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SUBJECT: Joint Guidance FHWA/Caltrans NEPA Consultation/Reevaluation Guidance

The Federal Highway Administration (FHWA) and the California Department of Transportation (Caltrans) have worked cooperatively to develop an efficient and consistent approach to the consultation and reevaluation process under the National Environmental Policy Act and 23 CFR 771.129. The collaboration has produced two products: 1) Joint Federal Highway Administration – California Division/California Department of Transportation Regulatory Guidance on NEPA Consultation/ Reevaluation (Joint Guidance) and 2) the NEPA/CEQA (California Environmental Quality Act) Re-validation form.

The Joint Guidance is organized around three trigger points for consultation and/or reevaluation: 1) project is proceeding to the next major federal approval, 2) project changes and 3) the three-year timeframe for an EIS. For each of these triggers, the guidance sets forth the process and documentation requirements for NEPA compliance.

While FHWA does not have the authority to mandate the use of the CEQA portion of the NEPA/CEQA Re-validation form, the use of the NEPA portion of the form is mandatory for all federal aid projects, including those off the State Highway System. For projects on the State Highway System, Caltrans is mandating the use of the CEQA portion of the form in addition to the NEPA portion of the form.

When the NEPA Pilot Program (NEPA delegation) begins, the joint guidance and the NEPA/CEQA Re-validation form will be revised as necessary.

If you have any questions regarding the Joint Guidance or NEPA/CEQA Re-validation form, please contact Kelly Dunlap, Chief, Caltrans Environmental Management Office, at (916) 651-8164 or David Cohen, FHWA Environmental Specialist, at (916) 498-5868.

Sincerely,

MAISER KHALED
Federal Highway Administration
Director, Project Development & Environment

for JAY NORVELL
California Department of Transportation
Chief, Division of Environmental Analysis

JOINT FEDERAL HIGHWAY ADMINISTRATION – CALIFORNIA DIVISION/CALIFORNIA DEPARTMENT OF TRANSPORTATION REGULATORY GUIDANCE ON NEPA CONSULTATION/ REEVALUATION

JUNE 15, 2007

As a highway project proceeds in its development from environmental review through construction, there may be circumstances that could affect the validity of its NEPA documentation or approval. The Federal Highway Administration (FHWA) regulations to implement the National Environmental Policy Act (NEPA) (23 CFR 771) and Technical Advisory T6640.8A provide direction on determining when a project's NEPA documentation must be re-examined.

The regulations (below) address both the *process* of re-assessing the validity of the NEPA documentation as well as the *product* of that process, whether it is documentation of the consultation with FHWA or a written evaluation of an Environmental Impact Statement (EIS). Historically, the term "reevaluation" has been used generically to mean both the process and the product and there has been confusion about which types of NEPA documentation need to be re-assessed and when. Consultation applies to all NEPA documentation [23 CFR 771.129(c)], whereas a written evaluation applies only to an EIS [23 CFR 771.129(a) and (b)]. Technical Advisory Section XI (below) addresses only EISs and is silent on re-assessing the validity of Categorical Exclusions (CEs) and Findings of No Significant Impact (FONSIs). This guidance offers the process and product for all types of NEPA documentation.

For purposes of this guidance paper, the term "reevaluation" refers to the *process* of re-assessing the validity of an EIS. The term "written evaluation" refers to the supporting information documenting the reevaluation of an EIS. "Consultation" means the *process* of discussing the validity of the environmental document or categorical exclusion with FHWA when there are changes to the project, as described below, or the project proceeds to the next major federal approval.

Caltrans has developed a form to document the re-assessment of the validity of NEPA and CEQA documents - the "NEPA/CEQA Re-validation Form". The form provides written documentation of the FHWA consultation and reevaluation processes for the administrative record and the project file.

The first step in validating any NEPA determination or documentation is to assess whether the project meets one of the "triggers" for consultation or reevaluation. The guidance is organized by the three circumstances that trigger the need for consultation or written evaluation. For each trigger, guidance is given on how to proceed through the process and what documentation results.

Triggers for Consultation or Reevaluation

There are three triggers that necessitate the initiation of the consultation or reevaluation process:

1. Project is proceeding to the next major federal approval
2. Project changes
3. Three year timeline for an EIS

Next Steps

This section of the guidance outlines the process and documentation that is needed based on which of the three triggers above applies.

Project is Proceeding to Next Major Federal Approval (Applies to all NEPA Documentation)

This step involves consultation with FHWA. As specified in 23 CFR 771.129(c), consultation with FHWA regarding the validity of the approved environmental document or CE designation must occur prior to requesting any major federal approvals from FHWA. Major federal approvals that occur after approval of NEPA documentation (CE, EA/FONSI, and FEIS) include undertaking final design, authorizing acquisition of a significant portion of the right-of-way, or approving plans, specifications, and estimates (PS&E). Consultation occurs by notifying the appropriate FHWA team leader that the project is proceeding forward to the next project development phase and that the request for the next major federal approval is imminent.

The FHWA team leader and appropriate members from the project development team (PDT) will then determine whether the approved environmental document or CE designation is still valid. Factors to consider include whether since approval of the original documentation there have been changes in project engineering/design; changes to the environmental setting/circumstances, including changes in laws and regulations; changes in nature and severity of environmental impacts; or changes to environmental commitments--avoidance, minimization, and/or mitigation. When a project that has a FEIS or supplemental EIS approved *within* three years, proceeds to the next major federal approval, another consideration in the consultation is the length of time since the NEPA approval. In accordance with the Technical Advisory: "...when the consultation occurs shortly after final EIS approval, an analysis usually should not be necessary. However, when it occurs nearly 3 years after final EIS approval, but before a written evaluation is required, the level of analysis should be similar to what normally would be undertaken for a written evaluation".

In order to determine the validity of the document, evaluation by qualified environmental planners and technical specialists is needed. Site visits may be needed depending on the circumstances and available information. All documentation prepared during this process should be retained for the administrative record, including but not limited to, internal and external coordination, reasons for all relevant decisions, technical support for said decisions, and any other documentation commensurate with this effort. Additional coordination with resource/regulatory agencies may also be necessary.

Documenting the Outcome

There are only two possible outcomes from this consultation: 1) the document or CE designation remains valid, or 2) the document or CE designation is no longer valid. If the determination is made that the document is still valid, that decision is documented by checking the appropriate boxes on page 1 of the NEPA/CEQA Re-validation Form and the form is signed, completing the process. No further documentation is necessary.

If the determination is made that the document or CE designation is no longer valid, then a further determination must be made as to whether a new environmental document is needed (e.g. a supplemental environmental document or new CE) or whether the original document can be revised. If the determination is made that a supplemental environmental document or new CE is needed, the process would proceed just as it had with the prior environmental document or CE. If the determination is made that the original document or CE can be made valid with further analysis, page 2 of the NEPA/CEQA Re-validation Form, and continuation sheets as needed, is/are completed and signed, concluding the process.

However, on projects where there is a substantial amount of change to the project design or circumstances, it may be practical to prepare a stand-alone document that makes a conclusion regarding whether the document remains valid or if a new or a supplemental document is required. In that case, fill out page 1 of the NEPA/CEQA Re-validation Form and then prepare the stand-alone document. The stand-alone document would use the same headings as those found on page 2 of the NEPA/CEQA Re-validation Form and again the focus would be on any changes to the project, its setting, impacts, or new issues that have arisen since the circulation of the document.

<u>Project Changes</u> (Applies to all NEPA Documentation)

This circumstance involves consultation with FHWA. Although project changes are not specifically called out in 23 CFR 771.129, they can be important triggers for reevaluation. They are treated as a trigger here because they can occur at any time in the project development process. In these cases, working with the FHWA to ensure that the environmental documentation reflects the current project is strongly recommended in order to avoid project delays. Examples of project changes include: changes in project engineering/ design; changes to the environmental setting/circumstances, including changes in laws and regulations; changes in nature and severity of environmental impacts; changes to environmental commitments--avoidance, minimization, and/or mitigation.

As with the "major approval" trigger above, evaluation and documentation by qualified staff is needed. Again, there are only two possible outcomes from this consultation: 1) the document or CE designation remains valid, or 2) the document or CE designation is no longer valid. See prior section above for "Documenting the Outcome."

Three-Year Timeline (Applies to EISs Only)

DEIS:

In accordance with 23 CFR 771.129(a) and (b) and Technical Advisory T6640.8A, a written evaluation of a draft EIS is required if the final EIS has not been submitted to FHWA within three years of the circulation of the draft EIS. In this circumstance, the DEIS is subject to a written evaluation of its validity. While the entire project must be re-examined for changes, an evaluation of a DEIS should focus on any changes to the project, its setting, impacts, or new issues that have arisen since the circulation of the document. Based on the written evaluation, a decision is made whether to document that the existing DEIS remains valid, to supplement the existing DEIS, or prepare a new DEIS.

FEIS:

The regulations and Technical Advisory require a written evaluation of a final EIS if major steps to advance the project have not occurred within three years of the approval of the final EIS, final EIS supplement, or the last major FHWA approval.

The purpose of the written evaluation is to determine whether the EIS remains valid or whether a new or supplemental EIS is required. Again, this is accomplished by consultation with the FHWA team leader and is based on whether there have been changes such as those listed in the previous two sections. A written evaluation of a final EIS must consider the entire project and all current environmental requirements to determine whether the existing final EIS remains valid. The same steps are taken to re-assess the validity of a draft or final EIS as in the consultation process.

Documenting the Outcome

The NEPA/CEQA Re-validation Form can be sufficient to comprise the written reevaluation. If the determination is made that the document is still valid, that decision is documented by checking the appropriate boxes on page 1 of the NEPA/CEQA Re-validation Form and the form is signed, completing the process. No further documentation is necessary.

However, on projects where there is a substantial amount of change to the project design or circumstances, it may be practical to prepare a stand-alone evaluation document that makes a conclusion regarding whether the document remains valid or if a new or a supplemental EIS is required. In that case, fill out page 1 of the NEPA/CEQA Re-validation Form and then prepare the stand-alone document. The stand-alone document would use the same headings as those found on page 2 of the NEPA/CEQA Re-validation Form and again the focus would be on any changes to the project, its setting, impacts, or new issues that have arisen since the circulation of the document.

23 CFR 771.129

§ 23 CFR 771.129 Re-evaluations.

(a) A written evaluation of the draft EIS shall be prepared by the applicant in cooperation with the Administration if an acceptable final EIS is not submitted to the Administration within 3 years from the date of the draft EIS circulation. The purpose of this evaluation is to determine whether or not a supplement to the draft EIS or a new draft EIS is needed.

(b) A written evaluation of the final EIS will be required before further approvals may be granted if major steps to advance the action (e.g., authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications, and estimates) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Administration approval or grant.

(c) After approval of the EIS, FONSI, or CE designation, the applicant shall consult with the Administrator prior to requesting any major approvals or grants to establish whether or not the approved environmental document or CE designation remains valid for the requested Administration action. These consultations will be documented when determined necessary by the Administration. [52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988]

TECHNICAL ADVISORY T6640.8A

XI. REEVALUATIONS

A. Draft EIS Reevaluation

If an acceptable final EIS is not received by FHWA within 3 years from the date of the draft EIS circulation, then a written evaluation is required to determine whether there have been changes in the project or its surroundings or new information which would require supplement to the draft EIS or a new draft EIS (23 CFR 771.129(a)). The written evaluation should be prepared by the HA in consultation with FHWA and should address all current environmental requirements. The entire project should be revisited to assess any changes that have occurred and their effect on the adequacy of the draft EIS.

There is no required format for the written evaluation. It should focus on the changes in the project, its surroundings and impacts, and any new issues identified since the draft EIS. Field reviews, additional studies (as necessary), and coordination (as appropriate) with other agencies should be undertaken and the results included in the written evaluation. If, after reviewing the written evaluation, the FHWA concludes that a supplemental EIS or a new draft EIS is not required, the decision should be appropriately documented. Since the next major step in the project development process is preparation of a final EIS, the final EIS may document the decision. A statement to this fact, the conclusions reached, and supporting information should be briefly summarized in the Summary Section of the final EIS.

B. Final EIS Reevaluation

There are two types of reevaluations required for a final EIS: consultation and written evaluation (23 CFR 771.129(b) and (c)). For the first, consultation, the final EIS is reevaluated prior to proceeding with major project approval (e.g., right-of-way acquisition, final design, and plans, specifications, and estimates (PS&E)) to determine whether the final EIS is still valid. The level of analysis and documentation, if any, should be agreed upon by the FHWA and HA. The analysis and documentation should focus on and be commensurate with the changes in the project and its surroundings, potential for controversy, and length of time since the last environmental action. For example, when the consultation occurs shortly after final EIS approval, an analysis usually should not be necessary. However, when it occurs nearly 3 years after final EIS approval, but before a written evaluation is required, the level of analysis should be similar to what normally would be undertaken for a written evaluation. Although written documentation is left to the

discretion of the Division Administrator, it is suggested that each consultation be appropriately documented in order to have a record to show the requirement was met.

The second type of reevaluation is a written evaluation. It is required if the HA has not taken additional major steps to advance the project (i.e., has not received from FHWA authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the PS&E) within any 3-year time period after approval of the final EIS, the final supplemental EIS, or the last major FHWA approval action.

The written evaluation should be prepared by the HA in consultation with FHWA and should address all current environmental requirements. The entire project should be revisited to assess any changes that have occurred and their effect on the adequacy of the final EIS.

There is no required format for the written evaluation. It should focus on the changes in the project, its surroundings and impacts, and any new issues identified since the final EIS was approved. Field reviews, additional environmental studies (as necessary), and coordination with other agencies should be undertaken (as appropriate to address any new impacts or issues and the results included in the written evaluation. The FHWA Division Office is the action office for the written evaluation. If it is determined that a supplemental EIS is not needed, the project files should be documented appropriately. In those rare cases where an EA is prepared to serve as the written evaluation, the files should clearly document whether new significant impacts were identified during the reevaluation process.

NEPA/CEQA RE-VALIDATION FORM

DIST./CO./RTE.	*Enter District, County & Route (State projects) or the County & Route (Local projects) here.*
PM/PM	*Enter the beginning and ending postmiles here (State projects).*
E.A. or Fed-Aid Project No.	*Enter the Expenditure Authorization (State projects) or Federal Aid Project # (Local projects) here.*
Other Project No. (specify)	*Enter any other project number here, and specify the type.*
PROJECT TITLE	*Enter project title here.*
ENVIRONMENTAL APPROVAL TYPE	*Enter type of original environmental document/CE Determination here.*
DATE APPROVED	*Enter date that environmental document/CE Determination was originally approved here.*
REASON FOR CONSULTATION (23 CFR 771.129)	*Check reason for consultation:* ☐ *Project proceeding to next major federal approval* ☐ *Change in scope, setting, effects, mitigation measures, requirements* ☐ *3-year timeline (EIS only)*
DESCRIPTION OF CHANGED CONDITIONS	*Briefly describe the changed conditions or new information on page 2. Append continuation sheet(s) as necessary. Include a revised Environmental Commitments Record (ECR) when applicable.*

NEPA CONCLUSION - VALIDITY

Based on an examination of the changed conditions and supporting information: [*Check ONE of the two statements below, regarding the validity of the original document/determination (23 CFR 771.129). If document is no longer valid, indicate whether additional public review is warranted and whether the type of environmental document will be elevated.]*

_____ **The original environmental document or CE remains valid. No further documentation will be prepared.**

_____ **The original document or CE is no longer valid; further documentation has been ☐ or will be ☐ prepared and is included on the continuation sheets ☐ or ☐ will be attached.**

_____ **(Yes/No) Additional public review is warranted (23 CFR 771.111(h)(3))**

_____ **(Yes/No) Supplemental environmental document is needed.**

_____ **(Yes/No) New environmental document is needed. (If "Yes," specify type: _____)**

CONCURRENCE WITH NEPA CONCLUSION

I concur with the NEPA conclusion above.

_____ _____ _____ _____

Signature: Environmental Branch Chief | Date | Signature: Project Manager/DLAE | Date

_____ _____

Signature: FHWA Project Development Engineer | Date

CEQA CONCLUSION : *(Only mandated for projects on the State Highway System.)*

Based on an examination of the changed conditions and supporting information, the following conclusion has been reached regarding appropriate CEQA documentation: *(Check ONE of the four statements below, indicating whether any additional documentation will be prepared, and if so, what kind. If additional documentation is prepared, attach a copy of this signed form and any continuation sheets.)*

_____ **Original document remains valid. No further documentation is necessary.**

_____ **Only minor technical changes or additions to the previous document are necessary. An addendum has been or will be ☐ prepared and is ☐ included on the continuation sheets or ☐ will be attached. It need not be circulated for public review. *(CEQA Guidelines, §15164)***

_____ **Changes are substantial, but only minor additions or changes are necessary to make the previous document adequate. A Supplemental environmental document will be prepared, and it will be circulated for public review. *(CEQA Guidelines, §15163)***

_____ **Changes are substantial, and major revisions to the current document are necessary. A Subsequent environmental document will be prepared, and it will be circulated for public review. *(CEQA Guidelines, §15162)***
(Specify type of subsequent document, e.g., Subsequent FEIR:)

_____

CONCURRENCE WITH CEQA CONCLUSION

I concur with the CEQA conclusion above.

_____ _____ _____ _____

Signature: Environmental Branch Chief | Date | Signature: Project Manager | Date

NEPA/CEQA RE-VALIDATION FORM

CONTINUATION SHEET(S)

Address only substantial changes or substantial new information since approval of the original document and only those areas that are applicable. Use the list below as section headings as they apply to the project change(s). Use as much or as little space as needed to adequately address the project change(s) and the associated impacts, minimization, avoidance and/or mitigation measures, if any.

Changes in project design, e.g., substantial scope change; a new alternative; change in project alignment.

Changes in environmental setting, e.g., new development affecting traffic or air quality;

Changes in environmental circumstances, e.g., a new law or regulation; change in the status of a listed species.

Changes to environmental impacts of the project, e.g., a new type of impact, or a change in the magnitude of an existing impact.

Changes to avoidance, minimization, and/or mitigation measures since the environmental document was approved.

Changes to environmental commitments since the environmental document was approved, e.g., the addition of new conditions in permits or approvals. When this applies, append a revised Environmental Commitments Record (ECR) as one of the Continuation Sheets.