State of California
DEPARTMENT OF TRANSPORTATION

Business, Transportation and Housing Agency

Memorandum

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Environmental Analysis

Date: October 1, 2012

From: Ronald Beals, Chief Counsel
Legal Division

Subject: **Procedures for Determining Legal Sufficiency of NEPA Documents under the USDOT Secretary Assignment of Responsibilities under Title 23 United States Code section 327**

By Memorandum of Understanding (MOU) effective July 1,2007, the Federal Highway Administration (FHWA) approved the California Department of Transportation's (Caltrans) 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, Caltrans 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. Caltrans 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.

On July 6, 2012, President Obama signed into law Pub. L. 112-141, the Moving Ahead for Progress in the 21st Century Act (hereafter, "MAP-21") which becomes effective on October 1, 2012. Section 1313 of MAP-21 amends 23 U.S.C. 327, making the Pilot Program permanent as the Surface Transportation Project Delivery Program (hereinafter, "Project Delivery Program"), allowing the participation therein of any State, and allowing a State to renew its participation in the program.

The US Department of Transportation Secretary (US DOT Secretary), acting by and through the FHWA, has taken into consideration Caltrans' original application for the program and that agency's program performance and as a result of that review, on September 25, 2012, Caltrans and FHWA entered into a Project Delivery Program MOU. The Project Delivery Program MOU officially approves Caltrans' participation in the Surface Transportation Project Delivery Program as set forth in 23 U.S.C. 327, and constitutes the written agreement required pursuant to 23 U.S.C. 327(a)(2)(A), (C), and (c) under which the US DOT Secretary may assign, and Caltrans may assume, the responsibilities of the US DOT Secretary for Federal environmental laws with respect to one or more highway projects within the State of California.

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 Caltrans' 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 USDOT Secretary's assignment authority. 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.) Caltrans will implement any promulgated regulations as a result of MAP-21. As part of the Assignment Authority, the Department's attorneys will provide the legal sufficiency review for both EIS and Section 4(f) evaluations, as well as provide 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.

Caltrans' Division of Environmental Analysis (DEA) has issued a memorandum dated October 1, 2012, (attached) that establishes the policy for Caltrans' review of an EIS or complex EA (Note: the EA does not require a legal sufficiency review or finding. Rather the review for an EA will utilize a memo stating that the EA is "Ready for Signature"). Caltrans' environmental counsel should review the DEA memorandum and be available to district staff for consultation early in the project process.

The October 1, 2012 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 in WORD format with Track Changes enabled;

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, which shall commence the first business day after receipt of the complete package during regular business hours. Caltrans has a goal of 22 business days for completion of the legal review. However, since concurrent review is being conducted along with DEA, issues raised late in the 22 business 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 above procedure also applies to Section 4(f) reviews, as discussed 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 business 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 Senior Environmental Planner (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 in WORD format with track changes showing additions and deletions and NOT in "Read Only" format;

3. A copy of the comments with a response key;

4. A copy of the completed Environmental Document Review Checklist as revised; and

5. 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 October 1, 2012 memorandum.

EIS/COMPLEX EA Review Criteria (Note that a complex EA review will not require a formal finding of Legal Sufficiency rather a memo stating that the EA is "Ready for Signature" will be utilized)

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 measure;

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 with FHWA (which has been incorporated by reference) 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 EIS or 4(f) evaluation is not final until a District Director or other authorized Caltrans person signs the document and therefore, the document that is being reviewed is a proposed final 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)[and/or 4(f) evaluation] 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 [and/or 4(f) evaluation] for this project to be legally sufficient."

A copy of the Legal Sufficiency memo will be forwarded to the Environmental Assistant Chief Counsel in the Sacramento Legal Office who will maintain a file of all Legal Sufficiency memos for Caltrans.

If the attorney is reviewing a complex EA, the attorney sends a memo to the senior environmental planner overseeing the document saying that the document is "Ready for Signature". The document is not final until signed by the District Director or other authorized Caltrans person.

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