# "Legal Sufficiency" of NEPA Documents for Transportation Projects

## Introduction

In 2003, the American Association of State Highway and Transportation Officials (AASHTO), the American Council of Engineering Companies (ACEC) and the Federal Highway Administration (FHWA) joined forces in an effort to improve the quality of environmental documents prepared for transportation projects in compliance with the requirements of the National Environmental Policy Act (NEPA)[1]. This "environmental document quality" initiative has been focused on the development and dissemination of information and tools to assist practitioners nationwide in improving the readability and usefulness of transportation NEPA documents.

In 2003 and 2004, an AASHTO/ACEC/FHWA committee conducted a joint survey of State Departments of Transportation (SDOT), engineering consultant firms and FHWA. The survey informed future activities of the committee and was followed by joint "environmental document quality" workshops held in conjunction with the AASHTO Standing Committee on the Environment's (SCOE) annual meetings in 2004 (Snowbird, UT) and 2005 (Chicago, Ill). Recognizing the varied and numerous causes of the general decline in the overall quality of transportation NEPA documents over the years, the AASHTO/ACEC/FHWA committee designated three task-teams to address the established priorities of the initiative: 1) improve the quality and clarity of NEPA documents; 2) address the "legal sufficiency" of NEPA documents; and 3) improve training and education in document preparation.

This "practitioner's guide" has been developed as one part of the overall initiative, to specifically address the issue of legal sufficiency of transportation NEPA documents. It is intended to provide SDOTs, engineering consultants and FHWA staff with a better understanding of the purpose of FHWA's legal sufficiency review, which is required for environmental impact statements (EIS)[2] and Section 4(f) evaluations[3]. While Section 4(f) is mentioned in the context of the legal sufficiency review requirement, the specifics of the process related to the legal sufficiency of Section 4(f) documents are not addressed in this paper.

The guide provides practical recommendations for improving the overall quality and developing legally sufficient NEPA documents for transportation projects. It is the result of a series of discussions and deliberations of a group of experienced NEPA, transportation and environmental professionals from SDOTs, FHWA, and engineering consultant firms. It represents the current and "best thinking" of this group of practitioners who are knowledgeable of the NEPA process, project development, and the multitude of issues associated with producing and reviewing environmental documents. It is intended as a practical guide to inform the experienced, as well as the inexperienced, NEPA practitioner. It is not official guidance and is not binding on any agency.

Why is the legal sufficiency of NEPA documents important? The simple answer is that the preparation of compliant environmental impact statements, environmental assessments and Section 4(f) evaluations is a legal responsibility. In terms of quality environmental

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[1] 42 U.S.C. 4332; with implementing guidance at 40 CFR 1500-1508

[2] 23 CFR 771.125(c)

[3] 49 U.S.C 303 with implementing regulations at 23 CFR 771.135; For more information on Section 4(f), see FHWA's Section 4(f) Policy Paper, March 2, 2005.

documentation, legal sufficiency involves more than a determination that the document complies with minimum legal standards of NEPA and other procedural or substantive requirements. In this context, legal sufficiency involves identifying and addressing the potential and probable legal risks associated with transportation project development and the preparation of NEPA documents and other environmental documentation. The risks associated with the project development process will likely be best addressed by improving the overall quality, clarity and reasoning of NEPA documents. These improvements can be achieved through format and process flexibility and other innovative practices without compromising legal standards. This will produce better public documents, improve the ability to successfully defend the document (and project) if litigation becomes a reality, and fulfill the intent of NEPA. Seeking expert legal advice throughout the project and document development process is the best way to achieve the broader purposes of legal sufficiency.

The guide is organized around three general themes related to the preparation and review of legally sufficient NEPA documents: 1) the legal sufficiency review; 2) some of the common trouble spots for legal sufficiency determinations; and 3) what practitioners can do to help create "better" documents, from a legal sufficiency perspective.

## 1. Legal Sufficiency Review

### What are "legal sufficiency" reviews and why are they required?

As a federal agency, the FHWA has a legal responsibility to carry out its mission in compliance with numerous Federal laws and regulations, such as NEPA and Section 4(f). To meet this responsibility, FHWA has adopted regulations requiring the legal sufficiency review of all final environmental impact statements (EISs)[4] and final Section 4(f) evaluations[5]. The requirement for a legal sufficiency review applies without regard to the likelihood of litigation, degree of controversy, project size or complexity.

Legal sufficiency reviews are required, as a matter of routine, prior to approval of the final environmental document by the FHWA Division Administrator. In some cases, the legal review will be performed earlier in the process. It may be done concurrently with the FHWA Division office's routine review of the administrative draft of the final EIS or, depending on the project and other issues, be conducted at the draft EIS stage, at the discretion of the FHWA. Legal sufficiency reviews are conducted by FHWA attorneys located in one of FHWA's field offices and/or headquarters. These attorneys are familiar with the interpretations of NEPA law specific to those federal Courts of Appeals and District Courts with jurisdiction over the States for which the attorneys are responsible. The FHWA goal is to complete legal sufficiency reviews within 30 days.

When conducting the legal sufficiency review, an FHWA attorney considers the likelihood of litigation and may focus on the specific issues that could likely be raised if the project were litigated. Even if there is little or no prospect of litigation, the reviewing attorney has an obligation to determine whether all applicable legal requirements have been satisfied. If a document is not in compliance with the applicable laws and requirements, the attorney's responsibility is to identify the problem and recommend steps to achieve compliance.

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[4] 23 C.F.R. 771.125(b)

[5] 23 C.F.R. 771.135(k)

Legal sufficiency reviews differ from other FHWA environmental document reviews and agency comments. Other types of FHWA document review include: 1) routine quality reviews conducted by Division Office staff during the preparation of every NEPA document, and 2) "prior concurrence" reviews, conducted by FHWA headquarters for those projects that meet the specific criteria in FHWA regulation (unusually complex, highly controversial projects, etc)[6]. An FHWA attorney conducts the legal sufficiency review and the ensuing comments are clearly indicated as such. Legal sufficiency review comments may differ in substance from other FHWA comments because the attorney is assessing the document from the standpoint of legal standards and litigation risk, rather than technical sufficiency. The reviewing attorney assumes that all the technical information is correct and analyzes the document from the point of view of whether it was developed properly and answers the pertinent questions that reasonably could be asked. The review addresses the adequacy of the discussion of specific document elements, including purpose and need, alternatives, the scope of the environment affected, the responses to comments and fulfillment of essential coordination requirements.

Legal sufficiency comments generally fall into the following categories:

- Compliance with the elements of applicable laws, regulations and Executive Orders (Examples: Section 4(f), Section 404, Section 7, etc.). These are substantive comments that require attention, additional explanation or reference.

- Consistency with important FHWA policies. (Examples: possible mitigation measures are not discussed, lack of evidence of coordination with other agencies or the public, etc.). Comments in this category must be considered and resolved before the document is approved.

- Substantive questions or issues that require more information or explanation. (Examples: adequacy of record supporting elimination of an alternative, why an alternative is or is not feasible and prudent under Section 4(f), the basis for decision to prepare a FONSI rather than EIS, etc.). Comments that fit into this category should be addressed.

- Clarification or editorial comments. (Examples: change the color of all water bodies on graphics from dark blue to a lighter tone; remove all sentences written in the passive voice). Generally, comments in this category are recommendations on ways the clarity of the document can be improved.

**How should legal sufficiency comments be addressed?**

How legal review comments are addressed likely depends on the nature of the comment. Just as other professionals have differences of opinion, so can lawyers. Because of the inherent differences among reviewers, differences among projects, as well as among court decisions, legal sufficiency review comments on one project may well be different from those on another project with similar issues.

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[6] For additional information on prior concurrence, refer to the FHWA guidance memorandum "EIS Prior Concurrence Procedures" (October 3, 2001); http://environment.fhwa.dot.gov/guidebook/pcguidance.htm

First, you should take the attorney's comments seriously and consider and analyze them thoroughly. If comments do not fit nicely into one of the four categories discussed above, or if it is not clear how the comment should be addressed or resolved, it is advisable to seek clarification from FHWA. This can be done through your local division office contact or the FHWA project development team representative. Prior to seeking such clarification, however, it is usually helpful to assess the time, cost and schedule implications of addressing each comment. Successive iterations of document revisions can be avoided by direct communication between the attorney and the project team. Once the comments have been addressed it is advisable to and helpful to prepare a table or matrix that includes the comment and how and where in the revised document it has been addressed. This may be a desirable practice for all substantive comments.

It is important to note that the written comments of legal counsel may be privileged attorney-client communications. If the privilege exists, these comments would not be subject to the Federal Freedom of Information Act (FOIA), although the protections may be different under state law. If these comments are not maintained strictly or are shared with someone who is not a client, the privilege is lost. Further, there are certain instances where FHWA chooses to waive this privilege and put the comments in an administrative record as evidence of awareness and to show how the issue was addressed. This is one way the court may be satisfied that the lead agency took the requisite "hard-look" at an issue and indeed was not making an arbitrary and capricious decision, as discussed in the next question. Also, since the legal sufficiency review itself is a regulatory requirement, evidence of the review should be documented in the administrative record for the project.

**Is litigation risk considered in the legal sufficiency review?**

For those projects that face potential litigation, the legal sufficiency review will generally involve consideration of litigation risks (i.e., issues that may be subject to legal challenge). An important part of the attorney's role in those cases will be to assist the project development team in identifying potential litigation risks and taking the necessary steps to reduce those risks. Often, those steps will involve additional efforts to strengthen certain areas of the NEPA documents themselves, and the administrative record, in terms of technical reports, correspondence and other materials.

To fully appreciate the importance of considering legal risks, practitioners must also understand the standards of judicial review. Challenges to federal agency decisions typically are filed under the Administrative Procedures Act (APA)[7]. Under this law, a court must defer or uphold the agency's decision, unless the court finds the decision to be arbitrary and capricious, an abuse of agency discretion, or otherwise not in accordance with law. This deferential standard of review means, in essence, that courts give agency decision-makers the benefit of the doubt. But it doesn't mean that courts simply rubberstamp agency decisions; they still must carefully review the record and determine whether it supports the decision. In other words, the record must show that the agency took a "hard look" at the environmental issues related to the project decision.

Any assessment of litigation risk, particularly during the NEPA process, is inherently subjective and uncertain. The assessment involves a prediction about how unknown judges, at some unknown point in the future, might rule on claims by unknown plaintiffs, based on a record that has not yet been fully developed. Despite these uncertainties, it is

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[7] 5 U.S.C. 552

possible to develop general conclusions about the degree of potential litigation risk for a project.

Some of the factors considered in assessing litigation risk include: /

- The likelihood that the proposed project will be challenged in court. This likelihood may exist because of an organized opposition; a history of problems with the project; or the proposed project has similarities to other litigated projects in the State, region or Nation.

- The degree and grounds (environmental vs. "not in my backyard") of public or agency controversy related to the proposed project or location of the project.

- The project involves complicated resource or regulatory issues. Examples include the probability of formal Section 7 consultation[8], environmental justice issues, complex Section 404[9] permitting issues, or any number of other substantive issues.

Project size and cost are also considerations, but are relative measures and should be considered in light of the locale, the resources involved, applicable requirements and other context issues. Although small projects can be complex and controversial, large projects will almost always be both.

**Is there a degree of litigation risk that is acceptable?**

This is a very difficult question to answer accurately. Every transportation project EIS has a degree of litigation risk associated with it. There is a close relationship between legal sufficiency and legal "defensibility". The legal sufficiency review attempts to determine that the NEPA or Section 4(f) process, including related procedures and documents has met the agency's own standards for adequacy and meets the Federal Administrative Procedure Act (APA) arbitrary and capricious test. In making a legal sufficiency determination, the attorney is saying, in essence, that the process was "good enough" to be defensible, but not that the process or document is "bulletproof" against all possible legal challenges. A document that is found legally sufficient may still involve a degree of risk if the project is litigated.

As previously noted, there is a baseline level of legal sufficiency that must be achieved in order for an attorney to issue the "finding". If a document does not meet the standards, an attorney will advise against its release until flaws are corrected or improvements are made. Examples are relatively few and far between, but in those situations where a project document clearly fails to meet the minimum legal requirements, the reviewing attorney must suggest ways of bringing it into compliance.

Commonly, attorneys reviewing a document will also identify issues that are not considered to be fundamental legal flaws, but still present a degree of risk or require some thought and attention. In these situations, the attorneys provide advice to their clients about the degree of risk and suggest ways for the risk to be reduced. In some cases, they provide information and advice to assist decision-makers in managing the litigation risks. Whether a particular litigation risk is acceptable will depend on the opinions and experience of the attorneys and project approving officials.

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[8] Endangered Species Act
[9] Clean Water Act

## 2. Common trouble spots for legal sufficiency determinations

### What are some of the more common legal sufficiency issues?

Practitioners should be familiar with the most common issues related to legal sufficiency and/or litigation risk since attorneys frequently raise these types of concerns during review of NEPA documents. Awareness of these concerns will help to expedite the legal sufficiency review by allowing the project team to anticipate and address the types of concerns that might otherwise be raised during the review.

A sampling of some of the major concerns and issues are listed below:

Segmentation. FHWA NEPA regulations require that project alternatives have logical termini, independent utility and not restrict alternatives for future transportation improvements[10]. The end-points of the project alternatives are usually described in a NEPA document, but in many cases there is little explanation related to the choice of these limits or termini, except in reaction to comments regarding the scope and boundaries of the study. To establish a solid foundation for the study, it is helpful to include (in the NEPA document or a supporting memo) justification for the project or alternatives termini, based on the criteria established in FHWA regulations[11]. The discussion of how and why the termini were chosen helps support the established purpose and need and provides evidence of the project's independent utility within these boundaries. It also is evidence that the agency took the requisite "hard look" at all relevant issues.

Study Area Boundaries. Study area boundaries play a key role in the NEPA process, yet often are defined vaguely or without any clear rationale. Also, the same study area is sometimes used for all resources, despite the fact that the project's impacts may extend over different geographic areas depending on the resource being considered (e.g., air quality vs. noise).

Purpose and Need. The purpose and need for a project is the linchpin of a NEPA study, and thus often becomes a target in litigation. Some common concerns include:

- Defining the project goals too narrowly – thus leaving the study open to criticism that the purpose and need statement improperly narrowed the range of alternatives.

- Defining the project goals too broadly – e.g., as "improving mobility in the project area." Such vague statements make it difficult to identify the actual purpose of *this particular* project, as opposed to any other project in the same area.

- Using all the nine factors listed in the FHWA's Technical Advisory[12] purpose and need guidance as the nine goals of the project. The FHWA guidance simply identifies the types of goals that should be considered; it doesn't mean that the same nine goals should be incorporated into the purpose and need for every project.

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[10] 23 C.F.R. 771.111(f)

[11] 23 CFR 771…..

[12]

- Ignoring the policy goals established in relevant transportation, land use, and other planning studies. These policy objectives provide an important part of the foundation for the purpose and need and should be explicitly considered when defining a project's objectives.

Alternatives Screening. Along with the purpose and need, the development and screening of the range of alternatives is a frequent criticism and potential target in litigation. In many cases, the record supporting the development and elimination of an alternative is relatively sparse. The reasons given for eliminating alternatives at the screening stage need to be logical and well supported in the record. Some common concerns include:

- Eliminating alternatives based on generalities, without any analysis to back up the findings (e.g., "does not sufficiently relieve congestion").

- Eliminating alternatives based on outdated information – e.g., previous studies that may no longer be reliable.

- Failing to re-consider screening decisions later in the study process, when new information has been developed that may put the screening decisions in a different light. For example, if an alternative is eliminated based on cost, it may be necessary to update the cost estimate for that alternative later in the study – particularly if information is developed that shows the costs of alternatives still under consideration have increased to the same level that was considered unacceptable at the screening stage.

- Over-reliance on "weighting and scoring" techniques. Numerical rating systems, sometimes known as "weighting and scoring," can be useful in the alternatives screening process, particularly if numerous alternatives are being considered. However, the results of these techniques can be misleading if important information is not available or if too much or too little weight is given to certain factors. For example, a scoring technique that does not take into account regulatory factors such as Section 404 and Section 4(f) may not provide an informed basis for screening alternatives. This does not mean that scoring techniques should be avoided; it does mean that they should be used with care.

Indirect and Cumulative Impacts. Over the last few years this issue has been the focus of a great deal of NEPA litigation. Indirect and cumulative impact requirements of the NEPA process were established in 1978 with the adoption of the Council on Environmental Quality (CEQ) Regulations. All practitioners should be familiar with the guidance and case law that exists. The guidance includes FHWA's Interim Guidance on Indirect and Cumulative Effects, CEQ's Guidance on Consideration of Past Actions in Preparing National Environmental Policy Act Cumulative Effects Analysis, and EPA's Consideration of Cumulative Impacts In EPA Review of NEPA Documents. One should also be familiar with the CEQ's handbook on Considering Cumulative Effects under the National Environmental Policy Act. There exists a great deal of other reference materials besides these. The point here is that this analysis in any environmental document should be thoroughly reviewed and considered in light of the available guidance, case law and also the particular issues that may arise in the project's area.

Compliance with Procedural Requirements. Legal sufficiency reviews often focus on the quality of the NEPA document itself. Yet the laws and regulations that govern the environmental review process also include other procedural requirements. For example, both Section 106 (historic) and Section 7 (endangered species) require consultation with other agencies regarding impacts to protected resources. If the record contains no documentation showing how these procedural requirements were met, it will be difficult in litigation to demonstrate compliance. One way to address this concern is to include a summary in the relevant section of the NEPA document that reviews the consultation process, with references to key dates, participants and documents in the record. It is particularly important to explain how the consultation process was resolved – i.e., include specific information regarding the event that concluded the process (e.g., an MOU for historic resources). It is also helpful to include correspondence related to these procedural requirements in an appendix to the NEPA document.

Compliance with Substantive Requirements. Legal sufficiency reviews must take into account the substantive requirements that have the potential to control the ultimate project decision. In particular, the important substantive requirements include Section 4(f) and Section 404, both of which contain specific findings that need to be made if a project will impact protected resources. For projects subject to these requirements, seemingly minor changes in wording can substantially affect legal defensibility. The sections of the NEPA document that address compliance with these regulatory requirements should be developed with regular input from legal counsel, and should be carefully reviewed by legal counsel before the NEPA document is published.

Responses to Comments. For high-profile projects, comments received on a draft NEPA document can be voluminous and responses to the comments are often developed and prepared by large teams. While the division of labor can help make the process more efficient, it also introduces the potential for inconsistent responses, as well as the potential for "rote" responses that fail to address the substantive issues raised in the comments. In addition, schedule and budget pressures can sometimes deter the project team from undertaking the additional work that is needed to respond substantively to the issues raised in the comments. To avoid those problems, the project schedule and budget should be based on realistic assumptions about the level of effort needed to develop thorough responses to comments.

Responses to Resource Agency Concerns. During long and controversial projects there can develop tensions between the action agencies and the resource agencies. This is not surprising given their missions are different. However, sometimes this relationship can break down to the point where the action agency does not respond adequately or professionally to the resource agency's comments. Often judges will look to these resource agencies as the public sector experts and failure of the action agency to rebut these comments with professional responses is often fatal to the project.

**How is the administrative record considered in a legal sufficiency review?**

Since the administrative record is a fundamentally important element of the project decision-making process, the content of the administrative record is inherently important to the legal sufficiency of the NEPA document. Under the APA, in order to defend its decisions when sued, FHWA must establish an *Administrative Record* to show that its decision is in accordance with the law, is not arbitrary or capricious, or an abuse of discretion. Clearly,

every project and every document will be different in terms of what constitutes the administrative record, but there are some basic practices or "guidelines" that generally apply.

First, the formal and official documents that are fundamental to the decisionmaking process must be included. These include the NEPA documents (EA, DEIS, FEIS and ROD) and other documents supporting or referenced in the NEPA documents, such as public hearing transcripts, technical reports, etc. These are the prescriptive documents that would be conspicuous if absent from the administrative record. Next, the record must include all related correspondence; meeting minutes and references that document decisions, factual bases, and compliance with NEPA process components, such as public involvement and interagency coordination. In the administrative record it is acceptable, even advisable, to err on the side of inclusion, when the information is directly related to any of the above items, or when it otherwise contributes to evidence of the deliberative (NEPA or project development) process. Documentation of contrary opinions or conflicting data and the resolution of same, are critical. When the relevance of the information item is less direct, or the relevance of the item to the "project story" or "decision" is very limited or can otherwise be represented by other items in the administrative record, then exclusion is reasonable.

In summary, a good administrative record should fully reflect how and why the agency reached its decision. Because the administrative record itself can become very sizable, and is by nature generated by many different people at a variety of locations over many months or years, a project-specific plan for managing the administrative record is necessary. The lead decision-making agency should be given the opportunity to approve the administrative record plan, very early in the project development process.

**Does overall document "quality" affect legal sufficiency?**

The same characteristics that make an EIS clear and understandable to the general public and project decision-makers also make it easier for an attorney to review and reach a conclusion of legal sufficiency, or a judge to uphold an agency's decision. If the document is disorganized, poorly written or incomplete it will be more difficult to assess regulatory compliance and determine the degree of litigation risk. Bad grammar in and of itself may not be a legal matter, but for an attorney trained in the careful use of language it is an unavoidable distraction and almost certain to elicit comments, even though this is not the purpose of their review. Poor organization makes it hard to find information and check for consistency. Sloppy writing, excessive use of jargon and obtuse or missing conclusions will make it harder for an attorney (or anyone else for that matter) to understand what the document is saying. Missing or incomplete information could mean longer review times, since the attorney cannot evaluate what is not there. Further, poorly written or organized documents may cause a reviewing judge to wonder if the substance of the document is suspect.

Sometimes during legal sufficiency review, FHWA attorneys will make editorial or other comments that are intended to make the document better, notwithstanding that the document may be "legally sufficient" as written. Especially if the document is likely to be the subject of legal challenge, an attorney will look for reasonable analysis of pertinent environmental issues and clear rationale for decisions. Document quality and clarity simply makes it much easier for the reviewing attorney, and ultimately a judge, to understand that the decisions are reasonable and based on the demonstrable facts and the applicable law,

i.e., that the decision-maker took a "hard look" at the environmental issues. Also, poor quality documents may not be considered legally sufficient because the public, the decision-makers or a judge could not reasonably be expected to understand the document.

### 3. What practitioners can do to create "better" documents from a legal sufficiency perspective.

#### How would early attorney involvement improve legal sufficiency?

Creating a high quality and legally sufficient document can be a complex undertaking, and as discussed above involve clearing many different substantive and procedural hurdles. One way to improve the quality of the document and avoid findings of legal insufficiency and also make environmental documents stronger is to have early attorney involvement in the NEPA process. Early attorney involvement means that an attorney familiar with NEPA law as it relates to transportation projects will be involved in the project development process throughout the entire process. This involvement may be as part of the project development team or as a routine participation with the team at key stages in the process.

Early attorney involvement is supported by the premise that practicing preventive law provides peace of mind and serves the best interest of the project and the public, and allows needed changes to be made at a time when they will be easier to make and before certain positions or commitments have been presented to the public and other agencies. In addition to the active and early involvement of an FHWA attorney, the project sponsor may enlist the services of its own attorney on the project team. The most important qualification is that the attorney be knowledgeable about NEPA and the substantive and procedural environmental requirements.

Early attorney involvement will:

- Help ensure that the information contained in the document is consistent with the most recent legal interpretations of NEPA law.
- Help address and pre-empt potential litigation risks and issues before problems develop.
- Provide timely consideration, consistency and appropriate production and compilation of necessary materials for the administrative record.
- Provide assistance in drafting and preparing a project's environmental documents, which should minimize reviewer comments and thus expedite document development and processing.

Legal advice should be sought and received at the earliest useful opportunity. This should occur well before the time that attorneys are typically called upon to defend a completed environmental document. By no means is there an easy or simple test for when this opportunity will be, but in most instances, simply asking whether an attorney should be involved is usually an indicator that one should be. Public controversy, project size and/or cost, and potential resource issues and impacts are some of the most common things to consider.

**What is the role of an attorney engaged in early legal involvement?**

The following are some suggestions for how State and Federal agencies can make efficient and effective use of early attorney involvement:

1. During scoping, work with the attorney to identify key project decision points in advance and have the attorney be prepared to provide legal input as those points occur. Some potential points are class of action determinations, range of alternatives, 4(f) determinations, use of planning level documentation during NEPA, and other decisions that have a great influence on the NEPA scope of documentation. After consulting with its own attorney, the project sponsor should consider obtaining additional guidance or concurrence from an FHWA attorney.,

2. Get attorney input in setting up a coordinated system for maintenance of project documentation. Complex projects generate thousands of pages of project information, some of which may be part of the project's administrative record, and some of which may not. Some of the documents will remain in the primary custody of the project sponsor, and some will be retained by FHWA. Much of the information, especially in the future, will be electronic and need to be maintained in ways that control public access to confidential information. Working out the process in advance of the project will eliminate or substantially reduce any future confusion as to what is the record of the project and where it is.

There are some administrative record-related practices that can be used early on to improve the quality of the NEPA process and therefore the legal sufficiency of the document. First, the attorney can be consulted in the development of the administrative record-preparation plan, as noted previously. Second, the contents of the administrative record can be periodically shared with the attorney in the form of an organized "contents" or outline. Sharing such an outline can also serve as a "trigger" if certain activities or interim process milestones need additional attention.

3. Foster an atmosphere in which asking questions in advance is preferable to fixing problems down the road. Often, the prevailing attitude is that asking an attorney for input is to be avoided unless absolutely necessary. This "pay me later" approach is counter-productive for several reasons. First, problem avoidance is usually faster and less expensive that problem remediation. Second, legal requirements are somewhat fluid and flexible. For example, just because a particular alternative was considered reasonable for one project does not mean the same alternative is reasonable for another.

4. Provide documents to the attorney for review at the internal administrative stage. This is true whether it is a DEIS or a FEIS. While legal sufficiency review is only formally required for the FEIS, attorney review at the DEIS stage will provide an excellent start in the development and preparation of a legal sufficient FEIS. Also, once the DEIS has been distributed to the public there is no way to address any problems that exist in that document. It makes sense to address concerns as early as possible and make timely changes. More constructive work can be done at the DEIS stage than can be done at the FEIS stage and, therefore, this is the point in time at which most FHWA attorneys would like to see the NEPA document.

5. Have the project sponsor's attorney perform a preliminary legal sufficiency review and share his or her comments with the FHWA attorney. It may be helpful for these attorneys to discuss the comments or issues with each other prior to providing them to the project development team.

6. Have a quality review process at both the SDOT and FHWA Division Office that will "certify" that the document has been professionally reviewed and believed to be legally sufficient by the professional staff.

## Conclusion

The FHWA legal sufficiency review is required by regulation for certain NEPA documents to assess and ensure the legal adequacy of the Federal decision-making process. Because of this fact, these reviews should be thought of as a normal and necessary part of the project development process.

Legal sufficiency depends on substantive content, procedural compliance, and to some degree overall document quality and readability. These reviews will assist FHWA and the SDOTs in understanding the litigation risks associated with a particular project and associated environmental document and administrative record. A legally sufficient NEPA document does not, however, eliminate the risk of legal challenge, or guarantee success if a project is litigated.

The early involvement in the project development process of attorneys experienced in NEPA, can be a key factor in reducing litigation risks related to environmental documentation by opening lines of communication on key issues early and positively. Early involvement by appropriate legal counsel will also help to avoid delays in established documentation and project delivery schedules.

Questions and comments concerning this paper should be directed to Lamar Smith of FHWA (lamar.smith@fhwa.dot.gov), 202-366-8994.

## Appendices

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FHWA Environmental Websites http://www.environment.fhwa.dot.gov

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