



**NEPA Assignment:**  
Legal Sufficiency Reviews and Certification




2016




## 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



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## 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



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## 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



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## The Attorney's Role

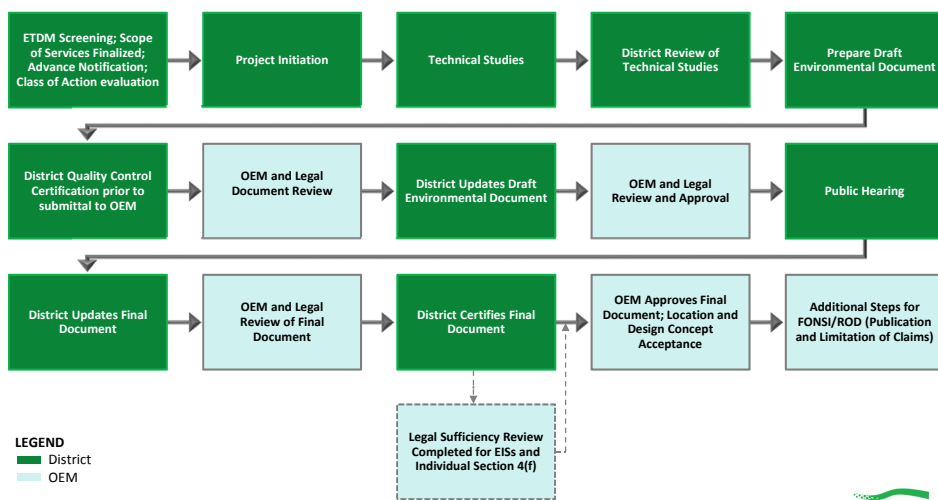
- Assess document from perspective of legal standards and litigation risk
- Assess whether document was properly developed and complies with laws and policies
- Determine whether the environmental document adequately covers the issues/concerns
- Identify weaknesses in the analysis/possible litigation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



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## When Does Legal Sufficiency Review Occur?



LEGEND  
■ District  
■ OEM



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## 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**



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## 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**



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## 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

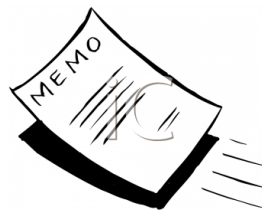


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## Legal Sufficiency Finding Memo

"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."



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## 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)**



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## 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



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## 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



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## 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



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## 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



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## Common NEPA Challenges

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



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## Common NEPA Challenges

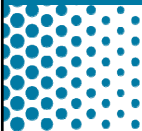
- Traffic Analysis and Forecasting
- Indirect/Cumulative Impacts
- Section 4(f)
- Responses to comments
- Gaps in Administrative Record



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## 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**



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## Best Way to Strengthen Your Document

# Coordinate with Your Attorney

During Legal Reviews (formal and informal)

During Legal Sufficiency Reviews




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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

 **FDOT**

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 **OEM**  
Office of Environmental Management

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Insert email video


## Email in Real Life A Video Break

<https://youtu.be/HTgYHHKs0Zw>




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**NEPA Assignment:**  
Preparing the Administrative Record




2016




### 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



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## 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



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## 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



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## 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



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## 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



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## 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



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## 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



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## 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



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## 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



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## 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"



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## 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



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## 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



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## 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



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## 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
- Index

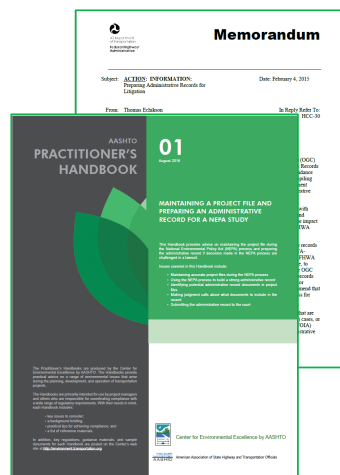


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## Further Guidance

- 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”**



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Most Important Factor Relating to the AR

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



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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



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