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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA-2008-0053]

Surface Transportation Project Delivery Pilot Program; Caltrans
Audit Report.

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final report.

SUMMARY: Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) established the Surface Transportation Project Delivery Pilot Program, codified at 23 U.S.C. 327. To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) mandates semiannual audits during each of the first 2 years of State participation. This final report presents the findings from the first FHWA audit of the California Department of Transportation (Caltrans) under the pilot program.

FOR FURTHER INFORMATION CONTACT: Ms. Ruth Rentch, Office of Project Development and Environmental Review, (202) 366-2034, Ruth.Rentch@dot.gov, or Mr. Michael Harkins, Office of the Chief Counsel, (202) 366-4928, Michael.Harkins@dot.gov, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the Office of the Federal Register's home page at <http://www.archives.gov> and the Government Printing Office's Web site at <http://www.access.gpo.gov>.

Background

Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (codified at 23 U.S.C. 327) established a pilot program to allow up to five States to assume the Secretary of Transportation's responsibilities for environmental review, consultation, or other actions under any Federal environmental law pertaining to the review or approval of highway projects. In order to be selected for the pilot program, a State must submit an application to the Secretary.

On June 29, 2007, Caltrans and FHWA entered into a Memorandum of

Understanding (MOU) that established the assignments to and assumptions of responsibility to Caltrans. Under the MOU, Caltrans assumed the majority of FHWA's responsibilities under the National Environmental Policy Act, as well as the FHWA's responsibilities under other Federal environmental laws for most highway projects in California.

To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) requires the Secretary to conduct semiannual audits during each of the first 2 years of State participation; and annual audits during each subsequent year of State participation. The results of each audit must be presented in the form of an audit report and be made available for public comment. The FHWA solicited comments on the first audit report in a Federal Register Notice published on June 2, 2008, at 73 FR 31536. The FHWA received one comment which was supportive of the draft audit report. This notice provides the final draft of the first FHWA audit report for Caltrans under the pilot program.

Authority: Section 6005 of Pub. L. 109-59; 23 U.S.C. 315 and 327.

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Issued on: September 16, 2008.
Thomas J. Madison, Jr.,
Federal Highway Administrator.

Surface Transportation Project Delivery Pilot Program--FHWA Audit of Caltrans, January 29-31, 2008

Background

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) section 6005(a) established the Surface Transportation Project Delivery Pilot Program (Pilot Program), codified at Title 23, United States Code (U.S.C.), section 327. The Section 6005 Pilot Program allows the Secretary to assign, and the State to assume, the Secretary of Transportation's (Secretary) responsibilities under the National Environmental Policy Act (NEPA) for one or more highway projects. Upon assigning NEPA responsibilities, the Secretary may further assign to the State all or part of the Secretary's responsibilities for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review of a specific highway project. When a State assumes the Secretary's responsibilities under this program, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of the Federal Highway Administration (FHWA).

To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) mandates that FHWA, on behalf of the Secretary, conduct semiannual audits during each of the first 2 years of State participation; and annual audits during each subsequent year of State participation. The focus of the FHWA audits is to assess a pilot State's compliance with the Memorandum of Understanding (MOU) \1\ and applicable Federal laws and policies, to collect information needed to evaluate the success of the Pilot Program, to evaluate pilot State progress toward achieving its performance measures, and to collect information needed for the Secretary's annual report to Congress on the administration of the Pilot Program. Additionally, 23 U.S.C. 327(g) requires FHWA to present the results of each audit in the form of an

audit report. This audit report was published in the Federal Register June 2, 2008, at 73 FR 31536 with a request for comments (Docket Number FHWA-2008-0053). The 60-day comment period closed August 1, 2008, with one comment received. In compliance with 23 U.S.C. 327(g)B, FHWA has responded to the comment and published the final report in the Federal Register no later than 60 days after the date on which the period for public comment closed.

\1\ Caltrans MOU available at http://environment.fhwa.dot.gov/strmlng/safe_cdote_pilot.asp.

The California Department of Transportation (Caltrans) published its Application for Assumption (Application) under the Pilot Program on March 14, 2007, and made it available for public comment for 30 days. After considering public comments, Caltrans submitted its application to FHWA on May 21, 2007, and FHWA, after soliciting the views of other Federal agencies, reviewed and approved the application. Then on June 29, 2007, Caltrans and FHWA entered into an MOU that established the assignments to and assumptions of responsibility to Caltrans, which became effective July 1, 2007. Under the MOU, Caltrans assumed the majority of FHWA's responsibilities under NEPA, as well as FHWA's responsibilities under other Federal environmental laws for most highway projects in California. Caltrans' participation in the Pilot Program will be effective through August 2011.

In order to meet the audit requirements specified in SAFETEA-LU, FHWA contracted with consultants who have expertise in compliance auditing to assist FHWA in developing the audit processes and procedures for the Pilot Program. Training was provided to the audit team, FHWA, and Caltrans staff in two phases:

1. Basics of Compliance Auditing (January 2007); and
2. Development of the Pilot Program Audit Process and Procedures (August 2007).

The August 2007 audit training included specific Pilot Program auditing processes and procedures. The auditors received training on each core audit area to be evaluated during FHWA audits of each pilot State's Program. The core audit areas to be evaluated are: Program management; records and documentation management; quality control and quality assurance processes; legal sufficiency; performance measures; and training.

Scope of the Audit

The Caltrans' Pilot Program audit was conducted by the FHWA audit team in California from January 29 through January 31, 2008. The audit, as required in SAFETEA-LU, assessed Caltrans' compliance with the roles and responsibilities it assumed in the MOU and also provided recommendations to assist Caltrans in creating a successful Pilot Program.

As this was the first FHWA audit of Caltrans' participation in the Pilot Program, it was designed to begin the audit sampling process. The audit sample included fundamental processes and procedures the State put in place to carry out the assumptions of the roles and responsibilities set forth in the MOU. Key sample areas included Pilot Program staffing resources, training, legal sufficiency, and the implementation of processes and procedures to support assumed responsibilities. The sampling process also included a geographic element, as the audit included onsite visits to two Caltrans locations, the Caltrans Headquarters office in Sacramento, and its District 4

Office in Oakland. Future audits will include onsite visits to other Caltrans Districts.

While the six core audit areas identified and discussed during the August 2007 training serve as the basis for each Pilot Program audit, it is not expected that each audit will address all six core audit areas. For the first audit, FHWA selected core audit areas for review based on professional auditing experience, statistical techniques (where appropriate), interviews with Federal resource agencies, and an evaluation of background information provided by Caltrans prior to the onsite audit. All Pilot Program areas for which compliance is required under the MOU will be evaluated cumulatively by FHWA in future audits. Future FHWA Pilot Program audits will also follow up on findings from previous FHWA Pilot Program audits.

Audit Process and Implementation

Each FHWA audit conducted under the Pilot Program is designed to ensure a pilot State's compliance with the commitments in its MOU with FHWA. FHWA will not evaluate specific project-related decisions made by the State as these decisions are the sole responsibility of the pilot State. However, the scope of the FHWA audits does include reviewing the processes and procedures used by the pilot State to reach project decisions in compliance with MOU Section 3.2.

Also, Caltrans committed in its Application (which is incorporated into the MOU in section 1.1.2) to implement specific processes to strengthen its environmental procedures in order to assume the responsibilities assigned by FHWA under the Pilot Program. The FHWA Pilot Program audits will review how Caltrans is meeting each of these commitments as well as the

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performance of the Pilot Program in the core audit areas previously described.

The Caltrans' Pilot Program commitments address:

- Organization and Procedures under the Pilot Program
- Expanded Quality Control Procedures
- Independent Environmental Decisionmaking
- Determining the NEPA Class of Action
- Consultation and Coordination with Resource Agencies
- Issue Identification and Conflict Resolution Procedures
- Record Keeping and Retention
- Expanded Internal Monitoring and Process Reviews
- Performance Measures To Assess the Pilot Program
- Training To Implement the Pilot Program
- Legal Sufficiency Review

The FHWA audit team included representatives from the following offices or agencies:

FHWA Office of Project Development and Environmental
Review

- FHWA Office of Chief Counsel
- FHWA Alaska Division Office
- FHWA Resource Center Environmental Team
- Volpe National Transportation Systems Center
- Advisory Council on Historic Preservation

From January 29 through January 31, 2008, the audit team conducted the onsite audit and evaluated the core Pilot Program areas associated with program management, training, records and documentation management, and legal sufficiency at both Caltrans Headquarters and District level. The onsite audit consisted of interviews with more than

40 Caltrans staff at Headquarters and in the Districts for both the Capital and Local Assistance programs, as well as 11 members of Caltrans' legal staff at Headquarters and in field offices. The audit team interviewed a cross-section of staff including top senior managers, senior environmental planners, associate planners, and technical experts. Caltrans staff at several Districts were contacted by telephone and a portion of the audit team visited the District 4 Office in Oakland. The team also reviewed project documentation associated with the projects provided to the FHWA California Division Office.

FHWA acknowledges that Caltrans identified specific issues during its first self-assessment performed under the Pilot Program as required under MOU section 8.2.6. During the FHWA onsite audit, Caltrans indicated that it had begun to implement corrective actions to address some issues identified in its first self-assessment. Some issues identified in the Caltrans self-assessment may overlap with FHWA findings in this audit report. In part, FHWA conducts each Pilot Program audit to evaluate assumed responsibilities and to obtain evidence to support the basis for each audit finding. Therefore, this audit report documents findings within the scope of the audit and as of the dates of the onsite portion of the audit. FHWA does acknowledge that some deficiencies identified in this audit report occurred during the first 3 months of Pilot Program operations.

In accordance with MOU section 11.4.1, FHWA provided Caltrans with a 30-day comment period to review this draft report. FHWA has reviewed the comments received from Caltrans and has revised sections of the draft report where appropriate.

Overall Audit Opinion

As this is a Pilot Program, it is expected that a learning curve is required. As such, Caltrans has made reasonable progress in implementing the start-up phase of Pilot Program operations and Caltrans is learning how to operate this new Pilot Program effectively. Based on the information reviewed, it is the audit team's opinion that to date, Caltrans has been carrying out the responsibilities it has assumed in keeping with the intent of the MOU. The Pilot Program in California is proceeding through the start-up phase. During the onsite audit, Caltrans staff and management indicated ongoing interest in obtaining constructive feedback on successes and areas for improvement. By addressing the findings in this report, Caltrans will help move the program toward success.

Findings

The FHWA audit team carefully examined Pilot Program areas to assess compliance in accordance with established criteria (i.e., MOU, Application for Assumption). The time period covered in this first audit report is from the start of the Pilot Program (July 1, 2007) through completion of the first onsite audit (January 31, 2008). This report presents audit findings in three areas:

Compliant--Audit verified that a process, procedure or other component of the Pilot Program meets a stated commitment in the Application for Assumption and/or MOU.

Needs Improvement--Audit determined that a process, procedure or other component of the Pilot Program as specified in the Application for Assumption and/or MOU is not fully implemented to achieve the stated commitment or the process or procedure implemented is not functioning at a level necessary to ensure the stated commitment is satisfied. Action is recommended to ensure success.

Deficient--Audit was unable to verify if a process, procedure or other component of the Pilot Program met the stated commitment in the Application for Assumption and/or MOU. Action is required to improve the process, procedure or other component prior to the next audit; or

Audit determined that a process, procedure or other component of the Pilot Program did not meet the stated commitment in the Application for Assumption and/or MOU. Corrective action is required prior to the next audit.

Summary Findings

Findings--Compliant

(C1) Legal Sufficiency--Caltrans' Legal Division has developed a consistent process to conduct formal legal sufficiency reviews by attorneys (per 23 Code of Federal Regulations Sec. Sec. 771.125(b) and 771.135 (k) \2\) and has provided basic legal sufficiency training to each reviewing attorney, in compliance with MOU section 8.2.5 and Section 773.106(b)(3)(iii) of Caltrans' Application. (Note: An evaluation of the implementation of the legal sufficiency review process could not be performed because no legal sufficiency determinations had been completed under the Pilot Program as of the date of the FHWA audit.)

\2\ Effective April 11, 2008, FHWA's Section 4(f) regulation has been re-codified as 23 CFR part 774. The legal sufficiency review requirement for Final Section 4(f) Evaluations is now found at 23 CFR 774.7(d).

(C2) Establish Pilot Program Policies and Procedures--Caltrans currently, in general, complies with MOU section 1.1.2 commitments to establish Pilot Program policy and procedural documentation (as detailed in Caltrans' Application).

Pilot Program policies and procedures are described in the Caltrans' Application sections ``Overview of Caltrans'' Standard Environmental Reference (SER), ``Other Guidance,'' and ``Appendix C.'' Caltrans maintains the SER, a four volume Environmental handbook, as a single on-line policy and procedural reference focusing on statutory and regulatory requirements for environmental documents, supporting technical studies, and the

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procedures for processing these reports. The SER addresses compliance with NEPA, the California Environmental Quality Act (CEQA), and other applicable Federal and State laws, executive orders, regulations, guidance documents, and policies. Caltrans added Chapter 38: ``NEPA Delegation,'' to Volume 1 of the SER to include the majority of the policies and procedures associated with administering the Pilot Program. However, other sections in the SER including ``Policy Memos'' contain information on the Pilot Program. In addition to the SER, a number of manuals and other forms of guidance on Caltrans Web sites include information on various aspects of processes associated with the Pilot Program. Most notably, Chapter 6 of the Local Assistance Program Manual for Local Assistance Projects Off the State Highway System provides detailed guidance on preparing environmental documents for local agency projects and also refers users to the SER.

(C3) Background NEPA Training--Caltrans' existing Environmental Staff Development Program, outlined in the Application, has processes in place to ensure that Environmental Staff involved in NEPA documentation have the underlying foundational skill sets required in addition to the added skills required to address responsibilities under the Pilot Program. To achieve this, the Environmental Staff Development Program includes numerous processes, including an annual needs assessment, to evaluate the training needs of the environmental staff at each of Caltrans' 12 districts. These processes help to ensure ongoing compliance with the overall Caltrans' Application commitment to ongoing staff development. (Note: Specific skills required for the Pilot Program are discussed under separate findings.)

(C4) Training Plan--Caltrans conducted a training needs assessment specific to the Pilot Program and developed a training plan titled ``Caltrans Surface Transportation Project Delivery Pilot Program Training Plan (Oct. 1, 2007)'' in compliance with section 12.1.2 of the MOU.

(C5) Interagency Agreements that Involve Signatories in Addition to FHWA and Caltrans--Caltrans complied with MOU section 5.1.5 as it pertains to the National Historic Preservation Act, Section 106 Programmatic Agreement (PA). Caltrans completed addenda to the PA within 6 months after the effective date of the MOU to reflect Caltrans' assignment of authority under the Pilot Program.

(C6) State Commitment of Resources--The initial evaluation of resources to implement the Pilot Program and the assignment of resources, as of the date of the first audit, is compliant with MOU section 4.2.2, as demonstrated by:

a. Creation of eight new Caltrans positions (Person Years or PY, equivalent to the Federal Full Time Equivalent or FTE) to support Pilot Program implementation. These new positions include two in the Caltrans Headquarters Division of Environmental Analysis (one NEPA Delegation Manager, one Statewide Audit Coordinator) and six new positions in the Caltrans Division of Local Assistance, Office of NEPA Delegation and Environmental Procedures (one Local Assistance NEPA Delegation and Environmental Coordinator and five Local Assistance NEPA Delegation Coordinators).

b. Assigning additional responsibilities to existing Caltrans Headquarters staff in the areas of Legal Sufficiency, Training, and Local Assistance, as well as expanding the responsibilities of four Environmental Coordinators. To date, these responsibilities have been accommodated within the work schedules of these positions.

c. Continuing and expanding the use of technical specialists (e.g., Biologists, Cultural Resource specialists) and generalists (e.g., Senior Environmental Planners) from Caltrans' Capital Projects section to assist, as needed, Caltrans' Local Assistance section with the review and approval of NEPA program elements. The reallocation of resources is conducted on an ongoing basis to meet needs (under the Pilot Program and in general) as they are identified.

d. Maintaining organizational and staffing capabilities to effectively carry out the responsibilities assumed under MOU sections 4.2.2 and 4.2.3 pertaining to section 106 of the National Historic Preservation Act.

Findings--Needs Improvement

(N1) Quality Assurance/Quality Control (QA/QC) Process Implementation--The Caltrans QA/QC process developed to comply with MOU section 8.2.5 has not been consistently implemented for all projects assumed under the Pilot Program. Caltrans personnel did not demonstrate a consistent understanding of the steps in the QA/QC process. As staff

use and apply the QA/QC procedures, Caltrans needs to actively monitor conformance with its procedures and, as needed, assess and correct the root causes behind areas of weakness in execution.

(N2) QA/QC Process Related to SER Chapter 38 Procedural and Policy Changes--MOU section 8.2.5 requires that Caltrans carry out regular QA/QC activities to ensure that the assumed responsibilities are conducted in accordance with the MOU. While some SER procedural and policy changes are addressed through memoranda or e-mails based on the level of importance, no system existed at the time of the audit to track all policy changes, thereby affecting the QA/QC of SER changes. The audit identified that a recent revision to SER Chapter 38 resulted in the erroneous omission of Environmental Impact Statements (EISs) from the list of environmental documents required to include a statement on the document cover page regarding Caltrans' assumption of responsibility under 23 U.S.C. 327 and MOU section 3.2.5.

(N3) Environmental Document Protocols--Class of Action Determination--The audit team was unable to identify through a review of Pilot Program policies and procedures specified in SER Chapter 38 how a class of action determination is documented. Caltrans staff interviewed indicated that an informal agreement exists to use e-mail correspondence to document decisions on class of action determinations. It is recommended that Caltrans acknowledge in SER Chapter 38 acceptable options for documentation of class of action determinations.

(N4) Documentation of Pilot Program Procedures in SER 38--SER Chapter 38 requires that the signatory of each environment document be informed of the completion of the environmental document QA/QC review process before signing the document. It is recommended that Caltrans acknowledge in SER Chapter 38 acceptable options to convey the recommendation to the signatory official that all QA/QC review certification forms have been completed.

(N5) Execution of the Legal Sufficiency Review Process--The first environmental document submitted for formal legal sufficiency review was not submitted in accordance with the procedures specified in the October 15, 2007, memorandum titled: ``Procedures for Determining Legal Sufficiency for Environmental Documents under the NEPA Pilot Program'' (nor, by reference, DEA's July 2, 2007, memorandum, ``Environmental Document Quality Control Program under the NEPA Pilot Program''). As this new process comes into use, Caltrans should actively monitor conformance and provide additional training as needed.

(N6) Pilot Program Self-Assessment--Caltrans' self-assessment process needs

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improvement to ensure it fully complies with MOU section 8.2.6. Specifically, the first self-assessment conducted by Caltrans under the Pilot Program did not correlate each identified issue needing improvement to the corrective action(s) taken to address each issue.

Findings--Deficient

(D1) QA/QC Process--Caltrans requires each environmental document to be reviewed according to the policy memo titled ``Environmental Document Quality Control Program under the NEPA Pilot Program (July 2, 2007).'' Several deficiencies exist with the quality control process detailed in the aforementioned policy memo, SER Chapter 38, and as required by MOU section 8.2.5. These deficiencies are:

a. Completion of Quality Control Certification Forms. The required Internal and External Certification forms used in the environmental document review process were not consistently completed prior to the

approval of each environmental document. The QC policy memo requires that ``all staff personnel who have served as a reviewer on a project document shall sign a Quality Control Certification Form at the conclusion of their review. The reviewer's signature certifies that the document meets professional standards and Federal and State requirements in the reviewer's area of expertise, and is consistent with the SER and annotated outlines.'' Seven of 11 documents examined identified where the signatory approved the environmental document prior to the completion of the document review process (i.e., before the Quality Control Certification Form was completed).

b. Inconsistent Completion of the Environmental Document Preparation and Review Tool Checklist and the Resource/Technical Specialist Review Certification on the Internal and External Quality Control Certification Forms. For EAs and EISs, the specific resource topics identified in the Environmental Document Preparation and Review Tool Checklist were not always consistent with the resource topics indicated on the Resource/Technical Specialist Review Certification forms for the same document.

c. The Peer Reviewer for 3 of 11 environmental documents examined under the audit did not meet the requirement in SER Chapter 38 to be ``a staff member who has not participated in, supervised or technically reviewed the project.''

(D2) Pilot Program Self-Assessment--Caltrans' self-assessment process failed to fully comply with MOU section 8.2.6 which requires the identification of ``any areas needing improvement.'' The Caltrans self-assessment (which reviewed the completion of the Quality Control Certification forms) did not identify that in some cases the peer reviewer function was not performed according to SER Chapter 38 policy. The policy requires an independent review by environmental staff not otherwise involved in the project. The self assessment did not identify that on 3 of 11 QA/QC certification forms (reviewed under this audit and the self assessment) used on EA and EIS projects, the person signing as the peer reviewer also signed as a technical expert.

(D3) Records Management--The project filing system in place at District 4 did not meet the Caltrans Uniform Filing System requirements as specified in the ``Record Keeping and Retention'' section of the Caltrans Application. This determination was made by the Audit Team through interviews with district personnel during the on-site audit. The Uniform Filing System is the records management method chosen by Caltrans to comply with the records retention requirements in MOU section 8.3. This filing system was not in use and was not implemented as described in the Application and SER Chapter 38.

(D4) Statement Regarding Assumption of Responsibility--MOU section 3.2.5 requires language regarding Caltrans' assumption of responsibility under 23 U.S.C. 327 be included on the cover page of each environmental document for all assumed Pilot Program projects. The cover pages for two Draft EIS documents and one EA reviewed during the audit did not include this required statement.

Response to Comments and Finalization of Report

Only one comment was received by FHWA during the 60-day comment period for the draft audit report. This comment was submitted by the Caltrans on July 31, 2008. Caltrans wished to thank FHWA for the opportunity to participate in the pilot program, an ``opportunity to test a new model for implementing the Secretary of transportation's environmental responsibilities.'' Caltrans also stated that their relationship with FHWA continues to be ``strong and healthy.'' Their comment also stated that they were pleased with the FHWA audit opinion. They take the pilot program responsibilities and commitments seriously

and appreciate FHWA's audit input and findings as they assist Caltrans in continuous improvement.

The FHWA feels that there was no need to revise the draft audit report findings to be responsive to this comment, with the exception of making the ``Background'' section current and the addition of this section.

[FR Doc. E8-22131 Filed 9-22-08; 8:45 am]

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