

Alaska Department of Transportation & Public Facilities

**Categorical Exclusion (CE)
Assignment Compliance Review
(23 U.S.C. 326)**

Corrective Action Plan

September 2010



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INTRODUCTION

Purpose

The purpose of this Corrective Action Plan is to address specific findings and observations that were outlined within the July 2010 *Categorical Exclusion (CE) Assignment Compliance Review Final Report* that was issued by the Federal Highway Administration (FHWA). The report was issued as a result of the FHWA program performance review per the *Memorandum of Understanding between Federal Highway Administration, Alaska Division and the Alaska Department of Transportation and Public Facilities, State Assumption of Responsibility for Categorical Exclusions*, which was executed on September 22, 2009. In March 2010 the FHWA initiated this program performance review with interviews and project file reviews conducted in both the Statewide and Region offices. FHWA provided a draft report for the Department of Transportation and Public Facilities (DOT&PF) to review and comment on July 9th, 2010. A close-out meeting occurred on the afternoon of July 21st and the report was finalized on July 22, 2010.

The final report was provided to DOT&PF staff for review and comment. A draft corrective action plan was developed in conjunction with the regions. The draft plan was then discussed in detail at a meeting with the regions in Anchorage, Alaska on September 15th.

Background

Pursuant to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) Section 6004, codified in 23 U.S.C. 326, the Alaska Department of Transportation and Public Facilities has assumed the Secretary of Transportation's (Secretary) authorities and responsibilities for determining if a transportation project qualifies for a Categorical Exclusion (CE), listed under 23 CFR 771.117. For assigned projects categorically excluded from the requirement to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA), DOT&PF has also assumed the Secretary's authorities and responsibilities for coordination and consultation with Federal resource agencies for all associated Federal environmental laws. These authorities and responsibilities include informal consultations with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act Section 7, Section 106 consultations with the State Historic Preservation Officer and the Advisory Council on Historic Preservation, and coordination with the U.S. Environmental Protection Agency for project-level air quality conformity findings.

For the CE Assignment the State of Alaska has assumed the legal responsibility for all NEPA decisions, and it is subject to Federal court jurisdiction. The State of Alaska has waived its 11th amendment sovereign immunity against actions brought by its citizens in Federal court for the purpose of NEPA assignment. On September 22, 2009, DOT&PF entered into the formal Section 6004 MOU with FHWA, Alaska Division to implement the CE Assignment Program in Alaska. The MOU outlines the specific terms that describe the roles and responsibilities under the CE Assignment.

The Section 6004 MOU (Stipulation IV(F)(5)) establishes that a CE Assignment Compliance Review in Alaska will take place at least every 12 months. FHWA conducted the first such compliance review in March of 2010. It is the intent of this corrective action plan to address those findings and observations made by FHWA during the first compliance review of the State's 6004 program. DOT&PF is committed to making the 6004 program a success as well as implementing the corrective actions listed in this plan.

Findings and Associated Corrective Actions

The *Categorical Exclusion (CE) Assignment Compliance Review Final Report* listed thirty eight (38) specific findings. A finding is a statement pertaining to compliance with a regulation, statute, FHWA guidance, policy, or procedures, DOT&PF procedures, or the Section 6004 MOU. Within the report

findings were followed by recommended corrective actions that FHWA felt would address the specific finding. This corrective action plan lists out the findings made by FHWA and then the corresponding corrective action that DOT&PF feels will address this finding.

FHWA Finding (1)

Three (3) project files were reviewed that did not contain adequate documentation to verify that they were assignable categories of actions or had met Stipulation IV. Another project file was reviewed that alluded to potential joint funding (which would exclude the project from assignment). An additional project file was reviewed that had a scope of work that appeared outside of the scopes of activities described in Stipulation I(A). In each case, the project file contained references to a scope of work or possible joint funding that would render the project not assignable, but contained no documentation addressing these questions regarding the applicability of assignment.

Stipulation I(A,B) in the MOU defines the scope of activities the State may determine as a designated activity for which the State may assume the FHWA's NEPA responsibilities and liabilities. The MOU defines those activities listed in regulation in 23 CFR 771.117(c) and the example activities listed in 23 CFR 771.117(d). Stipulation III(D) identifies conditions that would exclude a project from being assignable and Stipulation IV(A) makes the State responsible for compliance with governing laws, regulations and the MOU and requires the State to make all determinations under the 6004 MOU in accordance with 23 CFR 771.117(a) and (b) and succeeding regulations. Stipulation IV(B) establishes requirements for the identification, documentation and review of effects for CE determinations.

DOT&PF Corrective Action (1)

The Statewide Environmental Office (SEO) has resolved three (3) of the five (5) projects with FHWA. It has been determined after a review of the files for these three projects that the State did in fact make the appropriate determination on assignment under the 6004 MOU. Project information for these three projects was provided to FHWA in support of these determinations.

The SEO is continuing to work with the regions and FHWA to complete the review of the remaining two (2) project files.

FHWA Finding (2)

In a sixth case, on two separate occasions, a project had previously been determined by the FHWA to require an Environmental Impact Statement. Consultation between the FHWA and State had occurred intermittently for four years, including many meetings occurring over the last 6 months to exchange information and discuss the Class of Action. In each case, the FHWA advised that the project should not be classified as a CE. The State DOT formally determined the Class of Action as a CE and assumed responsibility for the project while good faith discussions with FHWA were still ongoing. The DOT&PF asserted during these discussions that they believed that the project met the scope and criteria of a CE and should be allowed to accept the risk of processing the project as a CE.

After a review of the project scope and potential effects, the FHWA made a determination that the number of potential environmental issues, coupled with the lack of detailed information regarding the context and intensity of impacts, made it impossible to make any supported determinations regarding the potential significance of environmental impacts. In addition, there was insufficient information for the FHWA to determine that this project would meet the conditions of 23 CFR 771.117 (a) or (b) in order to be classified as a Categorical Exclusion. The FHWA determined the project to be a Class III action requiring the preparation of an Environmental Assessment to determine if an Environmental Impact Statement is required. The FHWA subsequently excluded the project from assignment, pursuant to

Stipulations III(B), IV(A), and X(B), citing deep concerns regarding the determination and the State's stewardship of its responsibilities under the MOU.

In this case, the DOT&PF should have weighed more fully the responsibility assigned under the MOU and the prudence of asserting assignment. The cause may have been a misunderstanding of the discretion provided under the MOU [see Major Finding and Observation regarding Stipulation I(A,B)]. The effect of this occurrence is that the appropriateness of the State's determination of a project's class of action is now identified as a performance issue as a result of this compliance review. The State is now on notice that its determinations of class of action will be a subject to monitoring at any point FHWA considers necessary. If future occurrences of misclassified actions continue to occur, FHWA will take action to address this issue, including termination of some or all of the responsibilities assigned to the State.

At a minimum, this review has found 5 instances where project files did not adequately document that projects fall within assignable categories of action (Stipulation I). The project records should provide sufficient detail and adequately document the applicability of assignment.

The effect is an increase of risks to the State for the appropriateness of its decision making. It is possible their decisions may have increased risk of challenge or claims. However, the major risk posed in these situations is that they increase the possibility that a project would not be appropriately assigned to the State, which would violate the intent of the MOU and Congress. A project with joint federal funding sources is not assignable and typically poses an increase in complexity in regulatory compliance. A more concerning outcome is the risk that a project that will result in significant environmental impacts would be classified and advanced as a CE without the full decision making benefits of an EIS process. This could create the perception that the MOU process is being used to circumvent NEPA requirements, as opposed to allowing the State to achieve potential efficiencies through the internal processing of CE designations.

DOT&PF Corrective Action (2)

As stated in the previous corrective action, the SEO has resolved three (3) of the five (5) projects with FHWA. It has been determined after a review of the files for these three (3) projects, that the State did in fact make the appropriate determination on whether or not the projects were assigned to the State under the 6004 MOU. Project information for these three projects was provided to FHWA in support of these determinations. The SEO is continuing to work with the regions and FHWA to complete the review of the remaining two (2) project files.

In the sixth case mentioned in this finding the State made a class of action determination that this project (Seward 75-90), due to a reduction in the proposed project scope, and after discussions with various resource agencies, the project then appeared to fall under a Categorical Exclusion. FHWA had made a determination that the project would be a Class III action based on a different scope and potential impacts to environmental resources, and subsequently formally excluded this project from assignment to the State.

FHWA Finding (3)

DOT&PF has prepared several quarterly reports of CE decisions. The first report listed only one project and was complete and accurate, but was not provided by the due date. None of the subsequent reports have been considered complete and accurate. The second report was submitted on time, but was subsequently amended to address some omissions pointed out by the Division. With the exception of the first Quarterly Report, the reports have not included all the CE project approvals for the specified interval and contained missing or incorrect project numbers and dates. At the time of our review, the reports had not been posted on the DOT&PF website as required by the MOU. The reports were posted on the State's website subsequent to our review.

The MOU requires DOT&PF as part of the performance monitoring and quality assurance, (1) to prepare quarterly reports of CE decisions, (2) to prepare a report summarizing its performance under the provisions of the MOU on the 15th and 30th month of the MOU, and (3) to maintain project records and general administrative records pertaining to its MOU responsibilities.

There are likely several causes for this finding. Based on interviews conducted in the Regions and Statewide offices, no shared data base exists to collect, track, and manage information for CE projects. DOT&PF staff described distinct, separate, and unconnected approaches to collecting and managing information about CE project development. The effect of these differing approaches to collecting and tracking project status is (a) confusion about which projects are assigned or unassigned and (b) uncertainty about which projects have been approved and should be included in the quarterly report by the Statewide Office. The MOU contemplated DOT&PF establishing an electronic records system and information gained from interviews show that at least two electronic records systems are currently in development. The Northern Region Office has relied upon a relational data base to track the status of CE projects for more than 2 years. This system allows reports of approved projects to be listed with a few computer commands. Since time is tracked from initial authority to proceed to CE approval, it is possible to compare the timeliness of CE project development prior to and after DOT&PF assumed 6004 responsibilities. The Central Region Office is developing a different data base system that would accomplish broadly similar things as the data base in the Northern Region. Both the Central and Statewide offices rely upon Excel spread sheets (of differing formats) to currently track the status of their CE projects.

DOT&PF Corrective Action (3)

The SEO developed a tracking spreadsheet at the onset of the assignment of NEPA responsibilities to the State under the 6004 MOU. This spreadsheet has significantly reduced the errors in reporting. The most recent quarterly report was submitted on time and did not require any amendments. The FHWA review of the State's 6004 program was conducted less than 7 months into implementation of the program. Quarterly report deadlines are tracked on the Statewide Environmental Manager's Outlook calendar to ensure the timely submittal to FHWA.

In order to improve the accuracy of the State's quarterly reports to FHWA the SEO is continuing to work with the region offices on the development of a method by which projects could be tracked electronically and would be accessible to both the region and statewide environmental staff.

FHWA Finding (4)

Our review of project records and information gained in interviews showed that several different approaches exist among Region and Statewide offices to maintain project and administrative records pertaining to MOU responsibilities. Regarding project records, there is a heavy reliance on paper records, although electronic versions of some portion of paper records are also being generated. Reviews of paper and electronic project files in both Regions and Statewide offices revealed that for an individual project, sometimes the complete record was found in the Region, sometimes at the Statewide office, occasionally a complete record could be compiled from records in the Region and Statewide offices.

There appeared to be little attempt to compile non-project administrative records, such as records of training events, agendas, and actions taken to improve or resolve 6004 program implementation. There appeared to be little attempt to compile those data for later incorporation in a summary report.

The cause of unevenness and at times, incomplete documentation in project and program records may result from the newness of this assignment and attention focused on the initial development and implementation of new procedures. The effect of inconsistent project recordkeeping and the absence of an

overall procedure for retaining records of program implementation have resulted in actions not compliant with provisions of the MOU.

DOT&PF Corrective Action (4)

The SEO has advocated for, and continues to strive toward, a consistent project file system. The SEO provided a generic file structure to the regions shortly after the 6004 MOU was signed, and offered the regions assistance in uniformly structuring existing files. The SEO will continue to work with the regions on developing documented guidance for project file structure that would provide environmental staff with a method for determining what information should be retained within the project file. The SEO is working with the regions on developing a project file checklist for incorporation into each project file to promote complete project file documentation.

The SEO has initiated a project file review procedure that promotes consistent project file management. This file review procedure will be incorporated into our 6004 Monitoring Plan that will be developed prior to submittal of the 15-month monitoring report. The SEO will continue to work with the regions in developing project file structure training.

FHWA Finding (5)

The team reviewed several project files that provided evidence that Regions had been unresponsive to comments provided by the Statewide Office as a part of their quality control reviews when issuing concurrence on PCEs. These comments usually noted substantive errors or omissions in the documentation, but consistent with the State's procedures many of the reviews occurred after the Regions certified to FHWA that documentation was complete. As opposed to the FHWA who may withhold approval of an Authority to Proceed in order to obtain revisions to a non-assigned PCE, the current procedures for assigned projects provide little leverage for the Statewide Office to assure adequate documentation is completed prior to the Regions' certification to FHWA. The documentation should be complete (i.e. no errors or omissions) prior to the certification to FHWA that the environmental documentation had been completed. The cause was not foreseeing this weakness during the development of the procedures. The effect is FHWA approving funding without adequate documentation being completed. Additionally, due to delay in the Statewide Office's review, important corrections or policy changes may not be relayed by Statewide NEPA Managers to Regional NEPA practitioners in a timely manner.

DOT&PF Corrective Action (5)

The SEO will continue to work with all three regions to develop and issue procedure and process clarification (through a Chief Engineer Directive) on how to address the processing of PCEs. Clarification on processing PCEs will be emphasized in additional 6004 process training provided to all three regions.

FHWA Finding (6)

Project file reviews and interviews reflected confusion related to the process for determining the applicability for use of DOT&PF's internal PCEs. The intent in developing the procedures for 6004 was to implement a process for assigned projects that would follow the same process as non-assigned projects. Statewide NEPA Managers for 6004 would fulfill the role FHWA Area Engineers had been performing prior to the 6004 Assignment. The text in the manual infers that the 6004 NEPA Managers and the Area Engineers will be consulted on the appropriateness of using an existing PCE. Section 5.2.2 of the DOT&PF's Environmental Manual states,

"When making the decision regarding documentation, the REM consults with a Statewide NEPA Manager for 6004 (for assigned CEs) or FHWA Area Engineers (nonassigned CEs) to determine if a CE Documentation Form is required. If a programmatic agreement applies and a CE Documentation Form is

required, the REM will approve (certify) the completed form and forward a copy to the Statewide NEPA Manager for 6004 (assigned CE) or the FHWA Area Engineer (non-assigned CE) for their written concurrence and file".

Pg 5-11 of the DOT&PF's Environmental Manual indicates,

"For a class of action determination, the REM will consult in writing with the Statewide NEPA Manager for 6004 to determine if the project qualifies as a CE per 23 CFR 771.117 (c) or (d). The REM should identify the specific CE activity [e.g. d(4)]. If enough information is known about the project a determination on whether a programmatic agreement applies or if a CE Documentation Form is required may be made".

A literal interpretation of this text would imply that the Statewide NEPA Manager for 6004 or the FHWA Area Engineer does not necessarily have role in determining if a PCE was appropriate for a project. However, the practice for years prior to the assignment was for the REM to consult the FHWA Area Engineer on the class of action and the applicability of the use of a PCE for a specific project. This procedure was the intent of the authors of the Manual. This discrepancy has led to substantial confusion regarding roles and authorities under the assignment. The Manual should have been clear on this point. The effect is confusion and disagreement between the Region and Statewide Offices leading to delay and inefficiencies in project development.

DOT&PF Corrective Action (6)

The SEO does not feel it is necessary to revise the Alaska Environmental Procedures Manual to address this finding. The SEO and Region offices are appropriately determining the use of a PCE on a case by case basis in accordance the Alaska Environmental Procedures Manual.

The SEO has an active role in determining the applicability of an internal programmatic agreement to an activity. This determination is made up front during consultation with the REM per the Alaska Environmental Procedures Manual, when sufficient information about the action is known. There are times when it can be determined that a project fits the conditions of one of the internal programmatic agreement approvals during the class of action consultation. There are however times when it is not known during this initial consultation if an action will meet the conditions of one of the internal programmatic agreement approvals and more information is required. This is often the case with those actions that are listed on the 'c' or 'd' list but require the completion of a CE Documentation Form.

The SEO will continue to work with the regions regarding the use of the programmatic agreements, and the process by which projects are to be developed under these programmatic agreements.

FHWA Finding (7)

Numerous file reviews provided no evidence of the specific PCE being used for an assigned project. 26 of 28 project files for "c" list PCEs did not identify the specific PCE used. DOT&PF's Environmental Manual Section 5.2.2 states, that the REM certifies "that certain projects meet the terms of a particular agreement and determine if documentation is needed or not". This language implies that the specific PCE being used will be identified. The project documentation should have identified the particular agreement being used. The cause may be the vagueness of the text as well as confusion over the State's single PCE with three programmatic approvals. The effect is inadequate project documentation.

DOT&PF Corrective Action (7)

The FHWA review of the State's 6004 program was conducted less than 7 months into implementation of the program. During this time there was some initial confusion regarding the

“c” list and the use of programmatic agreements as the process was different than it was under FHWA prior to the signing of the 6004 MOU. This concern has been addressed through changes in Statewide NEPA Manager and REM processing of “c” list PCEs.

The SEO will continue to work with all three regions to develop and issue procedure and process clarification (through a Chief Engineer Directive) on how to address the processing of PCEs. Clarification on the processing of PCEs will be emphasized in Section 6004 process training provided to all of the regions.

FHWA Finding (8)

None of the Project Information Sheets (PIS) reviewed identified the specific PCE being used. DOT&PF's Internal Agreement (pg 5-57 of the Environmental Manual) requires the REM to certify on the PIS for a project, that the conditions of the applicable PCE (within the single agreement) are met. This requirement is reiterated in the text of the agreement for Approval #1 and Approval #2. The cause may be unfamiliarity with the requirement and the fact that this requirement was overlooked during development of the PIS form. The effect is inadequate project documentation and inadequate notice to FHWA of the specific action the State has taken. The PIS forms should have identified the specific PCE being used.

DOT&PF Corrective Action (8)

The Project Information Sheet (PIS) is not an environmental form. It is a form that is used by numerous divisions within DOT&PF, and this form is not strictly used for FHWA federal-aid funded projects. FHWA has been using this form to track the State's 6004 program activities, which has resulted in errors and confusion. DOT&PF will continue to submit quarterly reports on completed CEs as required per the 6004 MOU. The SEO will continue to work with the PIS form user groups within DOT&PF, and the FHWA to appropriately modify the PIS form.

FHWA Finding (9)

Interviews and review of project records indicate several instances of FHWA involvement in environmental compliance for assigned projects. There were several instances where DOT&PF Region staff contacted Division staff to ask whether a CE project was assigned or not and Division staff responded with an opinion. There also were instances where Division staff discussed assigned CE projects (or projects where assignment was still in question) and whether those actions had the "potential to affect historic properties."

The Division Office should not be contacted or otherwise involved in NEPA decision making for assigned CE projects or for projects where assignment is in question. Stipulation XI(A) clearly states that Division Office staff shall not provide project-level assistance to the State. At the same time, FHWA staff has an obligation as part of monitoring DOT&PF's actions under the MOU to identify and communicate to the State, instances of errors and omissions in the evidence of CE processing provided in PIS forms. Timely communication of errors and omissions allows for the State to take timely corrective actions. Therefore, when Division staff review evidence of CE processing (in PISs) for an assigned project and if there are errors or information is incomplete, it is appropriate for those staff to contact DOT&PF to identify those incomplete or erroneous records as part of FHWA's monitoring provisions.

The causes for project related discussions of assigned projects include: (1) a combination of the newness of the directive not to become involved, and a familiarity that exists between DOT&PF regional staff and Division staff, (2) a difficulty among both State and Division staff, in distinguishing between assigned and not-assigned CE projects, (3) a blurring of project-specific questions and ones that relate to prior projects or clarification of FHWA policies and procedures, and (4) an inherent ethic of streamlining and public service of FHWA staff to provide assistance to solve problems and keep project development moving forward. New procedures and forms (e.g., the PIS) have also been introduced by DOT&PF to

provide evidence of CE processing at the time of a request for authority to proceed (ATP) for funding or other action, which may have increased the instances where DOT&PF and FHWA staff have spoken to clarify form requirements that led to conversations regarding assigned projects. The effects of FHWA involvement in assigned projects are an undermining of the responsibilities assigned to the State. FHWA may also be making themselves liable for project decisions where they would otherwise have no involvement or liability.

DOT&PF Corrective Action (9)

As the FHWA review of the State's 6004 program was conducted less than 7 months into the program, there was some initial confusion within both DOT&PF and FHWA regarding the implementation of the 6004 program.

The SEO intends to offer regular statewide teleconferences for the REMs and Statewide NEPA Managers to address process related topics. The SEO will continue to work with all three regions on developing and implementing training that specifically targets the 6004 process, including the determination of class of action and determination of assignment. FHWA staff will be provided the opportunity to attend these training sessions per the 6004 MOU (Stipulation IV(E)(3)).

FHWA Finding (10)

There were several instances where requests for ATP were approved by FHWA Division Office staff with missing forms (no PIS, no written re-evaluation) or missing (signatures, dates), insufficient, or erroneous information. In reviewing DOT&PF project files, the team observed instances where CE documentation with errors and omissions was approved by FHWA (before the execution date of the MOU). Subsequently, DOT&PF re-evaluated the CE approval under the assignment, and in some cases, did not correct the prior errors and omissions. Consequently, Division staff may have approved requests for ATP based on certifications that relied on incomplete or erroneous documentation. FHWA should not be approving CE documentation with errors or omissions.

CE project files at the Division Office revealed instances of missing documentation for projects assigned to the state as well as for unassigned projects. All CE documentation for non-assigned projects should be in FHWA files. Some project files were not able to be located; and some lacked CE approval or re-evaluation documentation. For projects not assigned under the MOU, several programmatic CE projects did not have documentation from the Division staff, confirming that the action met the terms of the PCE for non-assigned projects.

DOT&PF Corrective Action (10)

The FHWA review of the State's 6004 program was conducted less than 7 months into the program, and there was some initial confusion regarding the implementation of the 6004 program.

The SEO intends to offer regular statewide teleconferences for the REMs and Statewide NEPA Managers to address process related topics. The SEO will continue to work with all three regions on developing, and implementing, training that specifically targets the 6004 process, including the determination of class of action and determination of assignment. FHWA staff will be provided the opportunity to attend these training sessions per the 6004 MOU (Stipulation IV(E)(3)).

FHWA Finding (11)

This review has identified a concentration of findings that were deficiencies in meeting Stipulation IV obligations in the DOT&PF Southeast Region (SER). These deficiencies were evidenced in documentation. The review found that 82% (9 of 11) of SER files were inadequate pursuant to the terms of the MOU. Files contained unsigned or improperly signed documents or missing documentation important to decision making and verification of compliance with the MOU and NEPA. It was also stated during one interview that substantial portions of a file for an assigned project were permanently

discarded after the scope for the project was reduced. These deficiencies ultimately made it impossible to fully review compliance with terms of the MOU in the SER.

In several instances, missing documents were determined to exist and were found in the Statewide Office files of the NEPA Manager.

A possible cause of the file deficiencies is the absence of a logical filing system in SER. Binders were supplied to the review team that appeared to contain assigned and nonassigned projects. Several files were not ordered consistently in any chronological or subject-based organizational structure. Another possible cause of the deficiencies is staffing. While general DOT&PF environmental staff has relatively low tenure statewide, this is particularly so in the SER. Staff interviews indicated that even though all 6 of their full time positions were filled, they were understaffed for the workload created by the 6004 process.

DOT&PF Corrective Action (11)

Southeast Region has added staff to address deficiencies within the project files. The staff is working closely with the REM to ensure that project files are centrally located and information is being placed within the project files. Southeast Region has also coordinated with both the SEO and the other regions to gain assistance on project file structure, contents in the project file, and assistance with developing a project file checklist.

The SEO has been working with Southeast Region staff to develop a project file structure, and get this in place to help correct deficiencies within the project files. SEO staff recently reviewed four (4) project files for consistency with the procedures manual and 6004 MOU. The SEO will continue to work with all three of the regions on their project file management.

The SEO has initiated a project file review procedure that will be incorporated into our 6004 Monitoring Plan. The DOT&PF 6004 Monitoring Plan will be developed prior to submittal of the 15-month monitoring report. The SEO will continue to work with the regions to develop project file structure training.

FHWA Finding (12)

During one interview, the DOT&PF staff asked if there was a requirement to follow FHWA policy for assigned projects. The basis for the question was a disbelief that full completion of the process to comply with Section 106 of the National Historic Preservation Act was necessary to issue a CE determination. This was later followed up with an inappropriate direct contact between the SER and FHWA HQ. The Region staff stated during the interview that they were currently in a dispute with their Statewide Environmental Office for coordinating directly with the State Historic Preservation Officer on a project, which is in conflict with their internal procedures.

A cause for this finding is confusion among staff regarding the responsibilities assumed by the State. Staff interviews informed the review team that it was typical to review a Categorical Exclusion Documentation Form (CEDF) up to four times before submitting to the Statewide NEPA Manager and that even after such review, no CE form or written re-evaluation had ever been accepted without any comments. File documentation also indicated 4 instances where the SER staff requested concurrence to proceed with a project citing applicability of a 2009 MOU between the DOT&PF and SHPO that only applied to State-funded projects and therefore was not applicable to the subject federal projects. The effects of both staff confusion and a lack of an adequate file and tracking system are that errors and omissions become systemic and full compliance across all projects will be difficult to achieve.

DOT&PF Corrective Action (12)

The FHWA review of the State's 6004 program was conducted less than 7 months into the program, and there was some initial confusion regarding the implementation of the 6004 program.

The SEO intends to offer regular statewide teleconferences for the REMs and Statewide NEPA Managers to address process related topics. The SEO will continue to work with all three regions to develop and implement training that specifically targets the 6004 process, including compliance with Section 106 of the National Historic Preservation Act. FHWA staff will be provided the opportunity to attend these training sessions per the 6004 MOU (Stipulation IV(E)(3)).

FHWA Finding (13)

The documentation and staff issues cited for the SER indicate a lack of adequate staff and organizational capability and expertise to effectively carry out the responsibilities assigned under the MOU. The observed differences between the SER and other DOT&PF Regions make it difficult for the DOT&PF to consistently demonstrate compliance with the terms of the MOU from a statewide perspective.

These findings and observations are cross-cutting and apply to a number of MOU Stipulations. Stipulation II(C) makes clear that DOT&PF is subject to the same existing and future substantive and procedural requirements as if those responsibilities were carried out by the FHWA. Stipulation IV sets forth State performance requirements with respect to compliance with governing laws, regulations and the MOU and Stipulation IV(B) establishes requirements for the identification, documentation and review of effects for CE determinations. Stipulation IV(B)4-6 requires the State to document its approval of the CE determination, specify the assigned CE that applies to the proposed project, and include verification of compliance with Federal law, FHWA regulations implementing the NEPA and specific terms of the MOU regarding whether a project may be assigned. Stipulation IV(C)1 requires the State document MOU exclusion findings and the reason for exclusion in the project file. Stipulation IV(D) requires the State to maintain adequate organizational and staff capability and expertise to effectively carry out the responsibilities assigned to it under the MOU, including technical and managerial expertise and resources necessary to consistently demonstrate maintaining adequate capacity to fulfill the requirements of the MOU.

DOT&PF Corrective Action (13)

In March (2010), during FHWA's review of the State's 6004 program, there was only one of the seven environmental staff within Southeast Region that did not have NEPA training. There was a NHI NEPA course taught in Anchorage in January 2010 and two (2) environmental staff members and the Preliminary Design and Environmental Group Chief from Southeast Region attended this course. A second NHI NEPA course will be offered in Juneau this coming month (October 2010) and the intent is to have all engineering design and environmental staff within Southeast Region that are available attend this course.

The SEO will continue to work with all three regions to provide mentoring and more frequent on-site project file and 6004 process reviews. The SEO and Northern Region have developed a method of mentoring and project involvement that will be used as a template for all three regions. The Statewide NEPA Manager makes frequent (approximately every other month) visits to the region and meets with the REM, Project Managers, and environmental analysts to discuss projects and 6004 processes. The additional on-site meetings have greatly assisted both the Statewide NEPA Manager as well as the staff within Northern Region.

The SEO intends to offer regular statewide teleconferences for the REMs and Statewide NEPA Managers to address process related topics. The SEO will continue to work with all three regions to develop, and implement, training that specifically targets the 6004 process. FHWA staff will be provided the opportunity to attend these training sessions per the 6004 MOU (Stipulation IV(E)(3)).

FHWA Finding (14)

Region and Division Staff indicated uncertainty regarding the process to determine whether a project is assigned or not. There are multiple instances where the FHWA Division was not provided with sufficient information that the CE processing was completed at time of request for ATP.

DOT&PF Corrective Action (14)

The SEO will continue to work with all three regions regarding procedure and 6004 CE process training. The SEO will be working with the three regions and Research staff to look at training needs for environmental staff with the intent of developing a training program for the environmental staff.

FHWA Finding (15)

DOT&PF Regions contacted Division staff regarding whether project is assigned when they were requesting ATP. DOT&PF staff is responsible for determining whether or not a project is assigned and reporting that the CE process is complete at the time of a request for ATP.

The State staff should not ask and the Division staff should not answer project specific questions. The cause may be Region staff unfamiliarity with the new 6004 procedures and inconsistent project recordkeeping. The effect is inefficiencies and delay in the process to request ATP approvals.

DOT&PF Corrective Action (15)

The FHWA review of the State's 6004 program was conducted less than 7 months into the program, and there was some initial confusion regarding the implementation of the 6004 program.

The SEO will continue to work with all three regions regarding procedure and 6004 CE process training. The SEO will work with the three regions and Research staff to examine the training needs for the environmental staff with the intent of developing a training program for the environmental staff.

FHWA Finding (16)

Substantial confusion exists regarding the procedure for use of the DOT&PF's Project Information Sheet (PIS).

DOT&PF Corrective Action (16)

To streamline the process, and remove confusion the statewide design and engineering services office (through a Chief Engineer Directive) will issue guidance on how to process the Project Information Sheet (PIS). This would also be emphasized in additional training provided to the regions. The PIS form is not an environmental form. It is a form that is used by numerous divisions within DOT&PF, and that the PIS is not strictly used for FHWA federal-aid funded projects. FHWA efforts to use this form to track the State's 6004 program activities has resulted in errors and confusion. DOT&PF will continue to submit quarterly reports on completed CEs as required per the 6004 MOU. The SEO will continue to work with the those that use the PIS within DOT&PF, and the FHWA to appropriately modify the PIS.

FHWA Finding (17)

Numerous PISs reviewed in Division financial files and Region Office files contained inconsistencies, errors and omissions. For each authorization, the DOT&PF should provide Office evidence that all assigned responsibilities have been completed in accordance with the MOU and FHWA should provide authorization only after receiving that evidence. The cause may be the lack of written procedures, conflicting procedures in the DOT&PF Preconstruction Manual, and unfamiliarity with a new procedure. The effect is inefficiencies and delay in ATP approvals and inappropriate approvals.

DOT&PF Corrective Action (17)

The PIS form is not an environmental form. It is a form that is used by numerous divisions within DOT&PF, and the PIS form is not strictly used for FHWA federal-aid funded projects. FHWA use of this form to track the State's 6004 program activities has resulted in errors and confusion. Proposed changes to this form, and its use, will need to be coordinated with, at a minimum, the DOT&PF Planning, Project Control, Preliminary Design and Environmental Sections. The SEO will continue to work with the PIS form user groups within DOT&PF, and the FHWA to appropriately modify the PIS form.

FHWA Finding (18)

24 of 102 Files reviewed provided no evidence of identifying and reviewing environmental effects of the proposed project. 22 of the 24 were for projects processed as "c" list CEs.

DOT&PF Corrective Action (18)

The SEO will review and provide additional guidance on the way "c" list projects are processed so that the environmental impacts are identified and analyzed before the projects receive environmental approval. The SEO office will also review and modify the class of action form to address this issue.

There were several observations that also pertained to "c" list projects and how they are reviewed and processed. By the SEO reviewing the process and modifying the class of action form these observations would also be addressed.

FHWA Finding (19)

DOT&PF developed a supplemented list of actions that would have "no potential to affect" historic properties dated March 12, 2010.

DOT&PF Corrective Action (19)

Pursuant to Stipulation IV(A)(6) of the 6004 MOU, the FHWA is to be provided an opportunity to review and comment on policies and guidance that are applicable to the State's performance of the 6004 MOU. The SEO will ensure that all future policies and guidance will only be issued after FHWA has been notified and provided the opportunity to review and comment.

FHWA Finding (20)

DOT&PF did not share the guidance with FHWA in advance of implementation as required by the MOU, along with the following pieces of new guidance: October 20, 2009 Guidance on 106 correspondence processing; October, 2009 Categorical Exclusion (CE) Class of Action Consultation Form; Bill Ballard's October 13, 2009, "programmatic adoption" of FHWA COAs prior to September 22, 2009; Bill Ballard's April 22, 2010 guidance email on "adopting FHWA documents". The MOU states that in order to minimize possible conflicts that could lead to MOU termination, the DOT&PF should have provided any new draft guidance to FHWA for review and comment prior to implementation. The cause may be unfamiliarity with the terms of the MOU. The effect is FHWA is unaware of proposed changes in guidance and has no opportunity to provide input on the guidance. In the case of the file programmatic adoption of FHWA COA determinations prior to September, 22, 2009, FHWA would have pointed out that DOT&PF is liable for all of those determinations and would be required to complete re-evaluations to verify the COA and assignability prior to taking major steps to advance the action.

DOT&PF Corrective Action (20)

Pursuant to Stipulation IV(A)(6) of the 6004 MOU, the FHWA is to be provided an opportunity to review and comment on policies and guidance that are applicable to the State's performance of the

6004 MOU. The SEO will ensure that all future policies and guidance will only be issued after FHWA has been notified and provided the opportunity to review and comment.

FHWA Finding (21)

DOT&PF Region staff had the opinion that they did not receive sufficient information from the Statewide Environmental Office to fully prepare them for the new process associated with assignment.

DOT&PF Corrective Action (21)

Section 6004 process and document training was provided to all three regions during the summer and fall of 2009. The environmental staff was not all available at the time. The SEO will be providing this training again prior to DOT&PF's 15-month monitoring report is due as there are new environmental staff.

FHWA Finding (22)

The Regions stated that they have been able to do things in the past that they cannot do now. The change has been more documentation, more detail. They acknowledged updating their procedures; however, many of the practitioners are still unfamiliar with them.

DOT&PF Corrective Action (22)

The FHWA review of the State's 6004 program was conducted less than 7 months into the program, and there was some initial confusion regarding the implementation of the 6004 program. The terms of the 6004 MOU do not provide DOT&PF the same flexibility that FHWA has with interpretation of the regulations. The Regions may view this as not being able to do things under the 6004 MOU that they could under FHWA.

Section 6004 process and document training was provided to all three regions in the summer and fall of 2009. Not all environmental staff were available at the time, and the SEO intends to provide this training again prior to DOT&PF's 15-month monitoring report is due as there are new environmental staff.

FHWA Finding (23)

There was stated uncertainty in processing requirements, detail, etc.

DOT&PF Corrective Action (23)

The FHWA review of the State's 6004 program was conducted less than 7 months into the program, and there was some initial confusion regarding the implementation of the 6004 program.

The SEO will evaluate the environmental procedure manual and procedures and determine if there are any areas that can be improved to increase efficiency and streamlining.

FHWA Finding (24)

38 of 102 project files reviewed lacked evidence of the required finding from Stipulation IV(B)(5). 34 of these project files were for projects that were either "c" list CEs and/or Re-evaluations. The project files should have included documentation of the required CE approval finding. The cause may be that little documentation is developed for some "c" list CEs and DOT&PF was unfamiliar with the need to include this finding in their normal processing of "c" list CEs and did not recognize that the finding was and required for Re-evaluations. The effect is inadequate project documentation of the State's responsibilities, authorities, and liabilities file under the assignment.

DOT&PF Corrective Action (24)

The FHWA review of the State's 6004 program was conducted less than 7 months into the program, and there was some initial confusion regarding the implementation of "c" list actions and re-evaluations.

This finding was a result of unforeseen oversight during DOT&PF and FHWA development of the 6004 program procedures and forms. The SEO will revise the forms to include this language to make certain that this issue is not missed in the future. The SEO also needs to emphasize this portion of the 6004 MOU in future training sessions.

FHWA Finding (25)

23 of 102 files did not identify the specific categorically excluded activity. 17 of those 23 files were for projects assumed with Re-evaluations of prior approvals. The MOU requires the State to identify the specific categorically excluded activity for each project assumed under the MOU. The cause may be the sometimes informal process used in documenting consultations that serve as Re-evaluations. The cause may be a lack of understanding that Re-evaluations require identification of the specific activity category; it should be noted that some previous versions of the CEDF did not identify the specific activity. The effect is inadequate documentation to demonstrate due consideration of the applicability of a project for assignment and to demonstrate compliance with the terms of the MOU.

DOT&PF Corrective Action (25)

The SEO will review procedures and forms to determine if they need to be modified to capture the specific CE activity. Re-evaluations make up the bulk of the projects with deficiencies and the re-evaluation process has been addressed. The re-evaluation form will be updated to capture the necessary changes.

The SEO will continue to work with all three regions to develop and implement training that specifically targets 6004 process, including processing re-evaluations. FHWA staff will be provided the opportunity to attend these training sessions per the 6004 MOU (Stipulation IV(E)(3)).

FHWA Finding (26)

66 of 102 files reviewed provided no evidence of consideration of Unusual Circumstances in determining the Class of Action (COA) for a project.

DOT&PF Corrective Action (26)

The SEO will look at adding language to address unusual circumstances to the various forms that are currently in use. The language will be used during the development of "c" listed projects as well. This issue will be emphasized in training with the environmental staff.

FHWA Finding (27)

It was stated that Regions are shopping for answers from FHWA area engineers. The MOU requires the state to use appropriate managerial and technical expertise to perform functions required under the MOU. DOT&PF staff should have adequate capabilities to assume 6004 responsibilities. The cause may be high turnover of Region staff and a reduced pool of applicants, who may lack relevant experience. The effect is confusion in processing assigned projects, ignorance of procedures or roles/responsibilities and possible delay in processing project reviews and approvals.

DOT&PF Corrective Action (27)

The SEO will continue to work with all three regions regarding procedure and training for the 6004 process. The SEO will work with the region and Research staff to determine the training needs for environmental staff with the intent of developing an environmental staff training program.

FHWA Finding (28)

Four State staff indicated in interviews a problem in running out of training funds and/or not enough Region staff to cover workload. One interviewee stated that the Region ran out of funding for necessary training to perform the 6004 assignment.

DOT&PF Corrective Action (28)

The SEO along with the regions will continue to assess the adequacy of staffing levels and workloads associated with the State's 6004 program. The SEO expects to address this matter in DOT&PF's 15-month monitoring report.

DOT&PF is attempting to seek additional funding in the annual operating budget for environmental training related to the implementation and maintenance of the State's 6004 program.

FHWA Finding (29)

Three interviews revealed that a Region office is understaffed and 6004 has exacerbated the shortage because of additional scrutiny and paperwork. New roles associated with the Assignment (e.g., 106, 404, 6004) have made the situation worse. One interviewee also identified trouble with retention of qualified personnel.

DOT&PF Corrective Action (29)

The FHWA review of the State's 6004 program was conducted less than 7 months into the program, and there was some initial confusion regarding the implementation of the State's 6004 program.

The SEO, along with the regions, will continue to assess the adequacy of staffing levels and workloads associated with the State's 6004 program. The SEO expects to address this matter in DOT&PF's 15-month monitoring report.

FHWA Finding (30)

One interviewee did not think the Region had adequate resources to make NEPA decisions. There were statements that staff is underpaid and should be promoted two steps in range.

DOT&PF Corrective Action (30)

The FHWA review of the State's 6004 program was conducted less than 7 months into the program, and there was some initial confusion regarding the implementation of the 6004 program.

The SEO, along with the regions, will develop an assessment of adequacy of staffing levels and workloads associated with the State's 6004 program. The SEO will continue to work with all three regions regarding procedure and training for the 6004 process. The SEO will work with the region and Research staff to evaluate the training needs of the environmental staff with the intent of developing an environmental staff training program.

FHWA Finding (31)

Region staff made statements regarding the adequacy of staffing that ranged from a need for additional staff to assist with administrative functions, to staff being overloaded with additional responsibilities to the extent that it has impacted capacity to perform the 6004 assignment.

DOT&PF Corrective Action (31)

The SEO, along with the regions, will develop a qualitative method for determining the adequacy of staffing levels and workloads associated with the State's 6004 program. The SEO expects to address this matter DOT&PF's 15-month monitoring report.

FHWA Finding (32)

DOT&PF staff stated that they do not have good "coverage" of the air quality technical discipline. The cause is unknown.

DOT&PF Corrective Action (32)

The SEO will continue to work with the regions to establish the necessary training region staff may need to successfully complete the work under the State's 6004 program. The SEO will work to ensure that there is an air quality subject matter expert in the SEO.

Northern Region recently completed a contract with Sierra Research to prepare both program conformity, and project level air quality conformity determinations. This example will be provided to the other two regions.

The SEO will continue to work with the regions on developing a list of core courses to be added to an environmental staff training program. The SEO has identified air quality as a core course in the initial development of a training plan for DOT&PF environmental staff.

FHWA Finding (33)

In one Region Office, 9 of 11 project files reviewed lacked sufficient project documentation required by the MOU and/or evidence that the State's procedures had been followed.

DOT&PF Corrective Action (33)

The SEO has been working with Southeast Region to assist in getting a file structure in place and correct deficiencies in the project files. Southeast Region has added staff to address the project files. Southeast Region has also coordinated with the SEO and other regions to gain assistance on project file structure, contents, etc.

The SEO staff recently reviewed four (4) project files for consistency with the environmental procedures manual and the 6004 MOU. The SEO will continue to work with all three of the regions on their project file management and structure to ensure that the project files are consistent with the procedures manual and the requirements of the 6004 MOU.

FHWA Finding (34)

In another Region Office 12 of 26 project files reviewed lacked sufficient documentation.

DOT&PF Corrective Action (34)

The SEO will continue to work with the regions on developing a project file structure and maintaining project files. The SEO will provide training to the regions on file management and work with the staff within the regions to ensure consistency with the procedures manual and the 6004 MOU. The SEO will schedule a time with Central Region to conduct a similar project file review as has been recently conducted in both Northern and Southeast Regions.

FHWA Finding (35)

Many project files lacked evidence of the printed name of the State official approving the determination. These were mainly "c" list CE approvals, Consultations that served as Re-evaluations, and PCEs. Project documentation should include the printed name of the approving official in each approval taken under the assignment. The cause is likely that the

State's procedures and forms were not developed and revised to address this requirement. The effect is that required documentation is unavailable.

DOT&PF Corrective Action (35)

The FHWA review of the State's 6004 program was conducted less than 7 months into the program, and there was some initial confusion regarding the implementation of "c" list activities.

The SEO will continue to work with the regions on the development of guidance for how to process "c" listed projects and what is required for these projects. This will also be emphasized in training provided to all the regions. The SEO will add a place for the printed names on our various forms.

FHWA Finding (36)

Several files were identified where FHWA approved an original CE determination that contained errors or omissions or where compliance with an applicable environmental law was lacking (i.e., inappropriate Section 106 No Potential to Effect Determinations) that were not remedied by the State during a re-evaluation under the Assignment.

DOT&PF Corrective Action (36)

The FHWA review of the State's 6004 program was conducted less than 7 months into the program, and there was some initial confusion regarding the implementation of re-evaluations as the process was different than it was under FHWA prior to the signing of the 6004 MOU.

The SEO will provide re-evaluation process and 6004 process training to all three regions. The SEO will work with the regions to develop a core course that will be added to a training program for the environmental staff.

FHWA Finding (37)

9 of 11 re-evaluations reviewed did not contain the required finding. The cause for this may be a lack of familiarity with the new DOT&PF Environmental Manual Chapter on Re-evaluations and a general lack of understanding on the purpose and requirement for a Re-evaluation pursuant to 23 CFR 771.129.

DOT&PF Corrective Action (37)

The FHWA review of the State's 6004 program was conducted less than 7 months into the program, and there was some initial confusion regarding the implementation of re-evaluations as the process was different than it was under FHWA prior to the signing of the 6004 MOU.

The SEO will provide training regarding re-evaluations and 6004 process to all three regions. The SEO will work with the regions to develop a list of core courses to be added to a training program for the environmental staff.

FHWA Finding (38)

22 of 102 files did not provide sufficient evidence that the projects are in compliance with all federal laws and regulations. 5 files (3 projects) did not contain sufficient evidence to verify compliance with Section 4(f). DOT&PF relied on questionable or inappropriate determinations made by FHWA that a project had no potential to effect historic properties in 16 of the 22 instances. In 2 of the 22 cases, it appeared that DOT&PF made questionable or inappropriate determinations that a project had no potential to effect historic properties. Project files should contain evidence that projects comply with all federal laws and regulations. The causes for the reliance on questionable or incorrect determinations made by FHWA may be attributable to a belief that the decision had been made and does not need to be revisited. The causes for lacking sufficient evidence for the Section 4(f) compliance and inappropriate determinations

under Section 106 may be due to lack of a precise understanding of the requirements and how to apply them in a given situation. The effects of these instances are an increased risk that a compliance requirement will be missed during NEPA. This may result in damage to protected resources, loss of public trust and credibility with other agencies.

DOT&PF Corrective Action (38)

The program review did not identify specific concerns, particularly in the project spreadsheet for “106 finding appropriate”. This lack of specifics made it difficult to propose corrective actions directed at the specific concerns, rather than to the overall Section 106 process. One issue that may have occurred involved documentation of historic property boundaries. This is being addressed during reviews of cultural resource reports and Section 106 initiation and finding letters.

The SEO will work with the regions to develop a list of core courses to be added to a training program for the environmental staff. Section 4(f) training needs to be offered routinely to the regions, the SEO has identified Section 4(f) as a core course in our initial development of a training plan for DOT&PF environmental staff.

OBSERVATIONS AND ASSOCIATED CORRECTIVE ACTIONS

The CE Assignment Compliance Review report listed twenty six (26) specific observations. An observation was circumstance where FHWA noted that a process or procedure may be improved. Within the report observations were sometimes followed by recommendations or FHWA suggestions on how to improve the process or procedure. Upon reviewing the final report DOT&PF noticed that there were observations that appeared to address similar issues, and would also be addressed by development of corrective actions for the various findings also listed in the report. This section will address only those observations that specifically would not be addressed by the corrective actions associated with the 38 findings.

FHWA Observation (1)

Information gained through interviews and review of project records indicates that there is some confusion in what actions are included in the example activity of modernization of a highway, especially regarding realignment projects. One project, 62638, may be a realignment project that falls outside the scope of "highway modernization." Since the term "realignment" is not included in the activity listed in regulation for highway modernization, it is necessary to interpret when a roadway realignment is part of modernization of a highway (assignable under the MOU) and when it is not (not assignable).

The intent in the description of actions associated with highway modernization appears to be limited to those that limit, for the most part, construction -activities to the footprint of the existing roadway or at most abutting the existing roadbed. In this way, minor realignments would likely fit with the highway modernization category. But when roadway realignments depart a distance further than the existing roadbed, there is the likelihood of greater environmental impacts that are usually associated with new highway alignments. While one could argue that realignments that depart from existing roadways may still result in no significant impacts, because highway realignment is not an action listed in regulation and has not been included in Appendix A of the MOU, it would not be assignable.

Stipulation I(A,B) in the MOU defines the scope of activities that the State may determine as a designated activity that the State may assume the FHWA's NEPA responsibilities and liabilities. The MOU defines those activities listed in regulation in 23 CFR 771.117(c) and the example activities listed in 23 CFR 771.117(d). With assignment of this responsibility, the State must determine whether the proposed activities of a specific project are included in the actions listed in regulation. Because the actions listed in regulation are described in general terms, some interpretation is needed to determine whether a specific project action fits the class of action listed in regulation. This discussion focuses on how one action,

highway realignment, mayor may not fit under modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes.

The MOU is silent regarding the process the State must follow to make its determinations. However, Stipulation IV(A)(1) says that the FHWA may terminate the MOU or a responsibility assigned in the MOU if the State makes determinations not in accordance with FHWA regulations. Also, while the MOU lacks language on how the State should ensure that its determinations comply with the scope of the actions in regulations, the monitoring provisions of the MOU allow the Division Office to evaluate whether those determinations are in accordance with FHWA regulations.

DOT&PF Observation Corrective Action (1)

FHWA review of the State's 6004 program was conducted less than 7 months into the program, and there was some initial confusion regarding the implementation of the 6004 process and what is assigned to the State under the 6004 MOU with regard to projects containing roadway realignment.

The SEO has determined that there are areas where guidance and clarification from the SEO and FHWA have not been particularly clear. The term "highway modernization" is one area that needs to be defined for the implementation of the 6004 MOU. The SEO office will continue to work with the regions on developing a definition for "highway modernization". The SEO will work with FHWA on developing a process by which such activities might be reviewed and added to the 6004 assignment.

FHWA Observation (2)

Based on information gained from interviews DOT&PF has not developed procedures, a plan or approach for a quality assurance program to evaluate and summarize its overall performance of the provisions of the MOU for reports due on months 15 and 30 of the MOU. DOT&PF staff indicated no process reviews have been conducted, nor were any planned. We observed many instances of attention to errors and omissions in project decision making and documentation, both in interviews and project records, but we could not determine that a plan or approach to continuously monitor the adequacy, efficiency, and capacity of the procedures of the assigned CE program has been developed.

The cause may be that the assignment is still very new and DOT&PF has focused on its development of implementing procedures, new forms, and quarterly reporting. The effect of not having developed a plan or approach to evaluation of its performance may result in difficulty in preparing reports, perhaps delay the completion of those reports, and missed opportunities to improve the process.

DOT&PF Observation Corrective Action (2)

The SEO has begun developing an internal monitoring plan. The SEO will continue to work with the regions to develop the final monitoring plan.

FHWA Observation (3)

Section 106 correspondence to tribal officials in files (including MOAs) and 106 templates do not mention that FHWA is responsible for formal government-to-government consultation.

DOT&PF Observation Corrective Action (3)

The SEO has modified the Section 106 templates used during the processing of projects that fall under the 6004 MOU. These new templates will be provided to FHWA so that they will have an opportunity to review and comment, per the 6004 MOU Stipulation IV(A)(6). The revised templates will be made available on the SEO website as soon as they are ready for distribution.

CONCLUSION

The July 2010 *Categorical Exclusion (CE) Assignment Compliance Review Final Report* that FHWA drafted has demonstrated that the State's 6004 Program not only has areas that need attention but also has areas of success. The report included observations of areas where FHWA feels that the State's 6004 program has created improvements in the processing of categorical exclusions. DOT&PF continues to be committed to working with FHWA in implementing the State's 6004 program.