State of California
DEPARTMENT OF TRANSPORTATION

Business, Transportation and Housing Agency

Memorandum

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To: TOM FELLENZ, Deputy Chief Counsel
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JEFF BENOWITZ, Deputy Chief Counsel

Date: July 16, 2008*
Supersedes Memorandum dated 10/15/2007

From: BRUCE A. BEHRENS, Chief Counsel

Subject: Procedures for Determining Legal Sufficiency of Environmental Documents under the NEPA Pilot Program

By Memorandum of Understanding (MOU) effective July 1, 2007 the Federal Highway Administration (FHWA) approved the State of California's application for participation in the Surface Transportation Project Delivery Pilot Program (Pilot Program) pursuant to Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (23 U.S.C. 327). Under the Pilot Program, the Department assumed all of FHWA's responsibilities under the National Environmental Policy Act (NEPA) for the State Highway System and local street and road projects in California[1]. The Department also assumed all of FHWA's responsibilities for environmental review, consultation, and other environmental-related actions pertaining to the review or approval of projects assumed under the Pilot Program, including Section 4(f) [23 U.S.C. 138] evaluations.

The legal sufficiency of a NEPA document is an important element of the overall project development process for a federally funded transportation project. This memorandum outlines the procedures for Department attorneys to ensure compliance with the various laws, regulations, and Executive Orders applicable to the NEPA decision-making process for each project developed under the recently approved NEPA delegation pilot program. FHWA, in compliance with the Council on Environmental Quality (CEQ) regulations, issued regulations that require a formal legal sufficiency review for all final environmental impact statements (EIS) and final Section 4(f) evaluations prior to final approval of the documents. (23 C.F.R. 771.125(b) and 23 C.F.R. 774.7(d), respectively) As part of the Pilot Program, the Department's attorneys will provide the legal sufficiency review for both EIS and Section 4(f) evaluations, as well as providing counsel for environmental-related issues during project development.

Adherence to the procedures and recordkeeping outlined in this memorandum shall constitute evidence of the adequacy of the legal sufficiency determination made by counsel.

REVIEW PROCESS

The Department's Division of Environmental Analysis (DEA) has issued a memorandum dated July 2, 2007, (attached) that establishes the policy for the Department's review of an EIS or

[1] The Pilot Program excluded projects listed in Section 773.106(b)(1) of the application.

complex EA. Department environmental counsel should review the memorandum and be available to district staff for consultation early in the project process.

The July 2, 2007 DEA policy memo provides that in order to initiate a legal review, the District/Region will submit the following material to the appropriate legal office:

1. A transmittal memo signed by the District/Region Senior Environmental Planner (SEP) requesting legal review in the case of a draft EIS, or legal sufficiency review if a final EIS;
2. A copy of the administrative environmental document (ED);
3. An electronic copy of the administrative ED;
4. An electronic copy of each technical study;
5. A copy of the completed Environmental Document Review Checklist; and
6. A completed and signed Quality Control Certification Sheet.

The reviewing attorney should ensure receipt of all of the above documents prior to initiating the review. The attorney will document receipt of the complete file which then initiates the review period. The Department has a goal of 30 days for completion of the legal review. However, since concurrent review is being conducted along with DEA, issues raised late in the 30-day review process by other reviewers may require additional time for the attorney to complete the review. Upon completion, the attorney will forward the legal review, comments, or legal sufficiency finding to the District/Region with a copy to DEA. In addition to documenting receipt of the completed file and initiation of the review, the attorney will document when the review was completed, the date(s) the attorney sent comments and to whom, the date responses to the comments were received, and the date of final legal sufficiency. The attorney will forward this data via email on a continuing basis to the Assistant Chief Counsel for Environmental at HQ Legal in Sacramento, who will monitor the process on a statewide basis. The above procedure also applies to Section 4(f) reviews, as discussed further below.

Per the DEA memo, the District/Region will make the changes to the document and submit the document to the appropriate legal office and HQ DEA. The goal of the legal office is to review the revised document within 10 days provided all comments are submitted to the reviewing attorney. The attorney will receive from the District/Region the following:

1. A transmittal memo signed by the District/Region SEP stating that the document has been revised pursuant to the legal review or legal sufficiency review and requesting pre-approval review or legal sufficiency finding;
2. A copy of the revised ED;
3. A copy of revised ED with track changes;
4. A copy of the comments with a response key;
5. A copy of the completed Environmental Document Review Checklist as revised; and
6. A copy of the signed Quality Review Certification Sheet as revised.

LEGAL SUFFICIENCY

For NEPA legal sufficiency reviews, the reviewing attorney will assess the document from the perspective of legal standards and litigation risk. The reviewing attorney assesses whether the environmental document was properly developed and whether it answers the substantive questions that could reasonably be raised. To accomplish the review, the attorney focuses on the adequacy of the discussion of the essential NEPA elements. The attorney will also highlight any shortcomings in the documentation and recommend steps to achieve compliance and improve the quality of the document.

In order to ensure that the legal review and certification is conducted on a final document, the attorney's review will take place only after all other District/Region reviewers have submitted their comments. Subsequent changes to the document from any source **must** be reviewed by the attorney to assess any implications on the finding of legal sufficiency. See DEA July 2, 2007 memorandum.

EIS/COMPLEX EA

The attorney reviewing an EIS, or complex EA when requested, must focus upon:

1. The Purpose and Need statement;
2. Discussion of the Alternatives;
3. Indirect and cumulative effects analysis;
4. Scope of the review of environmental resources and any significant impact to, and mitigation for, those resources (i.e. air, water, cultural resources, noise, ESA, environmental justice);
5. Coordination with local agencies/resource agencies and responses to concerns;
6. Availability for public review and comment, and adequacy of responses to those comments; and
7. Whether all applicable requirements have been substantially satisfied, including compliance with laws, regulations, Executive Orders and Agency guidance; and consistency with FHWA policies

SECTION 4(f)

The attorney reviewing 4(f) issues must focus upon:

1. Determining 4(f) applicability;
2. Feasible and Prudent Standard;
3. Format of document (Separate document or incorporated as an appendix into an EA or EIS);
4. Alternatives Analysis;

5. Minimization and/or mitigation measures;
6. Consultation/coordination with agency owning or administering the resource, FHWA (only in a constructive use situation), the DOI, and as appropriate, HUD and USDA and;
7. 4(f) conclusions/finding.

Note that the July 1, 2007 MOU requires the Department to coordinate with FHWA prior to determining that any action constitutes a constructive use of land from a publicly owned park, public recreation area, wildlife refuge, waterfowl refuge, or historic site (paragraph 8.1.5). The reviewing attorney must ensure that in such situations evidence of such coordination is documented in the file.

For both the EIS or 4(f) review, if the reviewing attorney has concerns with the document, the attorney will send the privileged comments to the District/Region with a copy to HQ DEA environmental coordinator. The attorney should clearly state any concerns with the document and work with the District/Region to resolve the concern. Per the DEA memo "no approval action may be taken until both the HQ environmental coordinator quality assurance and legal review or legal sufficiency are satisfied."

Please note that the EA, EIS, or 4(f) evaluation is not final until a District Director or other authorized Department person signs the document and therefore, the document that is being reviewed is a proposed final EA, EIS, or 4(f) evaluation. Once the attorney has completed the review and found the document to be legally sufficient, the attorney drafts a letter to the senior environmental planner overseeing the environmental document with a copy to HQ DEA stating:

> "I have reviewed the proposed Final Environmental Impact Statement (FEIS) [Environmental Assessment (EA)] [and/or, 4(f) evaluation] [as applicable] for the above project, which proposes to build [short description of the project and its location]. Pursuant to the provisions of 23 C.F.R. § 771.125(b) [and/or, 23 C.F.R. §774.7(d)], I find the proposed FEIS [EA] [and/or, 4(f) evaluation] for this project to be legally sufficient."

Questions regarding legal sufficiency reviews for NEPA documents should be directed to David McCray at (916) 654-2630.