



# Legal Sufficiency Reviews for NEPA Documents



# Why Focus on Legal Sufficiency?

- Some common concerns:
  - Impedes efforts to improve readability
  - Unpredictable
  - Conflicting advice
  - Slows down process
  - Overly risk-averse



# Focus of Task Force

- **Assess Current Practices**
  - What is the Process?
  - What are the Standards?
- **Provide Advice On:**
  - Types of Legal Input
  - Role of Litigation Risk
  - Common Trouble Spots
  - Role of Document Quality
  - How to Involve Attorneys



# Current Practices

- The Process
  - Required by regulation for EIS projects
  - Occurs prior to approval of *FEIS*
  - Distinct from “prior concurrence” reviews
  - Review time varies (ideal is 30 days, but ...)
- The Legal Standards
  - No standard checklist or manual
  - Much depends on views of individual attorneys

# Types of Legal Comments

- *Not all “legal sufficiency” comments are created equal.*
- Comments may address:
  - Compliance with regulatory requirements
  - Consistency with key FHWA policies
  - Substantive issues that need more explanation
  - Editorial issues (quality, clarity, consistency)

# Role of Litigation Risks

- *“Minimums” must always be met, regardless of potential for litigation.*
- *If litigation is expected, attorneys will:*
  - Assess likelihood of litigation
  - Identify specific areas of litigation risk
  - Offer suggestions for reducing risk
  - Assist decision-makers in weighing risks

# Common Trouble Spots

- *Issued commonly cited in legal sufficiency review include:*
  - Segmentation
  - Study Area Definition
  - Purpose and Need
  - Range of Alternatives
  - Indirect/Cumulative Impacts
  - Regulatory Issues - e.g., Section 4(f)
  - Responses to Comments
  - Gaps in Admin Record

# Role of Document Quality

- *Overall, legal defensibility is enhanced by:*
  - Clear, logical organization
  - Jargon-free writing
  - Effective use of visuals
  - “Telling the story” of the project
- *But don't forget to:*
  - Support your assumptions
  - Explain your methods
  - Provide back-up details
  - Build a strong administrative record



# Involving Attorneys

- *Early involvement is important.*
  - Key decisions are made early – e.g., P&N.
  - Legal advice is most helpful if provided in “real time” – not after decisions are made.
- *Direct communication helps avoid misunderstandings.*
  - Helps to clarify advice
  - Provide opportunity to adjust recommendations
  - Avoids multiple reviews

# Questions?

**The Legal Sufficiency Task Team includes:**

*Lamar Smith*

*Harold Aikens*

*Kathy Ames*

*Mike Brehm*

*Bobby Downie*

*Shannon Eggleston*

*Michelle Fishburn*

*Jack Gilbert*

*Lance Hanf*

*Bill Hauser*

*Rima Lewis*

*Bill Malley*

*David Mattern*

*Bill McCartney*

*Megan Stanley*

FHWA (team leader)

FHWA Chief Counsel's Office

Illinois DOT

Brehm Environmental LLC

Florida DOT

AASHTO

Lochner

FHWA Chief Counsel's Office

FHWA Chief Counsel's Office

New Hampshire DOT

FHWA Chief Counsel's Office

Akin Gump

Parametrix

Michael Baker Jr. Inc.

PBConsult

