Process Review

California Division Office
Categorical Exclusion (CE) Assignment Monitoring Review
(23 U.S.C. 326)

Final Report
FY 2015

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Executive Summary

The Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) Section 6004 (23 USC 326) allowed for the U.S. Department of Transportation (USDOT) to assign to the States the responsibility of determining whether a proposed project qualifies as a Categorical Exclusion (CE), thereby addressing National Environmental Policy Act requirements. The Moving Ahead for Progress in the 21st Century (MAP-21) transportation bill superseded SAFETEA-LU and made some minor changes to Section 6004, but did not materially change the provisions of National Environmental Policy Act (NEPA) assignment to the California Department of Transportation (Caltrans). CE Assignment was first approved in 2007 and then extended for three-year periods in 2010 and 2013.

Caltrans' CE Assignment (Assignment) performance is governed by a Memorandum of Understanding (MOU) that calls for the Federal Highway Administration (FHWA) to conduct a Process Review between the 19th and 31st months of the term of the MOU. The purpose is to review Caltrans' performance under the MOU in accordance with Section IV.F.5 of the June 2013 MOU. This report is the fifth FHWA CE Process Review.

The Review Team evaluated a total of 175 regular CE files from Districts 3, 4, and 10, and 10 Emergency Relief (ER) files recorded between January 1, 2015 and June 30, 2015. The 10 ER projects from Districts 1, 7 and 12 were considered separately in this review. For the field review, the Review Team looked at 20 CE project files in District 3, 20 files in District 4, and 19 files in District 10. Caltrans provided technical and logistical support for the file reviews.

This Process Review identified 5 findings and associated corrective actions and14 observations (combination of Desk Review, Field Review and ER Evaluations) along with recommendations that the FHWA team believes will improve and facilitate Caltrans' execution of the Assignment. Findings are statements pertaining to compliance with a regulation, statute, FHWA guidance, policy, or procedures, Caltrans procedures, or the 326 MOU. Observations are circumstances noted where FHWA believes a process or procedure may be improved. Recommendations are actions that FHWA thinks will improve the process and or the program.

FHWA also identified three Successful Practices. These included: 1) providing regular training; 2) keeping applicable manuals and guidance up-to-date, such as in the Standard Environmental Reference; 3) and using interdisciplinary teams in project evaluations.

The Review Team concluded that Caltrans is in compliance with applicable Federal and State laws, including NEPA. Caltrans maintains appropriate record-keeping requirements and has adequate staff to maintain the Assignment. At the same time, there is some room for improvement, such as completing all parts of the CE Form and Checklist, and ensuring that all of the required documentation is in the project file.

Background

Categorical exclusions are a class of NEPA actions which, based on past experience with similar actions in similar contexts, do not involve individual or cumulatively significant impacts to the natural or human environment. These actions do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic, or other resource; do not involve significant air, noise, or water quality impacts; do not have impacts on travel patterns; and do not otherwise, either individually or cumulatively, have any significant environmental impacts (23 CFR 771.117(a)).

SAFETEA-LU Section 6004 allowed the U.S. DOT to assign to the States the responsibility for determining whether or not a project is categorically excluded from the requirement to prepare an Environmental Assessment or an Environmental Impact Statement. Three states, California, Alaska and Utah, accepted those responsibilities. However, the U.S. Government's trust responsibility to Native American Tribes for conducting government-to-government consultations with Native American tribal governments is specifically retained by the FHWA, and could not be assigned to any State. In addition, any decisions outside of the environmental phase of project development (e.g., Right-of-Way decisions for Federal land transfers and engineering decisions for modified access to the Interstate) are also not assigned to Caltrans, and these decisions are subject to the provisions of the 2010 Stewardship & Oversight Agreement between Caltrans and the FHWA California Division. The Assignment of environmental decision-making for 6004 CEs to Caltrans is governed by a Memorandum of Understanding (MOU) signed by Caltrans and FHWA California Division initially on June 7, 2007. The term of the MOU is for three years after which time it can be renewed. The MOU has subsequently been extended twice for three-year increments. The next extension is scheduled for June 2016.

For these categorically excluded projects, Caltrans also assumed the FHWA's responsibilities for coordination and consultation under other Federal environmental protection laws, such as the Endangered Species Act, Clean Water Act, the National Historic Preservation Act, Coastal Zone Management Act, and Section 4(f) of the U.S. DOT Act of 1966. In the implementation of CE Assignment in California, Caltrans' environmental review, interagency coordination and consultation, public participation, and other related responsibilities for the 6004 CEs assigned under the MOU are subject to the same existing and future procedural and substantive requirements as if the responsibilities were carried out by the FHWA.

As noted at 23 U.S.C. 326, there is also a requirement that the FHWA conducts monitoring reviews of the State to assure compliance with the stipulations of the 6004 MOU, as well as with the FHWA's regulations and policies in environmental analysis, including Caltrans' compliance with the requirements of the Federal environmental protection laws administered by Federal resource and regulatory agencies. The monitoring reviews are also intended to verify that the States have the financial and staff resources to carry out the requirements of the MOU.

This is the fifth CE Assignment monitoring review in California. This review was conducted through a desk review of all 6004 CE determinations completed and submitted to FHWA by Caltrans District 4 (Alameda, Contra Costa, Sonoma, Napa, and Solano Counties), District 3

(Butte, Colusa, El Dorado, Glenn, Nevada, Placer, Sacramento, Sutter, Yolo, and Yuba), and District 10 (Alpine, Amador, Calaveras, Mariposa, Merced, San Joaquin, Stanislaus, and Tuolumne), and included a review of 59 project files. The review was conducted to examine the quality, and consistency of the information in the CE Form, Checklists, and project files in the three districts. The review enabled the review team to determine and document if any issues were isolated incidents, procedural implementation errors, or systemic in nature. The data and information collected in the desk review, and project file review were analyzed by the review team to identify trends for both successful practices and for the areas that need the FHWA's technical advice and assistance. The review team coordinates the results with Caltrans to ensure that there is a mutual understanding of the results, as well as the potential opportunities for process improvements at the statewide level.

This report includes FHWA California Division's independent evaluation of Caltrans' implementation of the 2 findings and 6 recommendations made in the fourth CE Assignment Program Monitoring Review, completed in FY 2014. The FY 2014 evaluation is located in Appendix A of this report.

Purpose and Objective

The purpose of this review was to evaluate the level of compliance with the provisions of the MOU, including compliance with NEPA and other Federal environmental laws and regulations.

In particular, it was the purpose of the Review Team to focus on similar risk areas identified in the FY 2014 CE Review done in Districts 4, 6 and 12. The Review Team examined both procedural and substantive compliance in Caltrans Districts 3, 4, and 10 for this review.

The primary objective of this monitoring review was to evaluate and document Caltrans' performance and successes achieved under the CE Assignment Program in California. The following seven performance measures and compliance indicators were used to gauge the level of program achievement.

I. CE determinations were supported by the project description.
II. CE decisions are factually and legally supportable at the time the decision is made.
III. CE decision-making procedures comply with NEPA, 23 CFR 771.117, and the MOU.
IV. The State has met the quality control requirements of the MOU.
V. The State has complied with other Federal and State legal requirements.
VI. The State has complied with record-keeping requirements.
VII. The State has complied with all requirements for ER CEs finalized between January 1, 2015 and June 30, 2015.

Based on these performance measures and indicators this year's review had four specific objectives:

1. Verify that the CE documentation was appropriate.

2. Verify that Caltrans was in compliance with applicable laws, regulations, and the provisions of the MOU.
3. Review the completeness of the project files.
4. Report findings and observations with any corrective actions or recommendations to Caltrans for improvements.

Scope and Methodology

The scope of this review covered the CEs approved in Caltrans Districts 3, 4 and 10, between January 1, 2015 and June 30, 2015, as well as all Emergency Relief (ER) CEs completed by Caltrans statewide for the same time period.

The following steps were taken in data collection and analysis:

a. Reviewed all CE types (electronic files), that are on the "C" list, "D" list, and the Appendix A list for the three districts.
b. Made independent determinations on accuracy, and completeness.
c. Itemized any problem area for individual CEs.
d. Reviewed 59 project hard copy files in the districts for accuracy and completeness.

This 2015 Process Review consisted of:

- Perform a file review on a statistically valid sample of CEs in Districts 3, 4 and 10;
- Report findings, observations and propose recommendations to Caltrans to improve the execution of CE Assignments;
- Identify successful practices; and
- Evaluate the implementation of Corrective Actions and Recommendations from the 2014 FHWA CE Process Review.

FHWA California Division conducted a desk review of all CEs approved between January 1 – June 30, 2015 in Districts 3, 4, and 10. The purpose of the desk review was to verify that the project descriptions support the CE determinations, and that the documentation complies with applicable laws, regulations, and the provisions of the MOU. The effort was based on a project-by-project review, with quantified observations and also included a review of all Emergency Relief (ER) CEs approved statewide between January 1, 2015 and June 30, 2015.

Key review terms:

Finding - A statement pertaining to compliance with a regulation, statute, FHWA guidance, policy, or procedures, Department of Transportation procedures, or the 326 MOU.

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

Corrective Action – An action required to address a deficiency identified in a Finding.

Recommendation – The Review Team's suggestion on how to improve a process or procedure based on an Observation.

2015 Results

FHWA reviewed a total of 175 individual CE determinations for Caltrans' Districts 3, 4, and 10. Ten ER projects were also reviewed, for a total of 185 CEs. The breakdown is provided below (CP = Capital Program; LA = Local Assistance). The numbers of projects reviewed are:

Desktop Review
District 3: 55 (15 CP; 40 LA)
District 4: 77 (23 (CP; 54 LA)
District 10: 43 (13 CP; 30LA)

ER Projects
Statewide Total Approvals: 10 (4 Capital projects- one each in Mendocino, Humboldt, Los Angeles and Orange Counties and 6 Local Projects - all in Los Angeles County)

District Project Files; 59
District 3: 20 (6 CP; 14 LA)
District 4: 20 (5 CP; 15 LA)
District 10: 19 (6 CP; 13 LA)

Findings and Observations: Desktop Review

Findings

Finding #1. There were three CE Checklists that were missing signatures from the individual that prepared the Checklist.

Corrective Action. Ensure all project files have signed CE Determination Forms and CE Checklists. Provide training or other measures to ensure there are approved NEPA documents for every project with Federal funding.

Finding #2. One project description did not support the use of the CE c4 selected by Caltrans.

Corrective Action. CE c4 is limited to elements of the State Highway Safety Plan and not construction-related activity. Use of this CE would be rare and this information needs to be related to the Districts.

Observations

Observation#1. Although not extensive, there were 14 instances where the Project Description did not support the particular CE that was used. The Review Team does note that there has been important and noticeable improvement in Project Descriptions relative to previous reviews.

Recommendation. Some additional training, potential modifications to the templates and enhanced QC appear warranted.

Observation #2. There was no indication that California Environmental Quality Act (CEQA) had been completed on many of the Local CE Forms. In most cases, the CEQA Determination section is either left blank or crossed out, not giving any indication how CEQA was addressed. After follow-up with Caltrans FHWA was informed that Local Agencies do not fill out the CEQA section, since this would leave Caltrans as the responsible agency for the decision.

Recommendation. Modify the CE Determination Form, under the Caltrans CEQA Determination section to reflect how CEQA is being addressed.

Observation #3. Checklist Section 1 #2. The wording is unclear and contradictory. Section 1 #2 is to be marked "yes/no" only if the CE falls under NEPA Assignment 23 USE 327. However, below it in parentheses it states, "Use only if project does not qualify under CE Assignment 23 USC 326". The two statements conflict with one another.

Recommendation. For purposes of flow and continuity, it's recommended that Section 1, #2 is moved under Section 1, #1, and clarify upfront whether the CE is being processed under 326 or 327.

Observation #4. Checklist Section 1 #3. The Checklist is confusing. It could be interpreted that the section only needs to be completed if CE 26, 27 or 28 is used or it should be completed regardless of what CE was used. Even if other CEs were used, sometimes this section was completed and sometimes not.

Recommendation. For consistency and completeness, we recommend that the language be clarified such that this section needs to be completed even if CEs other than 26, 27 or 28 are used.

Observation #5. Checklist – Cultural Resources Section. Screened undertaking needs to be better explained. It may exempt Caltrans from coordinating with SHPO, but there still needs to be a determination.

Recommendation. Modify the Cultural Resources section by clarifying the determination made when a Screened Undertaking is identified (i.e. no adverse effect, etc.).

Observation #6. Checklist – Biology Section. The section is confusing and as a result improperly completed in many cases. The "No Section 7 Needed" box is a redundant action which doesn't identify how the determination was made (i.e. no effect, not likely to adversely affect, etc.).

Recommendation. Revise Section 7 section of the Checklist.

Observation #7. Essential Fish Habitat, 6(f), ROW, and Section 401 were not always addressed on the Checklist.

Recommendation. Provide training to ensure that all sections of the Checklist are addressed.

Observation #8. Checklist - Floodplains Section. Not clear how "No Significant Encroachment" is being defined.

Recommendation. Add a citation to that section under "No Significant Encroachment" to clarify how the term is to be defined.

Observation #9. Identification of a 4(f) determination as "de minimis", Programmatic, or Individual was not complete for all checklists.

Recommendation. A stronger emphasis on completing the checklist should be made during the next training session.

Findings and Observations: ER Projects Review

The review of the ER CEs identified issues similar to those found in the desktop and district reviews. Namely, these included identification of CEQA Compliance, Section 1 #2 Completeness, Section 1 #3 Completeness and important omissions/incompleteness on the Checklist for Cultural Resources, Section 7, EFH and ROW. These are not reiterated here. The result is that only two additional Observations were identified, as indicated below.

Observation #1. More than one document left it unclear if the ER work was being done based on a Caltrans District Director's Order alone, since a Proclamation by the Governor or President was not in included in the documentation. The information provided for one ER project indicated that the ER work was done in accordance with a March 2, 2015 Proclamation, which did not cover work done in another county. It is possible that the work in the second county was covered under a separate Proclamation. Two Capital projects did not have a Governor's or Presidents' Proclamation of a State of Emergency, and three local projects did not have the Secretary of State's signature.

Recommendation. Caltrans HQ needs to make the requirements for declaring an emergency clear to the Districts, including the proper documentation, approvals and timelines. This also includes the identification of the specific Proclamation, that the work is being done under, and

the Secretary of State's signature.

Observation #2. The HazMat box was not marked on one Checklist; therefore it is unclear if the required HazMat work was done. One project marked all of the boxes in the Cultural Resources section, except Adverse Effect, and one other project that did not have a date for a Section 7 concurrence letter to support a Not Likely to Adversely Affect determination.

Recommendation. Ensure that CE Checklists are fully and accurately completed. In addition, it needs to be emphasized that only one box for determinations should checked.

Findings and Observations: Project File Review in District

Findings

Finding #1. The data in 9 of the 59 project files was not consistent, and conflicted with the CE Checklist.

Corrective Action. Ensure the project file has the necessary documentation to support the CE Checklist. If necessary, include a training segment emphasizing the importance of project file maintenance from a legal perspective.

Finding #2. The Section 7 Species List was out of date in 12 files reviewed.

Corrective Action. Ensure each project file include a species list which is dated no more than six months from the date of the CE determination.

Finding #3. The project description for one project was inconsistent with the project description in the FSTIP.

Corrective Action. Ensure the FSTIP accurately reflects the project description. If the project description changes significantly, then the FSTIP may need to be amended.

Observations

Observation #1. The project was missing information that was required to support the CE Checklist in 21 files.

Recommendation. Ensure the project file has the necessary documentation to support the CE Checklist. If necessary, include a training segment emphasizing the importance of project file maintenance from a legal perspective

Observation #2. The Section 7 Species List was missing from the project file in 12 cases.

Recommendation. Ensure the project file has the necessary documentation to support the CE Checklist. If necessary, include a training segment emphasizing the importance of project file maintenance from a legal perspective

Observation #3. There was no FSTIP documentation in 28 files. Most of the projects had to be researched online during the course of the review to determine FSTIP accountability.

Recommendation. Including the FSTIP in the project file is a Caltrans requirement; therefore, FHWA does not have a recommendation for this Observation.

Successful Practices

Successful Practice #1. Caltrans continues to provide training to staff, particularly relevant to NEPA assignment and associated laws and regulations.

Successful Practice #2. Caltrans is doing a very good job of updating applicable manuals and guidance.

Successful Practice #3. Caltrans does a good job of using multi-disciplinary teams in project review and development.

Conclusion

This is the fifth Process Review for CE assignment. This report identifies a total of 5 findings and 14 observations that should be further addressed. The review resulted in 2 Findings and 9 Observations from the desktop review, 2 Observations from the ER review, and 3 Findings and 3 Observations from the project file review.

The review team concluded that Caltrans is complying with applicable Federal and State laws, including NEPA. Caltrans maintains appropriate record-keeping requirements and has adequate staff to maintain the Assignment. There is some room for improvement, such as completing all parts of the CE Form and Checklist, and ensuring that all of the required documentation is in the project file.

The 2 Findings in the desktop review involved three missing signatures on Checklists, one project description that did not support the CE selected, and a lack of procedural accounting in ER projects.

The majority of the Observations for the desktop review involved inconsistencies in how the CE Checklist was completed, and areas that were not completed. It appears that the majority of the issues had to do with the Checklist itself, and modifications to the checklist should resolve the majority of the issues.

Two of the three Findings in the file review consisted of 10 project descriptions that did not support the exclusion or the project description in the FSTIP. There were significantly fewer issues involving project descriptions found in this review. Additional training should be sufficient to address these issues. The third finding, involving 12 out of date Section 7 Species Lists, did not appear to have an impact on listed species within the project footprint. This is an important issue, but it can be addressed through specific training.

All of the Observations made during the project file review involved missing documentation.

One Observation identified during the review of the ER projects related to clarifying ER procedures and requirements. Inclusion of an ER section in the CE Checklist should address this. The second Observation related to missing information or inconsistent determinations.

Within 30 days of receipt of this final report, the FHWA California Division requests that Caltrans provide an Implementation Plan on how Caltrans intends to address the Review Team's conclusions.

Appendix A

Recommendations and Actions from 2014 Process Review

The following descriptions are abbreviated. For complete descriptions, refer to the original 2014 report.

Findings

Finding #1. CE not signed by senior staff.

Corrective Action. Ensure that all CEs are reviewed and approved by senior staff.

Caltrans Implementation Action. In CE trainings, Caltrans is reinforcing the importance of correct approval signatures on CE Checklists.

Finding #2. CE (C9) ER Project authorized by Director's Order, and not the Governor or President. A Caltrans Director cannot make this declaration for this CE.

Corrective Action. All District Directors need to be notified by Caltrans Headquarters that this is not in accordance with emergency procedures.

Caltrans Implementation Action. On June 7, 2013, the CE Checklist CE/CE Determination Form was updated to reflect the renewed MOU and Emergency rulemaking as part of MAP-21. In addition, further clarification was provided in the regularly disseminated Coordinator Update and during Hot Topic meetings, which are attended by all Environmental Deputies and Office Chiefs.

Observations

Observation #1. Project description may not be complete such that all work is identified or fully explained. More detailed information would better support the use of a CE and not lead to a higher level of documentation (i.e., an EA or EIS).

Recommendation. Provide adequate information in the project description to identify all the proposed work to support the CE that is selected.

Caltrans Implementation Action. On February 11, 2014, the SER Chapter 30, "Categorical Exclusions", was updated to include more information on project descriptions.

Observation #2. A number of the CEs utilized outdated checklists. The current Checklist is dated June 7, 2013.

Recommendation. Inform staff of updated templates and the need to use the most current versions.

Caltrans Implementation Action. The FHWA reference to the June 7, 2013 version of the CE Checklist was inappropriate since this Process Review covered projects and CE Checklists which were completed between August 4, 2011 and July 31, 2012. Staff is notified via "web blasts" and the Coordinator Update when forms and/or templates are updated. In addition, a copy of the emergency declaration will be included in the project files.

Observation #3. Many CEs do not identify coordination/consultation with the resource/regulatory agencies even though the project may be in listed species habitat or may have cultural resources occurring on-site. There also were occasions when the information was provided and it was not consistent throughout the write-up. The effect is that the administrative record may not reflect compliance with laws and regulations intended for protected/regulated resources.

Recommendation. FHWA believes that inclusion of this coordination/consultation and the outcome in the CE is imperative for legal sufficiency. This can be provided in the Continuation Page of the most recent CE template/checklist.

Caltrans Implementation Action. The FHWA Process Review was limited to the CE Checklist and CE Determination Forms and did not include a review of project files necessary to support this Observation. Confirmation of consultation (i.e., BO, NLAA, MOA) dates are provided on the CE Checklist. Caltrans offers CE training to staff annually. Based on Observation #3, the training includes added emphasis on the importance of completing the CE Checklist. In addition, Caltrans has met with FHWA to explain how the CE Checklist documents consultation.

Observation #4. Only one CE selected, but it does not cover the full scope of the project or the CE applied only covered a portion of the proposed work.

Recommendation. Write the Project Description such that the work is all-inclusive and properly integrated with the selected CE. This could require minor modification of the CE template.

Caltrans Implementation Action. In CE trainings, Caltrans is emphasizing the importance of accurately determining the most correct CE type that matches project descriptions.

Observation #5. No information was provided to support an emergency situation had been declared by the Governor or President.

Recommendation. Provide the information regarding the date and declaration number in the project description or on the continuation sheet.

Caltrans Implementation Action. On June 7, 2013, the CE Checklist CE/CE Determination Form was updated to reflect the renewed MOU and Emergency rulemaking as part of MAP-21.

In addition, further clarification was provided in the regularly disseminated Coordinator Update and during Hot Topic meetings, which are attended by all Environmental Deputies and Office Chiefs.

Observation #6. There was a number of CEs which were not supported by the project description.

Recommendation. Training to improve project descriptions.

Caltrans Implementation Action. In CE trainings, Caltrans is emphasizing the importance of accurately determining the most correct CE type that matches project descriptions.