

Process Review

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

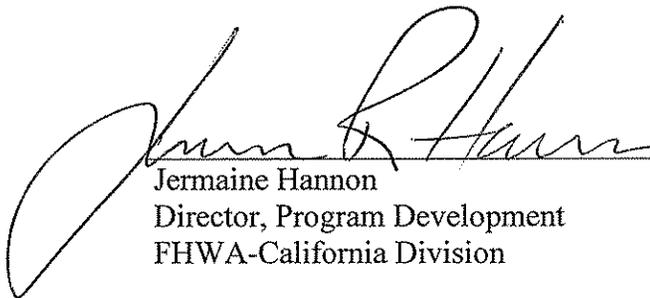
Final Report
FY 2013
For the Period Between August 4, 2011 through July 31, 2012

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Executive Summary

The Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) Section 6004 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 The Moving Ahead for Progress in the 21st Century (MAP-21) transportation bill superseded SAFETEA-LU and made some minor changes to Section 6004, but did not materially change the provisions of NEPA assignment to the California Department of Transportation (Caltrans). The program was initiated in 2007 by executing a Memorandum of Understanding and this MOU has been renewed for three-year periods in 2010 and 2013.

Caltrans' Section 6004 Assignment (Assignment) is governed by a MOU that calls for the Federal Highway Administration (FHWA) to monitor the State's performance under the MOU. The MOU executed in 2013 indicates that the monitoring would occur in the form of a Program Review that would occur on an approximately 19-month cycle to evaluate Caltrans' implementation of the Assignment. This report is the monitoring effort by FHWA of Caltrans performance under the CE Assignment.

The primary objective of this monitoring review was as follows:

- Evaluate the implementation of recommendations from previous monitoring reviews;
- Identify successful practices;
- Verify CE determinations are appropriately documented.
- Verify CE decision-making procedures comply with NEPA, 23 CFR 771.117, and the MOU.
- Identify any findings, observations, or recommendations that would serve to improve Caltrans' project review process and decision making under the CE Assignment.

The FHWA limited this monitoring to a desktop review of the Categorical Exclusion (CE) Checklist and the CE/CE Determination (Forms). Due to budgetary constraints it was not possible to conduct site visits and review the complete project "file of record." As requested by FHWA, Caltrans provided electronic copies of the Forms for Districts 4, 6, and 12. Capital and Local Program projects in Districts 4 and 12 and all Capital Projects in District 6 were reviewed. District 6 Local Programs CEs were not reviewed due to time restraints.

The review team concluded that Caltrans is generally making appropriate determinations, and overall, is in substantial compliance with all applicable Federal and State laws, including NEPA. The review team found that Caltrans has maintained appropriate record-keeping and has adequate financial resources and staff to carry out the MOU. At the same time, there is room for improvement, particularly related to project descriptions, completing all parts of the Forms and providing more information on consultation efforts.

This report identifies two (2) findings with corrective actions and five (5) observations with recommendations. Findings are statements pertaining to compliance with a regulation, statute, FHWA guidance, policy, or procedures, Caltrans procedures, or the Section 6004 MOU and must be corrected. Observations are circumstances noted where FHWA believes a process or procedure may be improved and are provided for consideration only.

The two Findings and five Observations are summarized below.

The first Finding is based on a few occurrences where the CE Checklist was not signed by the preparer (although the preparer's name was printed on the Form.) The second Finding is based on a review of the Forms that shows that the emergency relief CE was improperly associated with projects authorized as an emergency by the Caltrans District Director instead of the Governor or President. Corrective actions for the two findings are identified in this report.

The first observation notes that for some Forms the Project Description provided did not fully explain the proposed work. The second observation is that there were a few occurrences where the CE Checklist pre-dated the review period. The third observation was that the CE Checklist did not contain supporting resource/regulatory consultation information. The fourth observation was that several Forms lacked information to support the use of the emergency relief CE. The fifth observation was that several CE Determination Form Project Descriptions could not be reconciled with the CE action identified. The review team estimated that up to 15% of the CE action identified in the project file did not fully align with the project description.

FHWA also identified five Successful Practices. These included: 1) providing environmental commitments on a continuation page of the CE (this was very helpful in the evaluation and should be encouraged); 2) providing regular training; 3) keeping applicable manuals and guidance up-to-date, such as in the Standard Environmental Reference and Local Assistance Procedures Manual; 4) continuing the effort to integrate data bases; and 5) continued use of multi-disciplinary teams in project review and development.

Background

Categorical Exclusions (CEs) are a class of National Environmental Policy Act (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 are actions which 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, have assumed these responsibilities. However, the MOUs that define the

responsibilities assumed by the States, exclude the assignment of the U.S. Government's trust responsibility to Native American Tribes for conducting government-to-government consultations. In addition, the MOUs do not assign any non-environmental decisions (e.g., right of way approval 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.

In addition to assuming FHWA responsibility for making categorical exclusion determinations, Caltrans also assumed the FHWA's responsibilities for compliance with 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 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.

The provision of law that allows FHWA to assign its CE responsibilities to a State, 23 U.S.C. 326, also requires that FHWA monitors the State's compliance with the stipulations of the MOU. 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 fourth CE Assignment monitoring review in California. This review was conducted by a desk audit of all 6004 CE determinations completed and submitted to FHWA by Caltrans District 4 (Alameda, Contra Costa, Sonoma, Napa, and Solano Counties) and District 12 (Orange County), plus Capital Projects in District 6 (Madera, Fresno, Kings, Tulare, and Kern Counties.). The audits were conducted to examine the quality, consistency, and accuracy of CE determinations in the districts. The audit enabled the team to determine and document if any issues were isolated incidents, procedural errors, or systemic in nature. Each CE Checklist and CE Determination Form was carefully reviewed by the FHWA Team to (1) understand how compliance with each federal environmental law, assigned under the 6004 MOU, was being documented; (2) identify areas for improvement and/or opportunities for FHWA's technical advice and assistance. The review team coordinates the results with Caltrans to ensure that they understand the results and potential opportunities for process improvements at the statewide level.

This report also includes FHWA California Division's independent evaluation of Caltrans' implementation of the two findings and three recommendations made in the third CE Assignment Program Monitoring Review, conducted in FY 2011-2012;

- Quantitative evaluation of appropriate usage of CEs;
- Identification of problem areas; and

- The identification of successful practices in Caltrans' implementation of the Program Assignment.

The third CE Assignment Program Monitoring Review included two Findings with Corrective Actions and six Observations with Recommendations for future action that we believe will improve the quality and supportability of CE Determinations and facilitate future FHWA Monitoring Reviews.

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, the Review Team focused on risk areas identified in the FY 2011-2012 6004 CE Review performed in Districts 7 and 8.

The Review Team examined both procedural and substantive compliance in Caltrans Districts 4 and 12, and District 6 (Capital Projects) for this review. Typically, these reviews focus on one district that is highly urbanized and one that is more rural. District 4 and 12 were selected because of the urbanization in Orange County and the San Francisco Bay Area Counties. District 6 was selected due to its more rural nature and the review team's efforts to rotate among districts. Generally, only two to three districts are selected per review.

The primary objective of this monitoring review was to review project documentation to assess Caltrans' performance in adhering to the provisions of the MOU. The following six performance measures and compliance indicators were used to gauge the level of program achievement.

- I. CE determinations are appropriately and timely documented.
- 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 staffing and quality control requirements of MOU.
- V. The State has complied with other Federal and State legal requirements.
- VI. The State has complied with record-keeping requirements.

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

1. Verify that CE determinations are appropriately supported by documentation in a project's file, and that the documentation demonstrates compliance with all applicable laws, regulations, and the provisions of the MOU.
2. Review Caltrans' processes for the identification and documentation of CE determinations.

3. Report findings and observations with any corrective actions or recommendations to Caltrans for improvements.

Scope and Methodology

The scope of this monitoring review covered the CEs issued in Caltrans Districts 4, 6 (Capital only) and 12, between August 4, 2011 and July 31, 2012.

The following steps were taken in data collection and analysis:

- a. Reviewed all CE types, that are on the “C” list, “D” list, and the Appendix A list;
- b. Compared the CE determinations with the information in the project file to assess compliance with the provisions of the MOU.
- c. Itemized any problem area for individual CEs.

For the CE determinations issued in Districts 4, 6 (Capital), and 12, the FHWA California Division conducted a desk review. This desk review considered 100% of CE determinations reported by Caltrans to FHWA for the review period identified above in the five individual Caltrans offices (District 4 Capital Projects, District 4 Local Assistance, District 6 Capital Projects, District 12 Capital Projects and District 12 Local Programs). In particular, the review team compared the project descriptions in the Forms with the CE action reported by Caltrans to FHWA

The information is presented as:

Finding - A statement pertaining to compliance with a regulation, statute, FHWA guidance, policy, or procedures, DOT&PF procedures, or the Section 6004 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.

Recommendations and Actions from 2011-2012 Process Review

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

Finding #1. There was a lack of verification that the CE for Emergency Repairs was appropriate.

Evaluation. FHWA found that a project file in this review cited the CE for emergency relief was unsupported by documentation in the project file. Since the districts whose

project files were the basis of this finding were not revisited, the review team could not determine if this finding has been remedied. See Finding #2 in the 2013 report.

Finding #2. No evidence of required coordination/consultation with the resource/regulatory agencies.

Evaluation. This was still evident in the 2013 report. However, the revised Checklist (June 7, 2013) provides for additional information to be identified (e.g., outcome of Section 7 Endangered Species Act consultation).

Observation #1. Only one CE was used, but it did not cover all aspects of the proposed work.

Evaluation. Caltrans continues to use only one CE. FHWA continues to recommend that either the Project Description is written to entail all the proposed work or multiple CEs should be used.

Note: The California Division, after discussions with FHWA Headquarters, and Caltrans Headquarters has determined that the use of one CE determination based on the highest and best use, or the most appropriate/applicable CE determination is valid.

Observation #2. Using different versions of the CE and Checklist templates.

Evaluation. This was also observed in the 2013 review and the most current templates need to be used.

Observation #3. Inconsistent identification of when additional right-of-way is needed.

Evaluation. This observation was not considered in the latest report.

2013 Results

A total of 255 individual CE determinations for Caltrans' Districts 4, 6 (Capital only), and 12 were reviewed. The breakdown is provided below (CP = Capital Program; LA = Local Assistance). In all Forms reviewed, Caltrans only identified one CE action even though multiple CEs could have been identified to address all the various facets of a project as identified in the project description. If the selected CE was at least partially applicable or the most applicable, the determination was considered accurate for purposes of this review. The numbers of projects reviewed are:

District 4 (CP): 20
District 4 (LA): 161
District 6 (CP): 30
District 12 (CP): 15
District 12 (LA): 28

In general, for the 255 CEs reviewed, 217 Forms reviewed by FHWA had a CE determination in alignment with the project description and the information provided in the document, resulting in an 85% overall accuracy rate. For the 65 Capital Forms reviewed, 47 Forms had CE determinations in alignment with the project description and the information provided in the file for a 72% overall accuracy rate. Of the 190 Local Assistance Forms reviewed, 170 Forms had a CE determination in alignment with the project description and the information provided in the document, resulting in a 90% overall consistency rate. Where the CE determination was not found to be consistent with the information in the project file, the review team found that there were no instances where a project description would have required the preparation of an EA or an EIS.

Stipulation IV(B)(6) requires that Caltrans document in the project file the specific categorically excluded activity; the CE findings, including the determination that the project has no significant impact(s) on the environment; that there are no unusual circumstances (23 CFR 771.117(b)); and that all applicable FHWA responsibilities assigned under Stipulations I and II have been completed. Caltrans should have identified, in the project file, the specific categorically excluded activity or activities. By incompletely assessing the proposed project scope in terms of its applicability for a CE may result in a misclassification of a project's class of action. The reason why this record was not included in the project file is unknown. Caltrans should take action to ensure that the project record identifies all applicable specific categorically excluded activities.

Regarding the detailed evaluation:

In District 4, a total of 182 Forms were reviewed by the review team. Of the 20 Capital Programs CE determinations evaluated, FHWA found that only 3 Forms did not support the CE determination, indicating an accuracy of 85% (17/20). For the 162 CE Forms evaluated for under Local Assistance, 9 contained CE determinations that were inconsistent with the documentation in the project file, indicating an accuracy of 94% (153/162).

In District 6, only Forms under Capital Programs were evaluated. Of the 30 Forms reviewed, 11 contained CE determinations inconsistent with the documentation in the project file not in alignment, indicating an accuracy of 63% (19/30).

In District 12, a total of 43 Forms were reviewed. Of the 15 Capital Programs CE Forms evaluated, 4 were contained CE determinations inconsistent with the documentation in the project file, indicating an accuracy of 73% (11/15). For the 28 Local Assistance CE Forms evaluated, 11 contained CE determinations inconsistent with the documentation in the project file, for an accuracy of 60% (17/28).

Other problem areas identified include:

Major (24 instances or more)

- No check mark on Section 1 #2 – if the project was a Section 6005 CE (104 instances).
- No check mark on Section 1 #3 – if unusual circumstances were present (71 instances).
- CE document did not fully account for all project impacts (52 instances).
- No check mark for Section 6(f) (25 instances).

-No check mark for Section 401 (24 instances).

Minor (less than 24 instances)

- No checklist (9 instances).
- No senior signature (8 instances).
- No check mark for Section 106 (7 instances).
- No check mark for Section 7 (6 instances)
- No check mark for Coastal Zone (4 instances).
- No check mark for Section 404 (3 instances).
- No check mark for Section 4(f) (2 instances).

Findings and Observations

Findings

Finding #1. Although relatively rare, the review team found Forms where CE Checklists lacked an approval signature. FHWA believes that this is necessary to be consistent with provisions of NEPA Assignment and imperative that every CE Checklist have a valid signature.

Corrective Action. Ensure that all CE Checklists be signed by the appropriate staff member.

Finding #2. Several Forms identified a CE determination for an emergency action CE (C9) where the project record indicated the emergency was authorized by a Director's Order rather than the Governor or President. An emergency declared by a Caltrans Director makes the application of the CE for emergency relief inappropriate. Only the Governor or President can declare an emergency situation to use this CE.

This has an effect of not supporting decision-making for the administrative record.

Corrective Action. All District Directors need to be notified by Caltrans Headquarters that this is not in accordance with emergency procedures. Caltrans must identify a CE action that fits the project description that is assignable under the MOU, or work with FHWA to complete a documented CE, EA, or EIS for that project.

Observations

Observation #1. The review team often found that the CE determination in a project file may include all actions described in a project description. Although FHWA did not disagree with a CE being the appropriate environmental documentation, more detailed information is necessary to fully 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 such that the appropriateness of a selected CE is apparent. FHWA is willing to assist in providing training to project managers.

Observation #2. A number of the CE Forms utilized outdated checklists. It appears that the June 2010 template was appropriate for the investigated time; however the use of earlier versions was not uncommon. The current Checklist is dated June 7, 2013.

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

Observation #3. Many CE Forms do not identify coordination/consultation with the resource/regulatory agencies even though the project file suggests the project may be located in listed species habitat or may have cultural resources occurring on-site. The effect is that the project record may not adequately reflect compliance with laws and regulations intended for protected/regulated resources. Agencies involved may include Regional Water Quality Control Board (RWQCB) for Section 401 permitting, US Army Corps of Engineers for Section 404 Clean Water Act permitting, US Army Corps of Engineers for Section 10 Rivers and Harbors Act permitting, US Fish and Wildlife Service and/or National Marine Fisheries Service for Section 7, Endangered Species Act consultation, US Fish and Wildlife Service for the Migratory Bird Treaty Act (MBTA) (many CEs indicated that trees would be removed, but there was no indication that the MBTA was addressed) and State Historical Preservation Office for Section 106 consultation. Stipulation IV (B) (3) of the MOU requires the State to carry out the other environmental responsibilities assigned under the MOU, as necessary or appropriate for the activity.

Recommendation. A project file needs to include documentation of any required coordination/consultation and its outcome in the CE is required by Stipulation IV(B)(6). This can be provided in the Continuation Page of the most recent CE template/checklist.

Observation #4. Several Forms lacked information to support the application of the emergency relief CE to a particular project.

Recommendation. When Caltrans decides to apply the emergency relief CE to a particular project, the project file needs to provide the information regarding the date and declaration number in the project description or on the continuation sheet.

Observation #5. There were a number of CE Forms where the CE determination did not fully align with the project descriptions. FHWA concluded that of the 255 CEs reviewed, 38 or 15% of CE determinations did not fully align with the project descriptions.

Recommendation. The review team recommends that Caltrans develop training to ensure that CE determinations are consistent with a project's description.

Successful Practices

Successful Practice #1. In some instances, the Environmental Commitments and interagency coordination, including needed permits, were included on the CE Continuation Page. FHWA found this very helpful and informative in our evaluation.

Successful Practice #2. Caltrans continues to provide training to staff, particularly relevant to NEPA assignment and associated laws and regulations.

Successful Practice #3. It appears that Caltrans is doing a very good job of updating applicable manuals and guidance.

Successful Practice #4. Successful efforts are being made to integrate data exchange and compatibility between LP2000 (LA) and STEVE (CP).

Successful Practice #5. We commend Caltrans for the continued use of multi-disciplinary teams in project review and development.

Conclusion

This is the fourth Process Review for the CE assignment (Section 6004 of SAFETEA-LU, superseded by MAP-21). This includes a review of the two findings and four observations made in the 2011-2012 monitoring report and other suggestions to improve performance. Although satisfactory progress in addressing the previous recommendations has been made, this report identifies two findings and five observations that should be further addressed.

The findings and observations addressed in this report include, missing preparer signature, inappropriately applied Emergency relief CE, inability to confirm that inter-agency coordination where required, occurred, and consistency between the CE determination and a project description.

However, the review team concluded that Caltrans is generally making appropriate determinations, and overall, is in substantial compliance with all applicable Federal and State laws, including NEPA. The review team found that Caltrans has maintained appropriate record-keeping and has adequate financial resources and staff to carry out the MOU.

The next Process Review will take into account the 2012 Transportation Bill (MAP-21), or a subsequent Transportation Bill. The focus and breadth of the next review will be coordinated with Caltrans.

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.