Purpose of Training

• Distinguish Legal Review from Legal Sufficiency Review
• Discuss Legal Sufficiency Review Process
• Discuss the Legal Sufficiency Review Focus Areas
• Discuss Areas of Litigation Risk
What is Legal Review?

• Legal Review is conducted throughout the process

• Reasons to conduct Legal Reviews:
  ▪ Preempt Risk
  ▪ Review the draft document prior to it being released for public availability
  ▪ Identify potential problems at key decision points
  ▪ Ensure compliance early
  ▪ Avoid schedule delays
  ▪ Expedite document review

Legal Sufficiency Review is Required

• Titles 23 C.F.R. 771.125(2)(b) and 23 C.F.R. 774.7(d) provide
  ▪ 23 C.F.R. 771.125(2)(b): The final EIS will be reviewed for legal sufficiency prior to Administration approval
  ▪ 23 C.F.R. 774.7(d): The Administration shall review all Section 4(f) approvals under §§ 774.3(a) and 774.3 (c) for legal sufficiency

What is Legal Sufficiency Review?

• An assessment to determine whether the Environmental Document [EIS or Section 4(f) Evaluation] adequately addresses NEPA procedures, laws and policies
The Attorney’s Role

- Assess document from perspective of legal standards and litigation risk
- Assess whether document was properly developed and complies with laws and policies
- Determine whether the environmental document adequately covers the issues/concerns
- Identify weaknesses in the analysis/possible litigation risks and suggest options to improve the quality of the document

When Does Legal Sufficiency Review Occur?

ETDM Screening; Scope of Services Finalized; Advance Notification; Class of Action evaluation

Project Initiation → Technical Studies → District Review of Technical Studies → Prepare Draft Environmental Document

District Quality Control Certification prior to submission for OEM

OEM and Legal Document Review → District Updates Draft Environmental Document → OEM and Legal Review and Approval → Public Hearing

District Updates Final Document → OEM and Legal Review of Final Document

District Certifies Final Document → OEM Approves Final Document; Location and Design Concept Acceptance

Legal Sufficiency Review Completed for EISs and Individual Section 4(f)

Additional Steps for FONSI/ROD (Publication and Limitation of Claims)
Legal Sufficiency Review and Comments

• 30-Day Review Period

• Attorney provides comments on the document
  ▪ Attorney memo
  ▪ Combine with senior environmental team reviewers in a matrix
  ▪ Meetings or phone conversation

• Focus on critical issues, such as not in compliance with the law or data does not support statement

• Attorney comments must be satisfactorily addressed by document preparers

Legal Sufficiency Review Comment Categories

• Compliance with laws, regulations and Executive Orders
  ▪ Section 4(f); Section 404, Section 7

• Consistency with FHWA policy
  ▪ Mitigation Measures; agency coordination

• Substantive questions or issues
  ▪ Adequacy of record supporting elimination of alternative; decision for Finding of No Significant Impact (FONSI)

• Clarification or Editorial
Outcomes

What if document is not legally sufficient
- Send comments on discrepancy areas and suggestions to resolve
- Work with team to resolve the issues
- Document must be returned to attorney for review and finding determination

What is the attorney actually certifying?
- NEPA procedures were followed and document is in compliance
- NOT that you won’t get sued
- NOT that you won’t lose

Legal Sufficiency Finding Memo

“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.”
Judicial Review - Administrative Process

- Federal Administrative Procedures Act
  - A court will look at whether the Administrative Record (both the NEPA document and the related documents) supports the agency decision
- The Administrative Record includes the NEPA document and its studies, letters, recordings, comments, e-mails, maps and anything else that is adequately referred to in the NEPA documents or considered by the agency decision maker
- A rule of thumb:
  "If it’s not in the record, it doesn’t exist"  
  (at least not in a way that can support a FDOT decision in court)

Legal Sufficiency Review Focus Areas - EIS

- Purpose and Need Statement
- Discussion of the Alternatives
- Logical Termini and Independent Utility
- Direct, Cumulative and Indirect impact analysis
- Scope of Review
Legal Sufficiency Review Focus Areas - EIS

- Mitigation Measures
- Coordination with local, state and federal agencies
- Availability for public review and comment
- Adequacy of response to comments
- Compliance with laws, regulations and policies
- Assessing and reducing litigation risk

Legal Sufficiency Review Focus Areas – Section 4(f)

- Determining Section 4(f) applicability
- Feasible and Prudent Standard
- Format of document: separate document or incorporated as appendix
- Alternatives Analysis
- Minimization and/or mitigation measures
- Consultation and coordination with agency owning or administering the resource
- 4(f) Conclusions and Finding
Litigation Risk

- Attorneys should assess the document for litigation risks
- Litigation Risk is also assessed based on project controversy
  - Organized opposition
  - Project History
  - Not in my backyard ("NIMBY")
  - Complicated Resource or Regulatory Issue
- If litigation is expected, attorneys should:
  - Identify specific areas of litigation risk
  - Offer suggestions for improving the analysis in the document to reduce the risk
  - Assist decision-makers in weighing risks

Common NEPA Challenges

- Segmentation
- Study Area & Project Definition
- Purpose and Need
- Range of Alternatives
- Environmental Justice and Title VI
Common NEPA Challenges

- Traffic Analysis and Forecasting
- Indirect/Cumulative Impacts
- Section 4(f)
- Responses to comments
- Gaps in Administrative Record

How to Protect Your Documents
Prepare Quality Documents

Enhance Legal defensibility by:

• Clear, logical organization and writing
• Effective use of visuals—use the pictures
• Tell the project story

Always

• Support your assumptions and statements
• Thoroughly explain your methods
• BUILD A STRONG ADMINISTRATIVE RECORD

Best Way to Strengthen Your Document

Coordinate with Your Attorney
During Legal Reviews (formal and informal)
During Legal Sufficiency Reviews
Which statement is true regarding Legal Sufficiency Reviews?

a. Required for EISs and Section 4(f) Evaluations
b. Reviews for compliance with laws, regulations and Executive Orders
c. Ensures adequacy of record supporting elimination of alternative
d. All of the above
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Insert email video

Email in Real Life
A Video Break

https://youtu.be/HTgYHHKsOZw
Purpose of Training

• Describe the Administrative Record (AR)
• Discuss when an AR is required and the purpose
• Demonstrate how to create the AR
• Discuss how the AR is used in Court
What is an Administrative Record?

- All documents and materials directly or indirectly considered or relied upon by the agency decision maker at the time it made its final decision in the NEPA review process
  - Includes the decision documents
  - Documents generated or received by the agency during the environmental project review
- FDOT’s official record of the NEPA decision making process
- It is NOT the Project File

What is a “Document”?

- “Documents” or “records” include letters, staff reports, emails, meeting minutes, studies, models, guidance documents...
- Format doesn’t matter
  - Hand written notes
  - Transcript
  - Comment cards
- Basically anything the decision making authority considered, or presented, or the information was reasonably available during the process
- Include documentation of contrary opinions or conflicting data and resolution of same
Administrative Record – When and Why

- If a project is being challenged in court for not complying with NEPA, the case is brought in federal district court under the Administrative Procedures Act (5 U.S.C. section 551 et seq.)
- Agencies are to follow procedures and document the decision-making process
- The AR is used to support the Agency’s process
- The analysis, findings and conclusions and the basis for them must be in the AR, if not, the Court will draw its own conclusions
- If it’s not in the record, it didn’t happen

Court Relies on the AR to Review the Action

- **Standard of Judicial Review**
  - Arbitrary and Capricious
  - An Abuse of Discretion
  - Not in accordance with the law
- **Deference to Agency Decisions**
- **An Agency Decision will be Upheld if the Agency follows the Rule of Reason**
  - Sufficient information to show full consideration of environmental factors with reasoned decision after balancing risk of harm against project benefits and reasoned choice between alternatives
Preparing the Administrative Record

- Start early in the process and maintain accurate files
- District Project Manager has primary record keeping responsibilities (SWEPT)
  - Project File
  - Project File and AR
  - Attorney Work Product
- Randomly check files to make sure they are updated
- When litigation is filed, the District Project Manager finalizes the AR
- Contact all personnel involved in the project and gather files and documents
- Much easier if the project team has been managing the files and preparing the AR during the entire process

Preparing the Administrative Record

- AR consists of all documents and materials directly or indirectly considered or relied upon by the agency decision maker
- All documents and materials prepared, reviewed or received by agency personnel
- If unsure about what documents to include, contact your FDOT attorney for advice
- You should be working with the attorney during the process
What to Include

• Paper and electronic documents must be considered
• Include all NEPA documents
• Technical Reports/Modeling (assumptions, method and results)
• Maps, drawings and displays
• Comments and Responses to Comments (may use a matrix to summarize the comments and responses)
  ▪ Agency Comments
  ▪ Public Comments

What to Include

• Correspondence with Agencies, Consultants and stakeholders
• Emails containing discussion of the proposed project (external and internal)
• Public Notices issued by the Agency
• Meeting transcripts, minutes, summaries and notes
What NOT to include

• Generally draft documents are not included in the record
• Drafts may still be requested under Florida’s Public Records Act
• However, if the draft was circulated for public comments, then the draft, comments received and the agency’s response to those comments should be included
• Including drafts can show that the agency gave the required “hard look”

What NOT to include

• Attorney Work Product
• Information prohibited by other laws or regulations such as the Endangered Species Act or Cultural Resources
• Some documents may be redacted
• Personal notes unless they are the actual record or meeting minutes
• Statutes and Regulations
Organize the Record

- Chronological order is a typical method
- Put comments and responses to comments together
- Create an easy to follow table of contents
- District Project Manager should
  - Conduct a thorough search
  - Keep a record of where searched and who contacted
  - Sign and certify the AR

Plaintiffs can review

- Plaintiffs can review the draft AR
- Address disputes regarding contents of AR
- Plaintiffs can challenge to have documents added
- Court will decide
Submitting the AR to the Court

- FDOT will have to certify to the Court that the AR is complete
  - Usually the District PM or an attorney certifies the AR
- FDOT attorneys will check the local rules to lodge the AR
- Most Courts want the AR in electronic format
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Further Guidance

- September 2014 Department of Transportation Office of General Counsel (OGC) issued the “Guidance on Compilation and Preparation of Administrative Records for Litigation”
- February 4, 2015, FHWA Chief Counsel issued a memo titled “Preparing Administrative Records for Litigation”
- August 2016, AASHTO’s Practitioner’s Handbook “Maintaining a Project File and Preparing an Administrative Record for a NEPA Study”
Most Important Factor Relating to the AR

If it’s not in the record, it didn’t happen

Survey
What should be included as part of the Administrative Record?

a. Draft documents that have not been circulated for public comment
b. Technical reports and NEPA documents
c. Attorney Work Product
d. Statutes and Regulations
e. All of the above
Ready
Set
Go!

We are the Lead Federal Agency
Project Delivery Coordinators are your primary points of contact

OEM is here to help keep project moving
We all need to ensure our projects meet requirements

OEM and Districts need to keep the lines of communication open and clear

Moving Forward with FDOT in the Driver’s Seat
Together we are effective and efficient