

concerning the applicant's qualifications for service, including the applicant's character, reputation, reliability, judgment, and familiarity with international trade law.

### G. Current Roster Members and Prior Applicants

Current members of the chapter 10 roster who remain interested in inclusion on the chapter 10 roster only need to indicate that they are reapplying and submit updates (if any) to their applications on file. Current members do not need to resubmit their applications. Individuals who previously have applied but have not been selected must submit new applications to reapply. If an applicant, including a current or former roster member, has previously submitted materials referred to in item 9, such materials need not be resubmitted.

### H. Public Disclosure

Applications are covered by a Privacy Act System of Records Notice and are not subject to public disclosure and will not be posted publicly on *regs.gov*. They may be referred to other federal agencies and Congressional committees in the course of determining eligibility for the roster, and shared with foreign governments and the USMCA Secretariat in the course of panel selection.

### I. False Statements

False statements by applicants regarding their personal or professional qualifications, or financial or other relevant interests that bear on the applicants' suitability for placement on the chapter 10 roster or for appointment to binational panels, are subject to criminal sanctions under 18 U.S.C. 1001.

#### Juan Millan,

*Deputy General Counsel for Monitoring and Enforcement, Office of the United States Trade Representative.*

[FR Doc. 2023-21531 Filed 9-28-23; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### Revised Form FHWA-1273

**AGENCY:** Federal Highway Administration (FHWA), Department of Transportation (DOT).

**ACTION:** Notice.

**SUMMARY:** This notice announces the availability of revised Form FHWA-1273 "Required Contract Provisions

Federal-Aid Construction Contracts" (FHWA-1273). This form includes certain contract provisions that are required on all Federal-aid construction contracts. This form also includes proposal notices that Federal-aid recipients must incorporate or reference in all solicitation-for-bids or request-for-proposals documents for Federal-aid construction projects. The changes to the form are those necessary to conform to the U.S. Department of Labor's (DOL) August 23, 2023, final rule amending the Davis-Bacon Act (DBA) and the Davis-Bacon Related Acts (DBRA) implementing regulations and are aligned with the effective date of those regulations.

**DATES:** The revised Form FHWA-1273 is effective October 23, 2023.

**FOR FURTHER INFORMATION CONTACT:** Mr. James DeSanto, Office of Preconstruction, Construction and Pavements, (614) 357-8515, [james.desanto@dot.gov](mailto:james.desanto@dot.gov) or Mr. Silvio J. Morales, Office of Chief Counsel, (443) 835-8344, [silvio.morales@dot.gov](mailto:silvio.morales@dot.gov), Federal Highway Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., EST, Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** On March 18, 2022, the DOL published a notice of proposed rulemaking (NPRM), 87 FR 15698, proposing to update and modernize the regulations at 29 CFR parts 1, 3, and 5, which implement the DBA and the DBRA. The DBA requires the payment of locally prevailing wages and fringe benefits on Federal contracts for construction. The DBA prevailing wage requirements were subsequently incorporated into Title 23 of the United States Code (U.S.C.) and are thus applicable to Federal-aid highway construction contracts. 23 U.S.C. 113. In compliance with the latter FHWA requires that all Federal-aid highway construction contracts physically incorporate the DBA prevailing wage requirements via FHWA-1273. See 23 CFR 633.102.

After considering public comments on the NPRM, the DOL on August 23, 2023, published a final rule notice in the **Federal Register** at 88 FR 57526, adopting, with some modifications, the NPRM's proposed changes to the DBA prevailing wage regulations at 29 CFR parts 1, 3, and 5. The modifications to the required contract provisions contained in 29 CFR 5.5 are applicable to the DBA prevailing wage requirements within FHWA-1273. Pursuant to 23 CFR 633.104(a), FHWA has updated Form FHWA-1273 to be consistent with the new regulatory

requirements. As such, and in accordance with 23 CFR part 633, subpart A, the revised Form FHWA-1273, which can be found at <https://www.fhwa.dot.gov/programadmin/contracts/1273/1273.pdf>, must be used by recipients and contractors, including subcontractors at all tiers, as applicable under the regulations. As specified in DOL's final rule, the new regulations are applicable to all contracts awarded on or after October 23, 2023. Accordingly, States and other contracting agencies must use the revised Form FHWA-1273 in all prime construction contracts for Federal-aid construction projects awarded on or after October 23, 2023, as well as all subcontracts, including lower-tier subcontracts, that are awarded under such prime contracts.

**Authority:** 23 U.S.C. 113; 23 CFR 633.104; 29 CFR 5.5.

#### Shailen P. Bhatt,

*Administrator, Federal Highway Administration.*

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BILLING CODE 4910-22-P

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

[FHWA Docket No. FHWA-2023-0005]

#### Surface Transportation Project Delivery Program; Arizona Department of Transportation Draft FHWA Audit Report

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Notice; request for comment.

**SUMMARY:** The Moving Ahead for Progress in the 21st Century Act established the Surface Transportation Project Delivery Program (referred to as National Environmental Policy Act (NEPA) Assignment Program), allows a State to assume FHWA's environmental responsibilities for environmental review, consultation, and compliance under NEPA. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first 4 years of State participation to ensure compliance with program requirements. This is the third audit of the Arizona Department of Transportation's (ADOT) performance of its responsibilities under the NEPA Assignment Program. This notice announces and solicits comments on the third audit report for ADOT.

**DATES:** Comments must be received on or before October 30, 2023.

**FOR FURTHER INFORMATION CONTACT:** Ms. Colleen Vaughn, Office of Project Development and Environmental Review, (202) 633-0356, [colleen.vaughn@dot.gov](mailto:colleen.vaughn@dot.gov), Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, or Ms. Michelle Andotra, Office of the Chief Counsel, (404) 562-3679, [michelle.andotra@dot.gov](mailto:michelle.andotra@dot.gov), Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., EST, Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

An electronic copy of this notice may be downloaded from the specific docket page at [www.regulations.gov](http://www.regulations.gov).

**Background**

The Surface Transportation Project Delivery Program, codified at Title 23, United States Code (U.S.C.), Section 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of FHWA. The ADOT published its application for NEPA assumption on June 29, 2018, and solicited public comment. After considering public comments, ADOT submitted its application to FHWA on November 16, 2018. The application served as the basis for developing a memorandum of understanding (MOU) that identifies the responsibilities and obligations that ADOT would assume. The FHWA published a notice of the draft MOU in the **Federal Register** on February 11, 2019, at 84 FR 3275, with a 30-day comment period to solicit the views of the public and Federal agencies. After the close of the comment period, FHWA and ADOT considered comments and proceeded to execute the MOU. Effective April 16, 2019, ADOT assumed FHWA's responsibilities under NEPA, and the responsibilities for other Federal environmental laws described in the MOU.

Section 327(g) of Title 23, U.S.C., requires the Secretary to conduct annual audits to ensure compliance with the MOU during each of the first 4 years of State participation and, after the fourth

year, monitor compliance. The FHWA must make the results of each audit available for public comment. This notice announces and solicits comments on the third audit report for ADOT.

*Authority:* Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; 23 U.S.C. 327; 23 CFR 773.

**Shailen P. Bhatt,**

*Administrator, Federal Highway Administration.*

**Surface Transportation Project Delivery Program**

**Draft FHWA Audit #3 of the Arizona Department of Transportation**

**Executive Summary**

This is Audit #3 of the Arizona Department of Transportation's (ADOT) assumption of National Environmental Policy Act (NEPA) responsibilities under the Surface Transportation Project Delivery Program. Under the authority of Title 23, United States Code (U.S.C.), Section 327, ADOT and the Federal Highway Administration (FHWA) executed a memorandum of understanding (MOU) on April 16, 2019, to define ADOT's NEPA responsibilities and liabilities for Federal-aid highway projects and other related environmental reviews for highway projects in Arizona. This MOU covers environmental review responsibilities for projects that require the preparation of environmental assessments (EA), environmental impact statements (EIS), and unlisted (identified as individual by ADOT) categorical exclusions (CE).

The FHWA conducted a third audit of ADOT's performance according to the terms of the MOU from March 28 to April 1, 2022. Prior to the audit, the FHWA audit team reviewed ADOT's environmental manuals and procedures, NEPA project files, ADOT's response to FHWA's pre-audit information request (PAIR), and ADOT's NEPA Assignment Self-Assessment Report. During the third audit, the audit team conducted interviews with staff from ADOT's Environmental Planning (EP), Civil Rights Office, Communications, Construction Districts, Contracts & Specifications, as well as the Gila River Indian Community Tribal Historic Preservation Office (THPO), the Hopi THPO, the Salt River Pima-Maricopa Indian Community THPO, the Arizona State Historic Preservation Officer (SHPO), and the Arizona Attorney General's Office (AGO), and prepared preliminary audit results. The audit team presented these preliminary results to ADOT leadership on April 1, 2022.

The audit team found that ADOT has carried out the responsibilities it assumed consistent with the intent of the MOU and ADOT's application. The ADOT continues to develop, revise, and implement procedures and processes required to deliver its NEPA Assignment Program. This report describes several general observations and successful practices, as well as identified non-compliance observations where ADOT must implement corrective actions prior to the next audit. While ADOT has expressed lack of full agreement on some of the past audit observations, the audit team does recognize that ADOT continues to act on those past observations. By doing so, ADOT continues to assure successful program assignment.

**Background**

The purpose of the audits performed under the authority of 23 U.S.C. 327 is to assess a State's compliance with the provisions of the MOU as well as all applicable Federal statutes, regulations, policies, and guidance. The FHWA's review and oversight obligation requires FHWA to collect information to evaluate the success of the NEPA Assignment Program; to evaluate a State's progress toward achieving its performance measures as specified in the MOU; and to collect information for the administration of the NEPA Assignment Program. This report summarizes the results of the third audit in Arizona and ADOT's progress towards meeting the program review objectives identified in the MOU.

**Scope and Methodology**

The overall scope of this audit review is defined both in statute (23 U.S.C. 327) and the MOU (Part 11). The definition of an audit is one where an independent, unbiased body makes an official and careful examination and verification of accounts and records. Auditors who have special training with regard to accounts or financial records may follow a prescribed process or methodology in conducting an audit of those processes or methods. The FHWA considers its review to meet the definition of an audit because it is an unbiased, independent, official, and careful examination and verification of records and information about ADOT's assumption of environmental responsibilities.

The audit team consisted of NEPA subject matter experts (SME) from FHWA Headquarters, Resource Center, Office of the Chief Counsel, and staff from FHWA's Arizona Division. This audit is an unbiased official action taken by FHWA, which included an audit

team of diverse composition, and followed an established process for developing the review report and publishing it in the **Federal Register**.

The audit team reviewed six NEPA Assignment Program elements: program management; documentation and records management; quality assurance/quality control (QA/QC); performance measures; legal sufficiency; and training. The audit team considered four additional focus areas for this review: the procedures contained in 40 CFR part 93 for project-level conformity; the procedures contained in Section 4(f) of the U.S. Department of Transportation Act of 1966, codified at 49 U.S.C. 303 and 23 U.S.C. 138 (otherwise known as Section 4(f)); environmental justice evaluations (Environmental Justice per Executive Order (E.O.) 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and Tribal consultation per the National Historic Preservation Act (NHPA) of 1966, 36 CFR 800 *et seq.*, E.O. 13175, Consultation with Indian Tribal Governments); and additionally, ADOT's environmental commitment tracking process. This report concludes with a status update for FHWA's observations from the first and second audit reports.

The audit team conducted a careful examination of ADOT policies, guidance, and manuals pertaining to NEPA responsibilities, as well as a representative sample of ADOT's project files. Other documents, such as ADOT's PAIR responses and ADOT's Self-Assessment Report, also informed this review. In addition, the audit team interviewed ADOT, Arizona AGO, Tribal THPO staff, as well as the Arizona SHPO via videoconference.

The timeframe defined for this third audit includes highway project environmental approvals completed between January 1 to December 31, 2021. During this timeframe, ADOT completed NEPA approvals and documented NEPA decision points for six projects. Due to the small sample size, the audit team reviewed all six projects. This consisted of one Tier 1 EIS, one EA with a Finding of No Significant Impact, and four unlisted CEs. The FHWA also reviewed information pertaining to project tracking and mitigation commitment compliance for all projects that have been processed by ADOT since the initiation of the NEPA Assignment Program.

The PAIR submitted to ADOT contained 25 questions covering all 6 NEPA Assignment Program elements. The audit team developed specific

follow-up questions for the interviews with ADOT staff and others based on ADOT's responses to the PAIR. The audit team conducted a total of 23 interviews. Interview participants included staff from ADOT, Tribal THPOs, Arizona AGO, as well as the Arizona SHPO.

The audit team compared ADOT manuals and procedures to the information obtained during interviews and project file reviews to determine if ADOT's performance of its MOU responsibilities is in accordance with ADOT procedures and Federal requirements. The audit team documented individual observations and successful practices during the interviews and reviews, and combined these under the six NEPA Assignment Program elements. The audit results are described below by program element.

### Overall Audit Opinion

The audit team found ADOT has carried out the responsibilities it has assumed consistent with the intent of the MOU and ADOT's application. The FHWA is notifying ADOT of five non-compliance observations identified in this audit that require ADOT to take corrective action. The ADOT must address these non-compliance observations and continue making progress on non-compliance observations in the previous audits prior to the next audit. By addressing the observations cited in this report, ADOT will continue to ensure a successful program.

### Successful Practices and Observations

Successful practices are practices that the team believes are positive and encourages ADOT to consider continuing or expanding the use of those practices in the future. The audit team identified successful practices in this report.

Observations are items the audit team would like to draw ADOT's attention to, and for which ADOT may consider improving processes, procedures, and/or outcomes. The team identified 10 general observations in this report.

Non-compliance observations are instances where the audit team finds the State is not in compliance or is deficient with regard to a Federal regulation, statute, guidance, policy, State procedure, or the MOU. Non-compliance may also include instances where the State has failed to secure or maintain adequate personnel and/or financial resources to carry out the responsibilities they have assumed. The FHWA expects the State to develop and implement corrective actions to address all non-compliance observations. The

audit team identified five non-compliance observations in this report.

### Program Management

#### Successful Practice #1

The ADOT's PAIR response indicated, and interviews confirmed, that ADOT EP is working with the ADOT Civil Rights Office (CRO) to develop an environmental justice standard work process. This will establish the roles and responsibilities between the two ADOT offices and ensure the CRO's technical review of the environmental justice analysis is completed.

### Observations

#### Non-compliance Observation #1: Incomplete Reporting to the Federal Infrastructure Permitting Dashboard.

The ADOT is responsible for inputting project information for assigned projects into the Federal Infrastructure Permitting Dashboard (Dashboard), per MOU Section 8.5.1. During the audit, the audit team reviewed the Dashboard and found that it did not include Federal permit and authorization information for any of the applicable projects assigned to ADOT beyond NHPA Section 106 consultation. The audit team confirmed during interviews that ADOT had identified the need for additional permits and authorizations for these projects but had not uploaded the permit information in the Dashboard because those activities were planned far in the future. Per the Office of the Secretary of Transportation Dashboard reporting standards, ADOT is required to identify all Federal permits and authorizations that are anticipated to be needed for the project to complete construction, and to input target and actual milestone completion dates for those permits and authorizations. Target dates for milestones shall be based on the best available information. The ADOT must take corrective action to address this issue by the next audit.

*Observation #1:* Deficiencies and gaps in ADOT's manuals and procedures.

The audit team reviewed ADOT's manuals and procedures. Section 4.2.4 of the MOU specifies that ADOT must implement procedures to support appropriate environmental analysis and decisionmaking under NEPA and associated laws and regulations. The audit team identified the following deficiencies in ADOT's manuals and procedures which may result in incomplete project documentation or analysis and increase the risk for non-compliance:

- In Audit #2, the audit team identified an observation that the ADOT EA/EIS Manual does not contain

complete procedures for EA or EIS-level re-evaluations. The EA/EIS Manual instead points to the ADOT CE Manual for direction, therefore the process for EA/EIS re-evaluations continues to be incomplete and not well-defined. The FHWA requested the correction of the EA or EIS-level re-evaluation section of the EA/EIS Manual in Audit #2. To date, ADOT has not made the correction as requested by FHWA, therefore, this is a continuing observation.

- The ADOT EA/EIS Manual and the current 2017 ADOT Public Involvement Plan approved prior to NEPA assignment do not contain procedures detailing the criteria ADOT uses to make the determination on when to hold public hearings for EA-level projects and what criteria will be used to make determinations on whether to hold a public hearing when one is requested, as specified in 23 CFR 771.111(h)(2)(iii). The ADOT has indicated in its response to the PAIR and in interviews that they are in the process of updating the ADOT Public Involvement Plan to include more specificity on, and fulfilling the requirements for, public involvement under NEPA. The procedures should also be referenced in the ADOT EA/EIS Manual.

The ADOT acknowledged the need for improvement regarding manuals/guidance and version control. The FHWA recommended that ADOT revisit their current procedures for updating manuals/guidance, from use of amendment tables to use of document dates to reflect the latest/most current version.

*Observation #2:* Improvements to Tribal engagement warranted.

Interviews with ADOT staff and THPOs identified the need for improvements to Tribal consultation practices. The THPOs expressed frustration that ADOT's approach to engagement with the Tribes was lacking outside of Section 106, and engagement completed under Section 106 did not constitute meaningful engagement.

The ADOT should develop procedures that identify their responsibilities to coordinate and consult with Tribes in all phases of project development from planning through construction. The FHWA recommends:

- ADOT improve transparency regarding project information;
- ADOT provide the Tribes with any SHPO Section 4(f) consultation as part of the Tribal consultation package for individual projects; and
- All ADOT personnel with visibility on projects or who participate in meetings with Tribes complete

sensitivity training as well as training regarding the Federal Government's relationship to Tribes under Government-to-Government consultation, per MOU Section 3.2.3.

The FHWA recommendations listed above are outlined in the FHWA/ADOT Tribal Consultation Letter Agreement executed on August 5, 2022. The ADOT accepted FHWA's recommendations and added a Tribal Liaison position.

*Non-compliance Observation #2:* Responsibilities under the 327 MOU assigned to additional divisions independent of ADOT EP.

Based on interviews of ADOT staff, the PAIR responses, and review of ADOT's 327 application, it was identified that ADOT divisions outside of EP have responsibilities under NEPA Assignment. These divisions have not been identified or addressed in the ADOT EP procedures, manuals, or plans. These responsibilities include environmental commitment tracking, environmental review in the field, and completion of the necessary training associated with those responsibilities. The ADOT must take corrective actions to develop and implement procedures to apply the 327 MOU provisions to all divisions of ADOT, per MOU Section 1.1.2 and ADOT Final Application for Assumption of FHWA NEPA Responsibilities, by the next audit.

*Non-compliance Observation #3:* Deficiencies in environmental commitment tracking.

The ADOT was unable to provide FHWA with a process manual or any type of consolidated report which documents the tracking of environmental commitments made during the environmental review process. The ADOT was unable to identify a meaningful tracking and monitoring system for environmental commitments and mitigation compliance. The ADOT has stated that this NEPA requirement is the responsibility of the ADOT District Offices, which are outside the supervisory authority of ADOT's EP Office. Per MOU Section 1.1.2 and the ADOT Final Application for Assumption of FHWA NEPA Responsibilities, ADOT is responsible for environmental commitment tracking, and all divisions that have identified and assumed FHWA NEPA responsibilities must comply with all provisions of the 327 MOU and ADOT's NEPA application requesting assignment. The ADOT must take corrective actions to address the tracking of environmental commitments and mitigation compliance by the next audit.

The ADOT does complete monitoring of environmental commitments associated with contractor responsibilities that have funding line items. This is completed using their Field Automated System payment system, but that is only a small subset of project commitments. The ADOT EP has begun taking measures to establish a procedure or mechanism for tracking environmental commitments and mitigation compliance, including hiring an Environmental Commitments Coordinator and through development of the Environmental, Permits, Issues, and Commitments Tracking sheet.

*Documentation and Records Management*

Successful Practice #2

The ADOT staff identified a Historic Preservation Team tracking spreadsheet maintained by ADOT's Cultural Resources Program Manager. This spreadsheet is used to track and verify that all cultural resource environmental commitments on projects are implemented from identification to completion. If ADOT finds this tracking method to be effective, they could consider implementing it more widely to other environmental commitments throughout their program.

Observations

*Non-compliance Observation #4:* Incomplete project file submission and standard folder structure issues.

Pursuant to MOU Sections 8.2.2 and 8.2.3, FHWA requested all project files pertaining to the NEPA approvals and documented NEPA decision points to be completed during the audit review period. The audit team found several inconsistencies between ADOT's procedures for maintaining project files and the project file documentation provided to FHWA. The FHWA continues to experience issues when attempting to access the files ADOT provided for the audit, as they are either not in a format that can be opened, or they are inaccessible because they are saved as a link to the internal ADOT system and not the actual document. The MOU Sections 11.1.2 and 11.1.3 detail ADOT's responsibilities to provide FHWA any information FHWA reasonably considers necessary to ensure that ADOT is adequately carrying out the responsibilities assigned, and ADOT's agreement to cooperate with FHWA in conducting audits including providing access to all necessary information.

The ADOT's procedures specify utilizing a standard folder structure for all projects and saving all project

documentation and supporting information in the project files. The project files submitted by ADOT were incomplete, did not include all supporting documentation, and the files were not organized in accordance with the ADOT standard folder structure. It is unclear how ADOT is maintaining electronic project files and administrative records in compliance with its procedures and the terms of the 23 U.S.C. 327 MOU as they apply to records retention. The ADOT must take corrective action by the time of the next audit to ensure that the complete project file is provided to FHWA upon request. The documentation must support all determinations made. It is FHWA's expectation that documentation to

support a project's decision will be included in ADOT's project files. The ADOT will also provide complete documentation to FHWA upon request.

*Observation #3:* Minor edits needed to resolve deficiency in Section 4(f) evaluation of archaeological resources.

The ADOT's Section 4(f) Manual (Sections 3.3 and 3.4.2) and FHWA regulations, policies, and guidance provide information on determining the applicability of Section 4(f) to archaeological resources and determining if there is an exception or potential use. The ADOT's Section 4(f) Manual (Sections 5.2 and 5.3) specify procedures for documenting Section 4(f) uses of archaeological sites, exceptions per 23 CFR 774.13(b), and "no use" determinations.

During Audit #1, FHWA identified inconsistencies with ADOT's Section 4(f) evaluation and documentation of archaeological sites. In Audit #2, the audit team observed similar inconsistencies during the project file reviews and identified procedural deficiencies relating to ADOT's Section 4(f) evaluation and documentation. In response to the Audit #2 finding, ADOT updated their Section 106 Federal-aid Programmatic Agreement Manual (which also contains the Section 4(f) guidance) with new preservation in place language. The FHWA recommends the following edits to the new language (identified in italics and strikeouts):

"By law, transportation projects involving federal *actions and / or funding* require assessment in accordance with Section 4(f) of the Department of Transportation Act (PL 89-670) and its implementing regulations at 23 CFR Part 774. In compliance with this statute, ADOT is obligated to assess archaeological sites ~~from a purely Western, science based perspective~~. In doing so, ADOT has found that Site X derives its primary statutory importance from its data potential, the nature and extent of which do not warrant preservation in place. If your office has no objection to this finding, ADOT will determine, *in* accordance with 23 CFR § 774.13, that site X meets the archaeological exception from Section 4(f) consideration. ~~ADOT understands and acknowledges that while legally necessary, Western approaches to the identification, interpretation, and valuation of archaeological sites~~ *Native American places are but one of many voices regarding the significance of these resources.* As part of the ongoing Section 106 consultation process, ADOT has sought, and continues to seek information from *the State Historic Preservation Office (SHPO), Section 106 Consulting Parties, Tribes, and the public, as necessary, affiliated tribes* with regard to this and other affected cultural resources."

*Observation #4:* Deficiencies in Section 4(f) documentation of *de minimis* impact to historic properties.

The ADOT's procedures (ADOT Section 4(f) Manual Sections 5.1 and 5.4.2 and ADOT QA/QC Plan Section 5.1.1) specify obtaining written concurrence from the official with jurisdiction when ADOT determines a project will involve the *de minimis* use of a historic property protected by Section 4(f), per 23 U.S.C. 303(d) and 23 CFR 774.5. After completing the project file review, the audit team identified the following procedural deficiency relating to ADOT's procedures: the use of a single concurrence signature for both the Section 106 effect finding concurrence and the Section 4(f) *de minimis* application concurrence. The ADOT needs to either use separate concurrence signature lines for the two decisions being documented or to draft a Letter Agreement between the Arizona SHPO and ADOT that applies program wide. This agreement would state that when the SHPO concurs with a no

adverse effect finding that the single SHPO concurrence signature confirms that they concur with both decisions if ADOT details in the letter their intent to make a *de minimis* finding as well.

*Observation #5:* Continued improvement in Air Quality Conformity communication.

The ADOT has made progress regarding the level of communication and coordination with FHWA on project-level air quality conformity analysis. The ADOT should continue to build on that progress and keep the lines of communication open among all the interagency consultation partners. It would be good practice for ADOT to share re-evaluations requiring conformity determinations with interagency consultation partners for their input before requesting a FHWA conformity determination.

*Observation #6:* Inconsistent use and absence of the 327 MOU disclosure statement.

Section 3.1.3 of the MOU specifies that ADOT shall disclose the disclosure

statement to the public, Tribes, and agencies as part of agency outreach and public involvement procedures. The audit team project file reviews found inconsistent use of the disclosure statement on agency correspondence and technical reports, as well as absence of the statement in public involvement materials. The audit team found no consistent process or procedure for inclusion of the 327 MOU disclosure statement in the ADOT manuals/guidance as required by MOU Section 3.1.3. The ADOT should strive to achieve consistency in the placement of disclosure statements in documents.

*Non-compliance Observation #5:* Deficiencies in analysis of environmental impacts on low-income and minority populations (environmental justice).

The ADOT's EA/EIS Manual, CE Manual, and FHWA E.O., policies, and guidance provide information on completing the environmental justice analysis required for projects. The FHWA identified inconsistencies in

ADOT's Section EA/EIS Manual, CE Manual, PAIR response, and interview responses regarding how ADOT completes environmental justice analyses. The methodology described by ADOT is not in compliance with FHWA policy and guidance because ADOT analyzes the effect prior to identifying environmental justice populations in the project area. In addition, the CE Manual describes evaluating census data, but no additional sources for environmental justice population identification. The CE Manual also infers a default position that there will be no disproportionately high and adverse impacts on low-income or minority populations with CE-level projects. The audit team observed similar inconsistencies during the project file reviews for this audit and identified the same environmental justice analysis procedural deficiencies in the project documentation, as well as project files with little or no analysis documentation. In addition, there were inconsistent degrees of coordination with the ADOT CRO, who, according to the CE Manual and the PAIR response, is to be consulted on all environmental justice analyses. Based on these findings and a review of the ADOT Training Plan, additional environmental justice training is needed, and ADOT's manuals and procedures should be brought into compliance with FHWA requirements. The ADOT must take corrective action to ensure that environmental justice analysis and assessments are in compliance with E.O. 12898, DOT Order 5610.2C, and FHWA policy and guidance by the next audit.

#### *Quality Assurance/Quality Control*

##### Observations

*Observation #7:* QA/QC procedures lack assessment of compliance.

The ADOT has procedures in place for QA/QC which are described in the ADOT QA/QC Plan and the ADOT Project Development Procedures. When implemented, ADOT focuses on completeness of the project files, not the accuracy or technical merits of the decisions documented by those files. The ADOT does not check for compliance of the decisionmaking and it is therefore unclear how the project-level QC reviews inform the program. These observations were also found with Audits #1 and #2. The audit team continues to be unable to fully assess the implementation of project-level QC procedures. The ADOT does not appear to have a process in place for assessing the effectiveness of its QA/QC procedures to identify opportunities to improve the processes and procedures

in their program, in ways that could help ensure better compliance with MOU requirements.

*Observation #8:* QA/QC procedures do not inform the performance measures.

It is unclear how the QA/QC procedures, such as the use of QC checklists, are informing ADOT about the technical adequacy of the environmental analyses conducted for projects (MOU Section 10.2.1.B.c) and how the timing of QA/QC reviews influences timeliness and efficiency in completion of the NEPA analysis. The QA/QC process as documented does not include a review of the adequacy of the technical analyses completed. The current performance measures do not provide QA/QC completion dates to create meaningful datasets that allow assessment of the timeliness of QA/QC actions. The FHWA recommends that a column be added to the current performance data matrix that measures the adequacy of technical documentation, as well as date columns for the completion of the draft QC, final QC, and QA checklists.

#### *Performance Measures*

##### Successful Practice #3

The ADOT Environmental Programs Manager identified team-level internal performance measures used by her team to track timelines on biological decisions, improve coordination with U.S. Fish and Wildlife Service, and inform the prioritization of projects. The ADOT EP has made beneficial documentation changes based on these internal leading performance measures for the quality and timeliness of biological consultation. These could serve as an example of meaningful metrics that could be integrated into the performance measures that ADOT is currently tracking.

##### Observations

*Observation #9:* Incomplete development and implementation of performance measures to evaluate the quality of ADOT's program.

The audit team reviewed ADOT's development and implementation of performance measures to evaluate their program as required in the MOU (Part 10.2.1). The ADOT's QA/QC Plan, PAIR response, and self-assessment report identified several performance measures and reported the data for the review period. The ADOT's reporting data primarily dealt with increasing efficiencies and reducing project delivery schedules rather than measuring the quality of relationships with agencies and the general public,

and decisions made during the NEPA process. The metrics ADOT has developed are not being used to provide a meaningful or comprehensive evaluation of the overall program.

The FHWA was unable to determine how the ADOT QA/QC process is informing the improvement of the NEPA procedures used by ADOT, nor how it demonstrates meeting their performance measures. One area of concern is the lack of dates on key actions and when determinations are made. The FHWA recommends that ADOT evaluate the current performance measures matrix of other NEPA Assignment States department of transportation (such as Utah and Ohio) to assist in making meaningful changes in their current performance measures tracking. This observation was also made in Audit #1 and Audit #2.

#### *Legal Sufficiency*

The ADOT had completed one formal legal sufficiency review of an assigned environmental document during the audit period. The EIS received a formal legal sufficiency finding, which was included in the project file. Currently, ADOT retains the services of two Assistant Attorneys General (AAG) for NEPA Assignment reviews and related matters. The assigned AAGs have received formal and informal training in environmental law matters. The ADOT and the Attorney General's (AG) Office also have the option to procure outside counsel in accordance with 23 U.S.C. 327(a)(2)(G), but this was not necessary during the audit period.

##### Successful Practice #4

The ADOT seeks to involve lawyers early in the environmental review phase, with AAGs participating in project coordination team meetings and reviews of early drafts of environmental documents. The AAGs will provide legal guidance at any time ADOT requests it throughout the project development process. For formal legal sufficiency reviews, the process includes a submittal package from ADOT's NEPA program manager containing a request for legal sufficiency review. Various ADOT manuals set forth legal sufficiency review periods, and the AAGs coordinate with ADOT to ensure timely completion of legal sufficiency reviews. In addition, one of the AAGs has recently taken an active role in Tribal matters, including participating in meetings with Tribes and handling legal questions related to Tribal issues.

#### *Training*

*Observation #10:* Training Gaps.

The audit team reviewed ADOT's 2021 Training Plan and ADOT's PAIR responses pertaining to its training program. The ADOT's EP staff training matrix indicates that, while ADOT identifies the availability of staff needing training, many staff have not taken advantage of the opportunity for training, including other ADOT divisions subject to the 327 MOU provisions. The ADOT's training plan identifies that the training interval for some topics, such as the NEPA Assignment Program, is only once per staff member regardless of the period of time since the previous round of training. Staff may benefit from regular "refresher" type training, especially as regulatory requirements and policy may change over time.

#### **Status of Previous General Observations and Non-Compliance Observations From the Audit #2 Report**

This section describes the actions ADOT has taken (or is taking) in response to observations made during the second audit. The ADOT was provided the second audit draft report for review and provided comments to FHWA on August 2, 2021.

*Observation #1:* Deficiencies and gaps in ADOT's manuals and procedures.

During Audit #2, the audit team identified deficiencies in ADOT's manuals and procedures which may result in incomplete project documentation or analysis and increase the risk for non-compliance. The first was in the ADOT CE Checklist Manual and the EA/EIS Manual, specifically the process for re-evaluations for EAs and EISs was not well-defined. Although the team observed some improvements to the manuals in Audit #3, the deficiency identified in Audit #2 was not resolved and is an observation again in Audit #3. The other was the ADOT Section 4(f) Manual, documentation forms, and desk reference/matrix containing information inconsistent with FHWA guidance and regulation. The deficiencies identified in Audit #2 were addressed by ADOT, but additional issues were identified by the audit team in Audit #3.

*Non-compliance Observation #1:* Deficiencies in Section 4(f) evaluation of archaeological resources.

The audit team observed similar inconsistencies as were observed in Audit #1 during the project file reviews for Audit #2 and identified procedural deficiencies relating to ADOT's Section 4(f) evaluation. The consultation letter sent to the Arizona SHPO did not state ADOT's intent to apply the archaeological exception to sites or include other Section 4(f) information regarding the sites identified. In Audit

#3, the audit team acknowledges changes were made to ADOT's Section 106 Federal-aid Programmatic Agreement Manual, but FHWA provided corrections to the draft language for ADOT to incorporate.

*Non-compliance Observation #2:* Deficiencies in analysis of right-of-way impacts.

The ADOT's procedures (ADOT EA/EIS Manual) and FHWA's regulations, policies, and guidance provide information on how to consider right-of-way impacts in the NEPA analysis. The FHWA's regulations, policies, and guidance provide additional information for how early property acquisitions should be considered with the right-of-way impacts analysis. In Audit #2 for the 327 MOU, the audit team found one project file did not demonstrate that early acquisition of properties and previous relocations were adequately addressed in the impact analysis in the NEPA document. The ADOT submitted a letter to FHWA on April 28, 2022, detailing the steps ADOT will take within 60 days as a corrective action to address the right-of-way non-compliance observation. On May 23, 2022, ADOT submitted to FHWA updated procedures regarding right-of-way impacts in their NEPA analyses and FHWA provided technical assistance to ADOT regarding these procedures. This corrective action by ADOT resolves the non-compliance observation.

*Observation #3:* Inconsistencies in interagency consultation documentation.

After completing the project file review in Audit #2, the audit team found several inconsistencies with ADOT's documentation of compliance with interagency consultation requirements (per 40 CFR 93.105). It is unclear if interagency consultation occurred for some projects since the project files did not include information on agency responses, concurrence, and the comment resolution process. Therefore, it is unknown if the interagency consultation agencies had an opportunity to participate in consultation or if ADOT provided them an opportunity to review and comment on the materials as required by 40 CFR 93.105 and MOU Section 7.2.1. During Audit #3, the audit team found an increased amount of documentation providing evidence of interagency consultation efforts by ADOT in the project files reviewed.

*Observation #4:* Incomplete development and implementation of performance measures.

During Audit #2, the audit team reviewed ADOT's performance

measures and reporting data submitted for the review period and concluded that ADOT had made progress toward developing and implementing its performance measures. For Audit #3, FHWA continues to identify this program objective as an area of concern, described in the observations above and will continue to evaluate this area in subsequent audits.

#### **Finalizing This Report**

The FHWA provided a draft of the audit report to ADOT for a 14-day review and comment period, as well as notification of the non-compliance observations. The ADOT provided comments which the audit team considered in finalizing this draft audit report. The audit team acknowledges that ADOT has begun to address some of the observations identified in this report and recognizes ADOT's efforts toward improving their program. The FHWA is publishing this notice in the **Federal Register** for a 30-day comment period in accordance with 23 U.S.C. 327(g). No later than 60 days after the close of the comment period, FHWA will address all comments submitted to finalize this draft audit report pursuant to 23 U.S.C. 327(g)(2)(B). Subsequently, FHWA will publish the final audit report in the **Federal Register**. The FHWA will consider the results of this audit in preparing the scope of the next annual audit. The next audit report will include a summary that describes the status of ADOT's corrective and other actions taken in response to this audit's conclusions.

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## **DEPARTMENT OF TRANSPORTATION**

### **Federal Railroad Administration**

#### **Safety Advisory 2023-05; King Pin Assemblies in Highway-Rail Grade Crossing Warning Systems**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of safety advisory.

**SUMMARY:** FRA is issuing Safety Advisory 2023-05 to heighten awareness within the railroad industry of the potential failure of king pin assemblies in highway-rail grade crossing warning systems equipped with breakaway gates. This Safety Advisory recommends that railroads inspect and replace all worn components in king pin assemblies. This Safety Advisory also recommends that railroads develop inspection and