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?

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