

# CHAPTER 29

## LEGAL SUFFICIENCY AND OTHER LEGAL CONSIDERATIONS



- 26.1 Legislation, Regulations, and Guidance
- 26.2 Legal Sufficiency
- 26.3 Administrative Record



# LEGAL SUFFICIENCY AND OTHER LEGAL CONSIDERATIONS

**T**ransportation projects attract attention and legal action from an assortment of stakeholders for a wide variety of reasons. Transportation agencies, including the District of Columbia Department of Transportation (DDOT) and the Federal Highway Administration (FHWA), have a variety of procedures to ensure that their environmental efforts comply with the law and to minimize the likelihood or cost of adverse legal action.

## 29.1 Legislation, Regulations, and Guidance

- National Environmental Policy Act of 1969 (NEPA) as amended
- Regulations of the Council on Environmental Quality (CEQ), 40 Code of Federal Regulations (CFR) parts 1500–1508 implementing NEPA
- Section 4(f) at 49 United States Code (USC) 303 and 23 USC 138

- Administrative Procedures Act, which governs the way federal independent agencies and executive department agencies propose and establish regulations
- 23 CFR 771.125(b), which requires a formal legal sufficiency review for any final Environmental Impact Statement (EIS) issued by FHWA
- 23 CFR 771.135(k), which requires a formal legal sufficiency review for any final Section 4(f) report issued by FHWA

## 29.2 Legal Sufficiency

The FHWA review for legal sufficiency is required by regulation for final EIS documents and is intended to assess and ensure the legal adequacy of the federal decision-making process. These reviews are a normal and necessary part of the project development process.

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

The two key themes related to legal sufficiency of NEPA documents are:

- The legal sufficiency review
- The common trouble spots related to the legal sufficiency of NEPA documents

### 29.2.1 Legal Sufficiency Review

The legal sufficiency of NEPA documents is an important element of the overall NEPA project development process for federally funded transportation projects. It involves identifying and addressing potential legal risks of proposed projects. DDOT working through the division project engineer, seeking expert legal advice early and throughout the project and document development process is likely the best way to achieve the broader purposes of legal sufficiency.

Legal sufficiency reviews are normally performed concurrently with the FHWA Division Office routine review of the administrative draft of a Final EIS prior to its approval and formal circulation. However, depending on project complexity, controversy, and related issues, the review may be initiated at the Preliminary Draft EIS phase, the Draft EIS stage, or earlier. For DDOT projects, legal sufficiency review is provided by DDOT General Counsel

and FHWA General Counsel attorneys. These attorneys are familiar with the interpretations of NEPA law by the federal courts with jurisdiction over the states for which they are responsible.

Legal sufficiency reviews assess the document from the perspective of legal standards and litigation risk, rather than technical adequacy, which the attorney assumes to be correct and complete. The document is analyzed from the perspective of whether it was developed properly and answers the substantive questions that reasonably could be asked. The review focuses on the adequacy of the discussion of essential NEPA and project decision-making elements such as purpose and need, alternatives, scope of environmental resources and impact analysis, interagency coordination, public involvement, and responses to comments.

Legal sufficiency review comments generally focus on:

- Compliance with applicable laws, regulations, Executive Orders, or agency guidance. These are substantial comments, which require appropriate attention.
- Substantive questions or comments. These may include, for example, comments on the adequacy of supporting information related to the elimination of alternatives or analysis of Section 4(f) feasible and prudent alternatives.
- Consistency with FHWA policies. This may include, for example, comments related to mitigation measures or evidence of coordination with other agencies and/or the public.

- Editorial comments. Generally, comments in this category are opinions on ways in which the document can be improved.

### 29.2.2 Common Trouble Spots

The common issues of legal sufficiency and litigation risk are also those elements of the NEPA process that are essential to environmental compliance and project decision making. These generally include the following issues.

#### Purpose and Need

Project purpose and need is the linchpin of any NEPA study and is often a point of criticism and target in litigation. Common concerns include:

- The project purpose and need are defined too narrowly. This can lead to criticism that the range of reasonable alternatives was improperly narrowed.
- Project goals are established either vaguely or too broadly.
- Local agencies' policy and goals established in transportation, land use, and other relevant planning studies are not addressed in the purpose and need statement.

#### Alternatives Screening and Analysis

Related to purpose and need, the development and screening of alternatives is a frequent cause of criticism and target in litigation. The record must support the development and elimination of alternatives. Some common concerns include:

- Failing to explain the alternative development, screening, and evaluation process adequately so that it can be found rational, reasonable, and complete
- Eliminating alternatives without adequate or appropriate analysis to support the decisions
- Eliminating alternatives based on outdated information or older studies that may no longer be reliable
- Failing to reconsider alternative screening decisions later in the project development process when new information becomes available
- Over-reliance on weighting and scoring techniques. Such numerical rating systems can be useful for screening alternatives, 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. Scoring techniques should be used appropriately and with care.

#### Project Segmentations

The FHWA NEPA regulations require project alternatives to have logical termini, have independent utility, and not restrict consideration of alternatives for reasonably foreseeable future transportation improvements.

#### Study Area and Boundaries

Appropriate study area and environmental resource boundaries are critical to the NEPA process, yet are often described vaguely or without clear rationale. The study area is sometimes defined by limited boundaries, despite the fact that project impacts extend over a wide geographic area or

include different and overlapping environmental resource boundaries.

### **Indirect and Cumulative Effects Analysis**

The indirect and cumulative effects analysis required by CEQ regulations is often the target of criticism and litigation.

### **Compliance with Procedural Requirements**

The National Historic Preservation Act of 1966 (NHPA) Section 106, Employment Standards Administration (ESA) Section 7, and other procedural processes require the lead agencies to consult with resource and regulatory agencies concerning project impacts to specific resources. One way to address this concern is to include a summary in the relevant section of the NEPA document that highlights the consultation process, with key dates, participants, and reference to related documents in the record.

### **Compliance with Substantive Requirements**

Legal sufficiency reviews will look at the substantive requirements that will potentially influence the ultimate project decision. Two important requirements are Section 4(f) and Section 404, both of which require specific findings prior to approval of the project or permit.

### **Responses to Public Comments**

For some high-profile projects, public comments on the Draft EIS can be voluminous and substantive. Responding to these comments can be challenging and time consuming. In many cases, responses will be prepared by a team, which can make the process more efficient but also

may introduce inconsistency or result in responses that fail to address the substantive issue.

### **Responses to Resource Agency Concerns**

For large and complex projects, tension or disagreement can develop between the lead agency and resource agencies. It is important that relevant and reasonable resource agencies' concerns be considered and adequately addressed. Courts often look to resource agencies as subject-matter experts in the public sector, and failure on the part of the lead agency to adequately respond to their comments or address their concerns can present serious problems during litigation.

### **Accounting for New Information or Circumstances**

Essential information related to the project analysis and decision making must be kept current. Project studies should be continually updated, with new information incorporated into the document and administrative record as it becomes available.

## **29.3 Administrative Record**

The administrative record is the written record supporting the agency's decisions and decision making. An administrative record plays an important role if a project is litigated. The administrative record must show that:

- Agency decision makers understood the legal standard applying to the decision
- The standard was applied properly; that the agency considered the proper information, evaluated all of the factors requiring evaluation, and considered relevant

factors in terms of the legal requirements governing the action

- The action taken is reasonable

The Administrative Record should include all documents and material directly or indirectly considered by the agency decision maker in making the challenged decision. This includes documents and materials that:

- Cite whether they support or do not support the final decision of the agency
- Were available to the decision-making office at the time the decision was made
- Were considered by or relied upon by the agency
- Came before the agency at the time of the challenged decision, even if the documents and materials were not specifically considered by the final agency decision maker
- Provide both privileged and nonprivileged information

The administrative record can be organized in various ways—in chronological order, by issue, or by type of information. It should provide an index to allow readers easy access. After FHWA counsel reviews the administrative record, the FHWA must certify it. To have a complete and thorough administrative record, it should be created at the start of the project and continually updated. This will help ensure that no information is lost and will help enable organization of the information in a logical manner. While this is the preferred path, even if it is not followed, it is critical that all documents, correspondence, reference material, meeting summaries, guidance considered, studies,

notes, electronic files (including all e-mail), and any other information relied on be retained until all potential of litigation is past.

The administrative record needs to include privileged information as well as nonprivileged information. Once the record is compiled, privileged or protected documents and materials may be redacted or removed from the record. Ultimately, the administrative record should include all documents, including those from DDOT, from any consultants and subconsultants, from FHWA, and those provided to the project team by interest groups, the public, agencies, proponents, and opponents.

When compiling the administrative record, DDOT should:

- Search files
- Search e-mail and backup tapes
- Write facts and narrative
- Put items in chronological order
- Review court documents such as plaintiff's statement of facts
- Serve as a resource

At the outset of litigation, this entire file is submitted to the court, and the legal positions taken by the government are based on this written record. Therefore, a good administrative record should reflect what the agency did and why it acted. The record must reflect how the agency handled the information it received and developed. Because the record must reflect the way the agency handled negative information, include documents and

materials whether they support or do not support the final agency decision.

If the file is found to be inadequate after it is submitted to the court, the government may be allowed to complete the record, but this raises important questions about the completeness of the entire record. A court may allow extra-record discovery, including depositions of agency personnel, and may allow court testimony of agency personnel. The court may allow discovery if the court

determines that the incompleteness is based upon bad faith, that improprieties may have influenced the decision maker, or that the agency relied on substantial materials not included in the record.

The DDOT Environmental Document Review Form provided in Appendix I should be used to ensure that all documents needed for the administrative record are available.