performance measures to evaluate the proper administration and execution of federal responsibilities by the state. However, the FHWA and the USDOT have offered very little in the way of guidance or insight into how to identify, implement, and refine measures specifically related to NEPA assignment under 23 U.S.C. § 327. The following chapter analyzes performance metrics that have been developed within the MOU and which the state DOT is evaluated against in administering the responsibilities it assumed, and makes recommendations for tweaks to the performance measures.

The chapter provides a brief summary of contemporary literature and practice on monitoring program performance under MAP-21. NEPA assignment program performance measurement practices are drawn from Caltrans and TxDOT, with observations from the DOTs Districts and respective FHWA Divisions. From this synthesis of literature and observation, the chapter ends with recommendations for improving program implementation and monitoring with respect to setting robust, feasible, and objective performance measures under NEPA Assignment.

TRANSPORTATION PERFORMANCE MEASURES UNDER MAP-21

As mentioned in Chapter 2, a key feature of MAP-21 is the requirement that state DOTs develop a performance- and outcome-based program for transportation performance management. The FHWA defines transportation performance management as a strategic approach that uses system information to make investment and policy decisions to achieve national performance goals. MAP-21 introduces a number of statutory requirements for state DOTs that utilize performance-based approaches, rather

than strictly outcome-based, for surface transportation system programs (Elkind et al, 2015).

Under MAP-21, federal funding is linked to performance by requiring states to take corrective action if progress toward certain program targets is insufficient and to spend a specified portion of their annual federal funding on improvement if performance falls below minimum standards set by the FHWA under the MOU (FHWA, 2012). Performance management in transportation planning, project delivery and environmental compliance requires metrics and indicators that can effectively demonstrate progress towards a desired, but high reaching, outcome (e.g., performance result to be sought after), rather than an ultimate endpoint or objective of the program (e.g., a number of projects completed by 2017) (Mikesell, 2008). Measures must be flexible but manageable targets that take into account the differing long-term goals and visions established by districts and local governments throughout the state.

State DOTs and federal agencies must align their program objectives with national goals in exchange for federal highway-aid under MAP-21 and the FAST Act (23 U.S.C. § 150(a)). The objective of this performance and outcome-based program is for states to invest resources in projects that collectively will make progress toward the achievement of seven key national goals. For NEPA assignment, two national goals – environmental stewardship and a reduction in project delivery timeframes – correspond directly with efforts to shorten review timeframes while ensuring long-term environmental stewardship (TxDOT, 2014).

Federal guidance offered for measuring the success of NEPA assignment is intentionally vague but provides tremendous room for improvement when refining programmatic goals. This flexibility allows DOTs the opportunity to test and refine existing metrics and indicators before the FHWA ends its support and the Agency enters

into the self-monitoring phase of NEPA Assignment (AASHTO, 2007). To overcome limitations and better estimate and identify practices that may be used by interested DOTs, the framework and principles for monitoring performance management under MAP-21 are incorporated with the criteria listed by the US Government Accountability Office (GAO) in Table 5.1.

Table 5.1 Principles of Program Performance Measures

Criteria	Description and Features of Performance Measures
External Focus	Measures should relate to users and the long-term impacts of projects and programming – not strictly to monitor internal procedures.
Truly Measurable	Measures should gauge the cumulative successes and failures of a program, and indicate whether performance is improving, deteriorating, or staying the same. These should also be transparent and enlightens user about program performance.
Outcome-Based	Measure service delivery to stakeholders and project sponsors – not just measuring solely within the agency. Connected to the goals, objectives, and priorities of the agency and to the needs of external stakeholders.
Significant	Feedback and reporting on measurements should encompass the full scope of program operations within the department and across the agency. This addresses the important operational aspects of program performance
Manageable	The total number of measures, indicators, and metrics should be no greater than what is already needed to cover the scope of program operations.

Sources: US GAO, 2008; Texas State Auditor's Office [SAO], 2011

This framework focuses on program outcomes, not simply program outputs, and utilizes the basic criteria listed in Table 5.1 for selecting appropriate measures. The five GAO principles focus on modernizing traditional program evaluation practices, commonly associated with strategic performance-based budgeting, to more streamlined practices aligned with the Office of Management and Budget's 2010 Government Performance and Results Modernization Act (GAO, 2010). Under the Modernization Act,

the focus of program operations is on the results, rather than the process itself. By focusing on results, environmental decisions at federal, state, and district and local levels become more responsive to the interest of the stakeholders in the process.

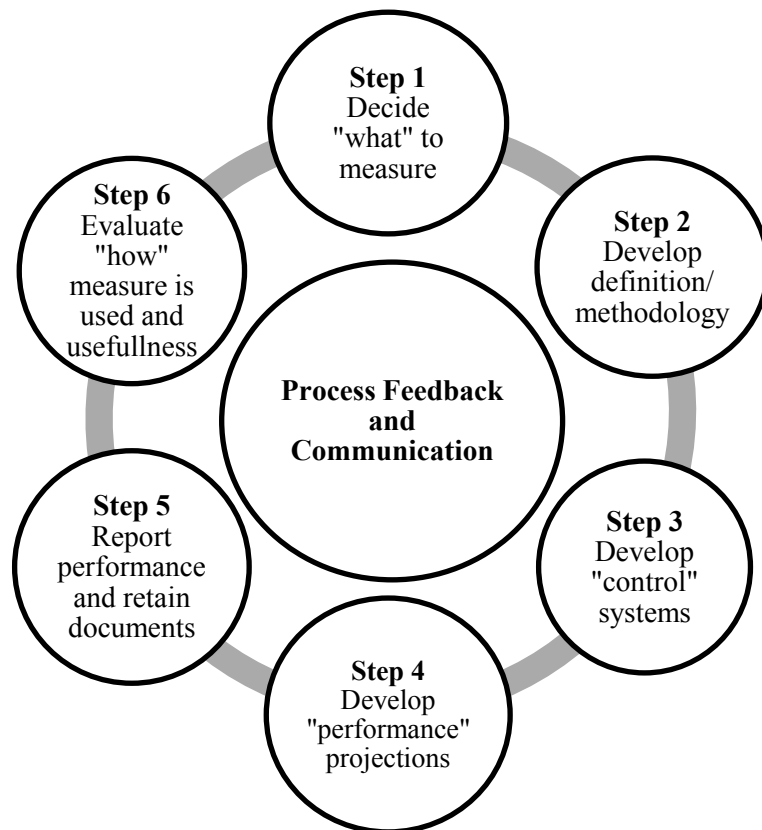
Performance Based Approach to NEPA Assignment

New rulemaking in MAP-21 that ties federal funds to broad goals such as improved safety, system reliability, and project delivery, provide further impetus for DOTs to review their organizational structure and manage outcomes in new ways. In Texas, for example, state agencies typically follow the model of strategic performance-based budgeting and planning issued by the Legislative Budget Board and the Governor's Office of Budget, Planning, and Policy (SAO, 2011). This approach uses performance management to improve agency performance by highlighting existing and potential problems (Mikesell, 2011).

Procedural and organizational changes resulting from NEPA assignment should be championed at the highest level and steps must be taken to integrate these changes into each process at every level of review so that stakeholders, practitioners, and the public understand their role. For example, TxDOT, within its first year, instituted a comprehensive and concise environmental review toolkit to provide up-to-date guidance and practices for its districts, departments, local governments and NEPA practitioners through monthly 'NEPA Chats' (TxDOT, 2015). This was noted by FHWA in its review as a best practice example. However, at the same time, FHWA also noted that it needed further refinement by the DOT headquarters. Local government and district staff were found to have a misunderstanding of the importance of their new roles and activities under NEPA assignment, resulting in deviations from expected procedure or performance (FHWA, 2014, 2015).

A performance-based approach to NEPA assignment is designed to evaluate improvement over time by assessing the level of resources and staffing committed to program operations at multiple layers of review and governance. The FHWA has adopted this framework under MAP-21 as a means to demonstrate understanding among all staff of a program's desired outcome and what actions are necessary to make progress toward identified goals (FHWA, 2013). It also helps to improve the nimbleness of an agency. Changes in high-level goals and performance measures will quickly filter down to the districts and local partners if staff and practitioners are able to directly relate their performance to the overall program mission (AASHTO, 2013).

Illustration 5.1 Performance Measure Feedback and Refinement under MAP-21



Sources: AASHTO Standing Committee on Performance Management, 2013; GAO, 2011

Illustration 5.1 outlines the iterative process of defining program performance measures and the central role of process feedback and communication for measure refinement. This process recommends that feedback loops be used to improve self-evaluation and to check the validity of assumptions about improved project delivery. The targeted outcome of this process is to verify whether project sponsors (e.g., federal transportation officials) and the public are satisfied, whether planning and environmental principles are being met, and whether environmental commitments and mitigation strategies are in effect (AASHTO, 2008).

Performance measurement and the measures used for NEPA assignment should continually adapt to evolving goals, changes to district staff roles and responsibilities, and project data availability, among other factors (FHWA, 2010). A performance measurement system, therefore, needs to be periodically refined through evaluation and feedback. It is important to note that this process is cyclical so that audits and self-assessments provide the framework for the ongoing refinement of program goals. For NEPA assignment, this feedback cycle is critical to effectuating incremental improvements in district performance management, and should be agreed upon by all districts, stakeholders, and agencies prior to adoption or consideration by the FHWA (FHWA, 2014).

The FHWA has been keen to note delays in identifying corrective actions and their resolution among the operating agency and its district staff in Caltrans audits (FHWA, 2009). For NEPA assignment, the FHWA strongly recommends that identification of areas for improvement come from an internal feedback loop, rather than from prescriptive guidance, in order to accommodate program needs across districts and to establish a standard timeframe for implementing new guidance and procedures (FHWA, 2012, 2014). Meaningful communication throughout the process of assessing

performance and measurement systems or developing new indicators and metrics in line with measures can significantly enhance program quality and longevity.

Goals and projections are also important tools to improve and test performance measures. They can also be used as guideposts to assess whether districts are improving time savings for reaching desired milestones while remaining compliant with the roles, requirements, and responsibilities listed in the NEPA assignment MOU. Performance projections should be challenging and ambitious but achievable. For example, Caltrans set its first-year targets for NEPA assignment too high, with the standard set at 95 percent attainment of goals. Rather than providing time to implement changes to meet these goals, the performance measures were not calibrated to accurately monitor stakeholder expectations, and it was difficult for the FHWA to determine whether satisfaction levels had actually improved (FHWA, 2008, 2009, 2012).

NEPA ASSIGNMENT PERFORMANCE MEASURES

The FHWA conducted six audits of Caltrans' MOU compliance between 2007 and 2013. Many issues cited in the audits will be relevant to the responsibilities and expectations TxDOT has assumed since its NEPA assignment in 2014. The FHWA's key assessments of Caltrans' performance measures are shown in Table 4.2. Although there were no substantial changes to or departure from Caltrans' performance measures as listed in the MOU, Caltrans made continual modifications to their NEPA assignment program structure based on suggestions from the FHWA during regular program audits and the agency's own findings from self-assessments.

The most notable improvements to Caltrans performance measures, indicated in audits, staff interviews, and program self-assessments, were:

- improvement in the scope of self-assessment and how the agency chose to evaluate their baseline measures and target goals (FHWA, 2012); and
- Introduction of new protocol to measure the improvement of interagency communication and public outreach to include external opinions on internal operations (e.g., Caltrans' perspective and the resource agency's perspective on an issue) (FHWA, 2009, 2010, 2011).

Although the FHWA recognizes these changes as improvements, it continues to identify issues and call for further improvements. Other issues identified, however, continue to arise annually for every district office.

Overall, findings from Caltrans suggest that procedural deficiencies stemming from a lack of understanding of the NEPA process indicate a need for stronger oversight and performance monitoring by the operating agency. Broadly defined measures, in this case, must extend beyond district boundaries and be focused on ensuring long-term compliance with NEPA assignment responsibilities defined in the MOU. They must also demonstrate the organization's environmental stewardship and create a greater awareness of environmental performance across all departments, which can help improve overall management and promote cooperation (Caltrans, 2009).

Comparing California and Texas Performance Measures

The following section describes the key differences and similarities between the performance metrics selected by TxDOT and Caltrans. Caltrans and TxDOT are required to report on the same performance measures provided in the MOU, but they have used different indicators and metrics to demonstrate performance in these areas.

While Caltrans reports more indicators than TxDOT for each performance measure, both DOTs are generally reporting on process-based indicators (e.g., those

which document how or whether a task was done) to demonstrate performance in the first two measures regarding (1) compliance with NEPA and Federal regulations, and (2) quality assurance quality control.

Outcome-based measures, which document how the actions taken affect process outcomes, are being used by both DOTs to demonstrate performance in the last two measures regarding (3) relationships with governments and the public, and (4) timeliness in the NEPA process (GAO, 2008).

Compliance with NEPA Assignment MOU and Federal Regulations

Caltrans and TxDOT have selected a similar indicator to demonstrate compliance with NEPA, Section 7 (endangered species), Section 106 (historical resources), and Section 4(f) (parklands). While the Caltrans list is still not all-encompassing, the DOT has selected a handful of key regulations that are reliably measurable to provide a more complete picture of compliance. However, Caltrans includes additional indicators to demonstrate compliance with other federal regulations and executive orders (Caltrans, 2011, 2012). The following indicators are being reported:

- Compliance with Executive Order 11990 (Protection of Wetlands) and Section 176(c) of the Clean Air Act (funding of projects in nonattainment areas)
- Compliance with Traffic Noise Analysis Protocol Requirements
- Appropriate use of C and D list CEs

Quality Assurance and Quality Control

TxDOT is reporting one metric for the timely completion of QA/QC process: percent of EAs and EISs with completed environmental document review checklists in file. Caltrans includes two additional metrics that are specific to its QA/QC process:

- Percent of sampled documents that followed applicable annotated outline

- Percent of draft and final documents for which the completed QA/QC procedures are appropriately completed based upon independent review of QC form

The addition of outcome-based measures to the first two performance measures is recommended. Evidence from previous studies with DOTs suggests that is an effective method of observing progress and efficacy of corrective actions. For example, such metrics could include the number of lawsuits lost or won as an indicator of compliance, or percent of documents rejected or revised during the QA/QC process, or simply the number of reevaluations per district (TxDOT, 2015).

Relationship with Resource Agencies and the Public

NEPA assignment is the first program introduced by the FHWA to evaluate relationships with the general public and with resources agencies. Currently, TxDOT and Caltrans are both relying upon other agencies to complete evaluation surveys to measure change in communication with resource agencies over time.

To measure relationships with the public, TxDOT is comparing the number of complaints received year-to-year, and Caltrans is comparing evaluations from public meetings. Caltrans also uses an impartial third-party review of public meetings to assess performance (Caltrans, 2009, 2011). With or without the third-party review, the Caltrans method may be less sensitive to backlash from controversial projects, and more sensitive in TxDOT's efforts to demonstrate improvement from "good" to the agency's mission to be "best in class (FHWA, 2015)."

Timeliness in the NEPA Process

TxDOT and Caltrans are both reporting on time to completion of environmental documents to demonstrate increased efficiency and timeliness of NEPA process. Caltrans

additionally reports on the median time for additional intervals, such as time from Notice of Intent to proceed to a draft EIS. Measuring smaller time frames may allow more targeted identification of process strengths and deficiencies.

Both agencies are also reporting the median time from submittal of biological assessments to receipt of biological opinions before and after assignment. However, neither agency is reporting time to complete consultation or permitting procedures for other resources, such as cultural, historical, and archaeological resources.

RECOMMENDATIONS

The recommendations and findings demonstrate potential improvements to performance management and monitoring during NEPA assignment. The preliminary NEPA Assignment performance measures currently utilized by both agencies are useful in the short run, but the recommendations here aim to provide options for adaptable performance measurement as the NEPA Assignment program matures, as well as to ensure that a DOT performs NEPA duties in a defensible and complete manner.

Compliance with NEPA and all Other Environmental Statutes

Performance measures should account for all regulations, laws, and rules assumed. In addition, metrics and indicators should provide a broad goal for ensuring compliance with all required environmental regulations and laws, but should also encompass all statutes, ordinances, and orders to ensure all human-related impacts are identified.

Accounting for compliance with all other environmental statutes, guidance and procedures will require a pre-determined timeframe to ensure consistency among practitioners and local agencies. This timeframe should eventually decrease with program maturity and “learning-by-doing.”

Quality Control and Assurance for NEPA Decisions

Evidence of quality assurance and quality control is critical. Indicators suggesting compliance with the QA/QC plan should show a progression of improved knowledge for determining project classifications among DOT Staff, local public agencies, and NEPA practitioners. Providing a record of such improvement throughout the implementation of NEPA Assignment will help to demonstrate a DOT's commitment to training and sharing of best practices.

Relationships with the Agencies and the General Public

Interagency surveys to monitor relationships are not effective in capturing the entire picture. Both internal perspectives and external perspectives on NEPA Assignment operations should be incorporated for long-term program improvements. Suggestions for demonstrating improvements in relationships, as well as increasing timeliness in the NEPA process, are best met through early engagement. Strategies for expediting review, like linking the planning and NEPA processes and the use of programmatic reviews, promote better working relationships and communication between agencies, and should be taken into account when monitoring performance.

Current metrics focus on counting the “complaints” received by an agency from both the public and other resource agencies. This does not appropriately measure the success of NEPA Assignment and the process in general, but rather provides a limited view into a small subset of project stakeholders (FHWA, 2015). In this manner, “comments received and addressed” would be a better way to measure effective public involvement. Strong public participation could mean the project team did an excellent job of outreach and should not be penalized for the public's feedback (Elkind et al, 2015).

Increased Efficiency and Timeliness in Completion of NEPA Process

Improved efficiency and compliance with all aspects of NEPA Assignment will come with routine practice as state DOTs transition into their newly assumed roles. Training can complement specific areas for improving areas of overall time-savings, such as decreasing the number of re-evaluations through collaboration, but the process needs to take into account simple effective practices observed among rural, urban, and metro districts.

Chapter 6: Concluding Remarks

To better help state DOTs with their implementation of the NEPA Assignment, the following are key recommendations based on findings presented throughout the report. Agency leadership must stay engaged and involved in all aspects of NEPA Assignment throughout implementation, and continuous training of staff and other stakeholders is necessary to ensure that the DOT reduces its risk of litigation. While this may seem intuitive, practice and experience with California and Texas indicate that the DOT must remain flexible when emphasizing expediency in project delivery. Importantly, it is critical that the DOT ensure all staff and parties, from local governments to cooperating federal agencies, understand the importance of the federal role that the agency has assumed and the need for consistent, uniform documentation when carrying out NEPA responsibilities.

First, implementation of a robust oversight program will help foster the exchange of information, best practices, and resources among districts, local governments, and practitioners, while also putting the entire organization in a better position to more fully implement all assumed responsibilities and go above and beyond commitments outlined in the MOU (FHWA, 2012). High quality environmental documentation and resource tracking require that DOTs not only adopt FHWA's role as administrative reviewer, but also regularly clarify organizational procedures to maintain a high degree of NEPA certification among staff and consultants.

When undergoing program implementation, DOTs should be cognizant of environmental issues and concerns raised by stakeholders at all levels of engagement in the NEPA process. Achieving consistency and unanimity among staff expertise under NEPA will require that the DOT headquarters and environmental departments provide

on-time project-level assistance with NEPA and focus on addressing issues arising at the local and district levels (Elkind et al., 2015). The FHWA concluded that the highly decentralized nature of operations of both Caltrans and TxDOT continued to be a major contributing factor to variations and deficiencies observed throughout program implementation (FHWA, 2012, 2014). For instance, the FHWA remarked in its audit, “as a result [of the organizational structure], Caltrans Headquarters [DEA] must provide clear, consistent, and ongoing oversight over [each individual] Districts’ implementation of program and responsibilities” (FHWA, 2012). This is a central concern that all regulatory agencies must take into consideration during program implementation and strategic operations.

Second, general NEPA guidance provided to date by the FHWA and USDOT will not meet the specificity of NEPA Assignment responsibilities under the MOU and 23 U.S.C. § 327. Rather, it will require that DOT’s assess differing practices and approaches at the local, state, and national levels. Chapters 4 and 5 indicate that close attention should be drawn to internal and external monitoring, QA/QC measures, staff training and certification, resource allocation, and quality environmental documentation/record keeping (Caltrans, 2012; AASHTO, 2014). Under NEPA Assignment DOTs should become standard-bearers of innovation in project delivery and environmental streamlining.

Third, DOTs should consider adopting a formal NEPA Assignment-specific training plan for local agencies and NEPA-practitioners. Given the very large number of local assistance projects in some Districts, and the typically high staff turnover within local agencies, an ongoing training plan is necessary to ensure that practitioners and local agency program staff can carry out the responsibilities under the MOU and work with the

local agencies and consultants to ensure compliance with statewide procedures and federal requirements assumed by the DOT under Assignment (AASHTO, 2014).

Lastly, one essential attribute with NEPA Assignment participation is that DOT staff and participating local governments will eventually become NEPA experts unto themselves. Training and compliance measures should reflect the level of intensity required in areas of concern. As such, modifications to program training should be steadfast and frequent to meet constant change under mandated NEPA and environmental planning statutes (AASHTO, 2014). As part of the shift from process-oriented documentation to a more concise, referenced streamlined method of documentation under NEPA Assignment, the DOT must focus improvements in administrative flexibility under NEPA, and position itself as national leader for high-quality project performance, delivery, and accountability through Assignment-specific innovations for process adaptability and refinement. Strengthening, clarifying, and reasserting NEPA's central role in project planning and delivery allows for uniformity among districts and precludes any possible corrective actions by FHWA.

In conclusion, learning from other states' experiences, refining program performance measures, and helping all practitioners understand regulations other than NEPA will all contribute to improved chances of DOT's environmental decisions satisfying the obligations in its MOU with the FHWA and hold up to a legal challenge, since the DOTs will now shoulders that responsibility.

Appendix

Appendix A: Comparison of Responsibilities under 23 USC §§ 326 & 327

Table A1: Responsibilities under CE Assignment and NEPA Assignment

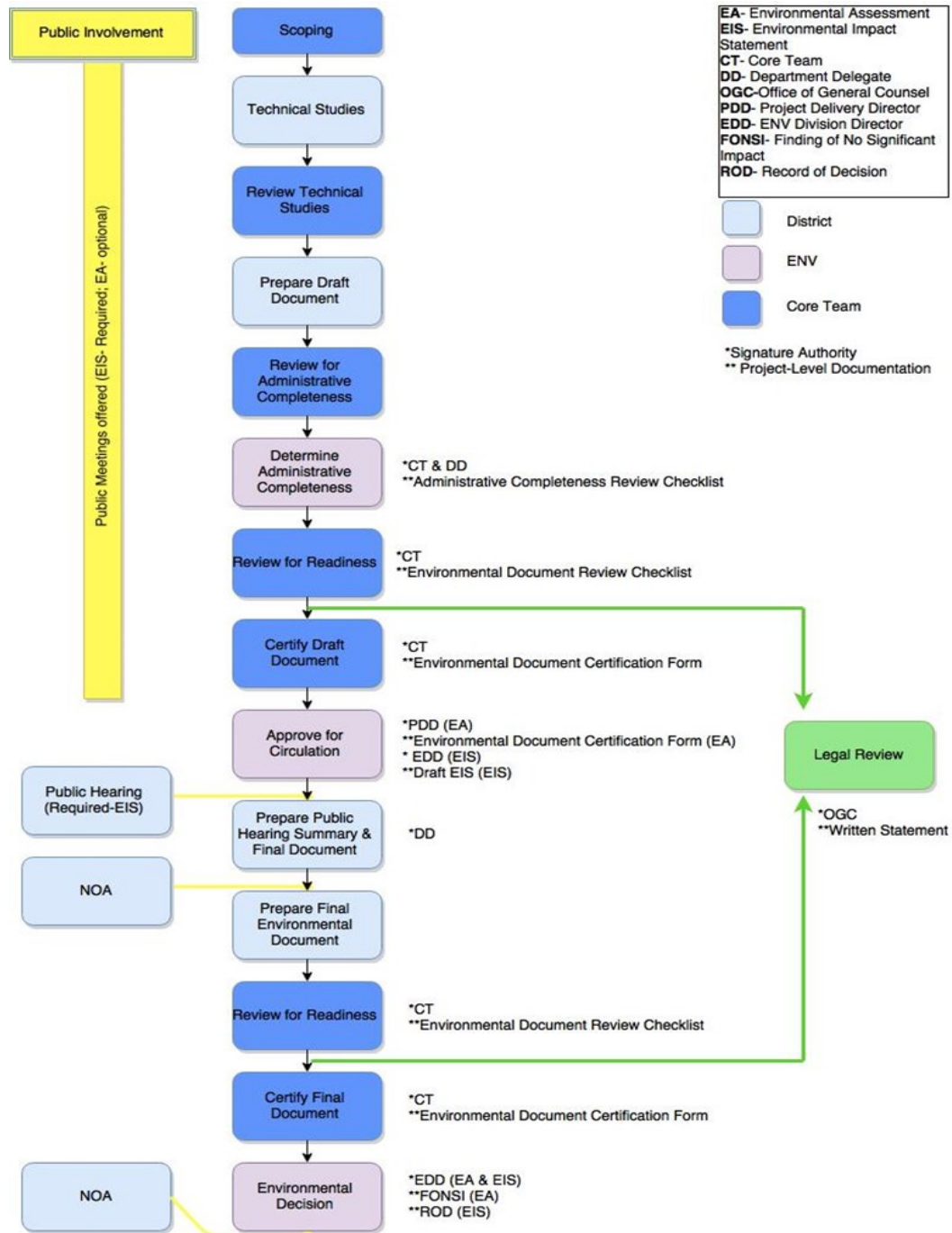
Topic	23 USC § 326	23 USC § 327
Responsibilities	Determination of CEs	All of the USDOT Secretary's NEPA responsibilities
Commitment of Resources	Financial resources, technical, environmental, and managerial expertise	Addition of legal expertise and sufficient qualified staff to oversee consultant work
Conflict Resolution	Make good faith efforts to identify and resolve conflicts with other agencies, tribes, and the public	Comply with any requirements of USDOT or FHWA conflict resolution, including those under 23 CFR 139(h)
Relationship to the FHWA	FHWA will not intervene in issues involving other agencies, unless: (1) it believes the state is not complying with the MOU, or (2) the issue is an emerging national policy issue	Addition of a third circumstance for intervention: (3) upon request by either the DOT or third-party agency
Monitoring and Oversight	Submit a performance report twice during MOU period identifying areas of improvement and corrective actions	Submit a self-assessment report one month before each audit including 6 specific elements
Audits	FHWA will review performance following submission of the self-assessment report. It may review records and interview staff, and it is not prevented from using other monitoring tactics	FHWA and the DOT will coordinate semiannual audits. FHWA may interview consultants and personnel from other agencies to assess performance in addition to the DOT staff
Performance Measures	<ol style="list-style-type: none"> CE decisions are appropriately and timely documented. CE decisions are factually and legally supportable at 	<ol style="list-style-type: none"> Compliance with NEPA and other environmental regulations Quality control and assurance for decisions

	<p>the time the decision is made.</p> <ol style="list-style-type: none"> 3. CE decision-making procedures comply with NEPA, 23 CFR 771.117, and the MOU. 4. The State has met staffing and quality control requirements of MOU. 5. The State has complied with other Federal and State legal requirements. 6. The State has complied with recordkeeping requirements. 	<ol style="list-style-type: none"> 3. Relationships with agencies and the public 4. Increased efficiency and timeliness
Training	State must provide needed training and notify FHWA of identified training needs	FHWA provides initial training. A joint training plan will be created and updated annually

Sources: TxDOT CE MOU, 2013; and TxDOT NEPA Assignment MOU, 2014

Appendix B: NEPA Quality Assurance and Quality Control Process

Illustration B1: TxDOT QA/QC Process for EAs and EISs



Sources: TxDOT QA/QC Draft Guidance; CE, EA, and EIS Handbook, 2015

Appendix C: Council on Environmental Quality Guidance

Table C1: CEQ Guidance, 1970–2015

Guidance Title	Year
Environmental review pursuant to the Safe Drinking Water Act of 1974	1974
Executive Orders 11988 flood plain management & 11990 protection of wetlands	1978
NEPA liaisons – agency implementing procedures	1979
Interagency consultation to avoid or mitigate adverse effects on rivers in nationwide inventory	1980
Forty most asked questions concerning CEQs NEPA regulations	1981
Guidance regarding NEPA regulations	1983
Guidance on NEPA analysis for transboundary impacts	1997
Environmental justice guidance under NEPA	1997
Designation of non-federal agencies to be cooperating agency in implementing procedural requirements of NEPA	2000
Cooperating agencies in implementing the procedural requirements of NEPA	2002
Exchange of letters with Secretary of Transportation: Purpose and Need	2003
Guidance on consideration of past actions in cumulative effects analysis	2005
CEQ and OMB memorandum on environmental conflict resolutions	2005
CEQ, OSTP and OMB memo on national environmental status trends and indicators	2008
Reporting on NEPA status for projects receiving American Recovery and Reinvestment Act funding	2009
Establishing, applying and revising categorical exclusions	2010
Appropriate use of mitigation and monitoring and appropriate use of mitigated findings of no significant impact	2011
Memorandum for Heads of Federal Departments and Agencies: Improving the Process for Preparing Efficient and Timely Environmental Reviews under NEPA	2012
CEQ & OMB Memorandum on Environmental Collaboration and Conflict Resolution	2012
Guidance on Effective Use of Programmatic NEPA Reviews	2014

Source: Council on Environmental Quality, 2015

Glossary

Caltrans - California Department of Transportation
CEs - Categorical Exclusions
CEQ - Council on Environmental Quality
CEQA- California Environmental Quality Act
DEA - Department of Environmental Affairs
DEIS - Draft Environmental Impact Statement
DOTs - State Department of Transportation
EAs - Environmental Assessments
EIA - Environmental Impact Assessments
EIS - Environmental Impact Statement
EPA - Environmental Protection Agency
FHWA - Federal Highway Administration
GAO - Government Accountability Office
MOU - Memorandum of Understanding
MPO - Metropolitan Planning Organization
NEPA - National Environmental Policy Act
NOIs - Notices of Intent
OPR – California Governor’s Office on Planning and Research
QA/QC - Quality Assurance/Quality Control
ROD - Record of Decision
SAB - Self-Assessment Branch
TxDOT - Texas Department of Transportation
UFS - Uniform Filing System
USACE - United States Army Corp of Engineers
USDOT - U.S. Department of Transportation
USFWS - U.S. Fish and Wildlife Services

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