

**FEDERAL HIGHWAY ADMINISTRATION
2006 ENVIRONMENTAL CONFERENCE**

FINAL PROCEEDINGS

**Crystal City, Virginia
June 27-29, 2006**

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CONFERENCE WELCOME AND INTRODUCTIONS: A LOOK AT FHWA PAST, PRESENT AND FUTURE

Speakers

April Marchese, Director, Office of Natural and Human Environment, FHWA

Rick Capka, Administrator, Federal Highway Administration

Cindy Burbank, Associate Administrator, Office of Planning, Environment, and Realty, FHWA

Fred Skaer, Director, Office of Project Development and Environmental Review, FHWA

Description: During this first session of Federal Highway Administration's (FHWA) 2006 Environmental Conference, participants were welcomed to the Conference as well as given an overview of the Conference agenda. The session included an interactive "walk down memory lane" of the past 50 years of FHWA and the Interstate Highway System. April Marchese opened the session by welcoming participants and explaining some of the logistics of the conference and documents in each participant's folder. She then welcomed FHWA Administrator Rick Capka, who spoke about the past, present and future of FHWA on the eve of the 50th Anniversary of the Interstate Highway System. After Mr. Capka spoke and answered audience questions, Cindy Burbank addressed the Conference's theme, and introduced Fred Skaer, who led the conference participants in a game of highway history trivia.

Keynote Address (Rick Capka)

Mr. Capka, FHWA's Administrator, opened the conference with a discussion focusing on the past, present and future of FHWA. He spoke about the 50th anniversary of the Interstate Highway System, and how the Interstate Highway System will help the United States remain competitive in the global economy. He also described how FHWA's Vital Few Goals and the core issues of freight, congestion, and transportation planning have been evolving over the past fifty years, as well as how they will be addressed in the future. In closing, Mr. Capka provided thoughts on how a Report to Congress that the Committee on Surface Transportation is drafting could affect the future of transportation in the United States.

Important points from Mr. Capka's address included:

- ◆ *Freight:* The U.S. should work to remain competitive in the global market. In order to continue this effort, the cost of transportation needs to be reduced. The Interstate can play a significant role in doing so.
- ◆ *Congestion:* Congestion is a new challenge to FHWA, especially since Secretary Mineta announced his Congestion Initiative. The challenge is determining the most appropriate strategies for addressing congestion. The Secretary's Congestion Initiative is addressing congestion problems, but the roles that FHWA play remain and will become even more important.
- ◆ *Transportation Planning:* Though planning has always been part of the transportation delivery process, fifty years ago, engineering and construction were the major focuses. At that time, there were no National Environmental Policy Act (NEPA) and planning guidelines.

Planning, environmental review and construction is one continuous flow and should be treated that way. Before, transportation planning was often a stovepipe process with projects handed from one team to the next to complete different parts of the process. By the time projects were at the construction phase, many of the principles of planning and environmental review could have been lost. Now transportation project delivery is becoming a more coordinated process that integrates the human skills and talents within FHWA.

Mr. Capka also addressed the status of FHWA's Vital Few Goals (VFG). According to Mr. Capka, the initiatives supporting the VFG have to be kept in constant motion, and none can be favored or dropped. Specifically:

- ◆ *Safety*: In 1956, there were 5.6 fatalities per 100 million miles of roadway. By 2004, the number has been reduced to 1.44 fatalities per 100 million miles of roadway – and 0.08 fatalities per 100 million miles of Interstate roadway. FHWA has helped the country come very far in achieving road safety goals. However, 1.44 fatalities per 100 million miles equaled over 43,000 deaths in 2004, which means that there is still work that can be done to improve safety.
- ◆ *Congestion and Mobility*: The Secretary's initiative is extremely important and should be implemented with a commitment to environmental stewardship. There needs to be a continual learning process and use of practices such as Context Sensitive Solutions. Coordinating early on with other agencies such as the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) can also be an effective approach.

Mr. Capka then spoke about the National Surface Transportation Policy and Revenue Study Commission mandated by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). Congress challenged the commission – a diverse, bi-partisan 12-member group from both the public and private sectors – to take a look at the future of surface transportation. Topics the Commission is currently studying include:

- ◆ Roles of Federal, State and local transportation agencies;
- ◆ Efforts of the public sector to integrate with the private sector; and,
- ◆ How Federal dollars are being used in relation to the Federal interest.

In closing, Mr. Capka suggested that Conference participants celebrate the work of the past 50 years, while looking forward to the future that they each will help shape.

Comments, Questions, and Answers

- ◆ Question: As the price of gas steadily increases, is there a concern with the gas tax collection and the new highway bill? Answer: Rising gas prices may lead to lower gas tax revenues. Even though the gas prices have risen, the rate of gas purchases has been inelastic. It is unclear how long it will take for this trend to change. Potential outcomes of rising gas prices are:
 - Less gas users can mean less congestion;
 - An increase in value pricing and demand; and,
 - Increased consideration of dynamic pricing and HOV lanes.
- ◆ Question: Considering SAFETEA-LU Sections 6004 and 6005, is increased devolution to States anticipated with the next bill? Answer: States need to be held to the same level of accountability that Federal agencies are held to. Some of the five pilot States are excited to begin the pilot, because it will help provide an opportunity to improve their NEPA process before taking on more responsibility. Other States are unsure how to handle the new responsibilities.
- ◆ Question: How do States handle earmarked projects that have a lot of funding but are not a priority? Answer: There were over 6,000 earmarked projects in SAFETEA-LU. There is a growing awareness that earmarks are not the best way for Congress to fund transportation projects.
 - An example of where earmarking funds was successful was in the creation of the Interstate system. The Interstate project had a clear vision. In the future, that clear vision should be continued.
- ◆ Question: What is the clear vision for FHWA's future? Answer: Economists are looking at the global economy. Currently, the US is at the top of that economy. By 2050, China and the Far East may be the leaders. Effective transportation is a factor that can help keep the U.S. globally competitive.

- ◆ Question: Will there be a trend for FHWA Division Offices to merge to share technology and expertise? Answer: Offices are not merging. Instead, they are sharing technical expertise through strong relationships.
- ◆ Question: How does the business of moving people relate to public-private partnerships, congestion management, and high-speed rail? Answer: Every mode of transportation presents an opportunity. There is a need to find a balance between road transportation and rail transit.

Conference Welcome to Participants (Cindy Burbank)

Following Mr. Capka, Ms. Burbank briefly touched upon the 2006 Environmental Conference's theme of the "Past, Present and Future." She pointed out that the Interstate has a very important past, a very busy present (especially since the implementation of SAFETEA-LU), and an interesting role in the future. FHWA should continue to enhance relationships with States and other transportation partners.

FHWA Highway Trivia (Fred Skaer)

Following Mr. Capka's address and Ms. Burbank's introduction, Mr. Skaer led an informal game of highway trivia. During the game, Conference participants were divided into two teams. Alternating between teams, team members were given one chance to correctly answer each question. Bonus points were awarded for correctly identifying the respective artists associated with a series of songs being played in conjunction with trivia. Questions/Answers are available upon request.

SAFETEA-LU

Moderator

Carol Adkins, Water and Ecosystems Team Leader, Office of Natural and Human Environment, FHWA

Speakers

Larry Anderson, Planning Oversight and Stewardship Team Leader, Office of Planning, FHWA
Owen Lindauer, Archeologist, Office of Project Development and Environmental Review, FHWA
MaryAnn Naber, Federal Preservation Officer, Office of Project Development and Environmental Review, FHWA

Felicia Young, Research and Financial Services Team Leader, Office of Interstate and Border Planning, FHWA

Pat Cazenias, Highway Engineer, Office of Natural and Human Environment, FHWA

Bonnie Harper-Lore, Restoration Ecologist, Office of Natural and Human Environment, FHWA

Description: The SAFETEA-LU plenary session provided a brief overview of a number of sections of SAFETEA-LU, such as the new provisions for consideration of conservation and land use plans in transportation planning, Categorical Exclusion (CE) delegation, provisions concerning pollution abatement and environmental restoration, noxious weeds, the Interstate exemption, changes to the CMAQ program and to conformity. The session was also the forum during which FHWA presented plaques for its annual Exemplary Ecosystem Initiatives Awards. Environmental Conference participants who contributed to drafting guidance for SAFETEA-LU sections were also acknowledged.

Exemplary Ecosystems Initiative Awards and SAFETEA-LU Contributions (April Marchese, Fred Skaer, Cindy Burbank)

The following States accepted Exemplary Ecosystems Initiative Awards:

- ◆ Arkansas – Eco-region-Based Approach to Wetlands Mitigation, accepted by Randal Looney
- ◆ California – Coachella Valley Habitat Preservation Initiative, accepted by Maiser Khaled
- ◆ Florida – GIS Technology Applications, accepted by Kathy Kendall

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- ◆ Kansas – Prairie Restoration, Conservation, and Education Initiative, accepted by John Knowles
- ◆ Pennsylvania – Ecological Mitigation and Enhancement Projects, accepted by Deborah Suci-Smith
- ◆ South Carolina – Carolina Bays Ecosystem Initiative, accepted by Shane Belcher
- ◆ Washington – Interstate 90 Snoqualmie Pass East Project, accepted by Kevin Ward
- ◆ Wyoming – Moran Junction to Dubois Project Wildlife Crossing Study, accepted by Rod Vaughn.

Criteria used for Exemplary Ecosystem selection can be found at www.fhwa.dot.gov/environment/ecosystems/econitc.htm.

SAFETEA-LU Contributors

Within FHWA, there is a wide variety of expertise, talent, and experience. As a result, the SAFETEA-LU guidance that FHWA staff has produced is both clear and reader-friendly. This was achieved through open communication over teleconferences, videoconferences, and webinars. Those involved were able to “keep the assembly line moving while the assembly line was changing.”

The following is a list of the chairs of the SAFETEA-LU committees:

- ◆ Shari Schaftlein – Environmental Review Provisions
- ◆ Pam Stephenson – Section 6002
- ◆ Owen Lindauer – Section 6004
- ◆ Ruth Rentch and Carol Adkins – Section 6005
- ◆ MaryAnn Naber – Section 6007
- ◆ Lamar Smith – Section 6009
- ◆ Aung Gye – Section 6010
- ◆ Mike Koontz – CMAQ
- ◆ Cecelia Ho – Transportation Conformity

Planning Provisions (Larry Anderson)

Mr. Anderson addressed key provisions in SAFETEA-LU Sections 6001, 6002, 3005, and 3006. These sections revise 23 USC 134-135, building upon the Transportation Equity Act for the 21st Century (TEA-21) and the Intermodal Surface Transportation Efficiency Act (ISTEA). With SAFETEA-LU, there now are eight statewide and metropolitan transportation planning factors.

Consultation Requirements

New SAFETEA-LU consultation requirements are intended to promote consistency with statewide and metropolitan transportation planning. These include:

- ◆ Metropolitan Planning Organizations (MPO) and States must consult with the State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation while developing a long-range transportation plan.
- ◆ States must also consult with tribal organizations while developing long-range statewide transportation plans.
- ◆ Statewide and metropolitan transportation plans must now include a discussion on environmental mitigation activities related to the transportation plans.
- ◆ Consultation should involve comparisons of transportation plans with environmental resources by using plans and maps or inventories of natural and historic resources, if available. An example of a useful resource is a State’s Wildlife Action Plan.

Stakeholder Involvement Requirements

- ◆ The term “interested parties” has been expanded to include representatives of users of pedestrian and bicycle facilities and representatives of disabled transportation users.
- ◆ MPOs must consult with “interested parties” in developing and using a Participation Plan.
- ◆ There are also new requirements on publishing planning documents via the Internet, ensuring public meeting accessibility, and using visualization technologies.

FHWA and the Federal Transit Administration (FTA) issued a Notice of Proposed Rulemaking (NPRM) on statewide and metropolitan transportation planning on June 9, 2006, based on SAFETEA-LU and Section 1308 of TEA-21. The comment period for the NPRM extends through September 7, 2006.

Air Quality (April Marchese)

Ms. Marchese described SAFETEA-LU changes to the Congestion Mitigation and Air Quality (CMAQ) Improvement Program.

- ◆ There is a new modified apportionment formula for CMAQ based on population and CO₂.
- ◆ Priority is being given to diesel retrofits and other cost-effective emissions-reducing activities through the property and savings clause, without making changes in authority of local government.
- ◆ There are minor changes in eligibility for CMAQ. Many States that were already considered eligible are now officially eligible. Also, some State specific projects are now eligible.

There were also transportation conformity changes in SAFETEA-LU. These changes simplify processes and change timing.

- ◆ *Processes*: Transportation Control Measures (TCM) substitution can be a substitution as long as the provisions are met. A 12-month grace period was established for conformity lapse.
- ◆ *Timing*: Conformity was reconfigured to a two-year trigger, while frequency of conformity plans is now every four years. MPOs may reduce the conformity horizon to every 10 years.

Categorical Exclusions (Owen Lindauer)

SAFETEA-LU allows States to apply to assume the Secretary's responsibilities for determining the eligibility of specifically designated projects that are categorically excluded from environmental assessments (EA) and environmental impact statements (EIS). This assignment also may include the assignment of other environmental responsibilities for review, consultation, or other related actions. Divisions have the flexibility to decide the responsibilities to assign. The State assumption of responsibilities is accomplished by executing a MOU that is subject to public notice and comment. Government-to-government relations with Indian tribes are not assignable to state Departments of Transportation (DOTs).

Interstate Highway Exemptions (MaryAnn Naber)

In 1956, the Federal Highways Act was signed, creating the Interstate Highway System. A majority of the Interstate system was built after 1956. To be eligible for listing on the National Register of Historic Places (NRHP), an entity must be at least 50 years old. Given this requirement, as of 2006, the Interstate Highway System is eligible. SAFETEA-LU's Section 6007 effectively excludes the vast majority of the Interstate Highway System from review as a potential historic property under Sections 4(f) of the Department of Transportation Act of 1966 and Section 106 of the National Historic Preservation Act (NHPA).

Certain elements of the Interstate Highway System, such as bridges, tunnels, and rest stops of national and/or exceptional significance, are excluded from the provisions of the Exemptions when designated by FHWA. The Section 106 exemption sets forth the criteria for excluding those elements when they:

- ◆ Are at least 50 years old and meet the National Register of Historic Places (NRHP) criteria for national significance;
- ◆ Are less than 50 years old and meet the NRHP criteria for exceptional significance;
- ◆ Are listed in the NRHP or have been determined eligible by the Keeper; or
- ◆ Were constructed prior to 1956, were later incorporated into the Interstate, and meet the NR criteria for state or local significance.

Environmental Restoration and Pollution Abatement (Pat Cazenias)

Ms. Cazenias spoke about the portion of SAFETEA-LU Section 6006 pertaining to environmental restoration and pollution abatement. Stormwater treatment facilities and other mitigation measures exist around the country and were built as part of Federal-aid highway improvements projects. Mitigation of highway environmental impacts as part of a Federal-aid highway project has long been an eligible expense. Section 6006 expanded eligibility of Federal-aid funds under the National Highway System and the Surface Transportation Program (STP) to address environmental restoration and pollution abatement activities (commonly referred to as stormwater treatment systems) by retrofits to existing transportation projects. This eligibility applies to projects undergoing reconstruction, rehabilitation, resurfacing or restoration, and to stand-alone projects carried out to address water pollution or environmental degradation caused wholly or partially by a transportation facility.

Vegetation (Bonnie Harper-Lore)

Section 6006 creates 23 U.S. Code Section 329. This provision adds a new eligibility for the use of federal-aid funds that applies to vegetation, especially the control of terrestrial and aquatic noxious weeds, and the establishment of native plant species. Guidance was sent to the field on May 16, 2006.

Federal-Aid funds may be used for the following activities:

- ◆ Right-of-way vegetation surveys to determine management requirements to control Federal or State noxious weeds;
- ◆ Establishment of plants, with a preference for native species;
- ◆ Control or elimination of noxious weeds;
- ◆ Elimination of flammable plants to create fuel breaks; and,
- ◆ Training of crews, and contractors in the use of Integrated Roadside Vegetation Management and Cooperative Weed Management Areas.

SECTION 4(F)

Moderator

Maryann Blouin, Attorney Advisor, Resource Center, FHWA

Speakers

Lance Hanf, Attorney Advisor, Western Legal Services, FHWA

Diane Mobley, Attorney Advisor, Office of Chief Counsel, FHWA

Lamar Smith, Training, Technology and Technical Assistance Team Leader, Office of Project Development and Environmental Review, FHWA

Description: In 2005, FHWA issued updated guidance on Section 4(f) and Congress passed SAFETEA-LU, which included changes to Section 4(f). The Section 4(f) plenary session provided an overview of the updated Section 4(f) Policy Paper and the provisions in SAFETEA-LU affecting Section 4(f).

De Minimus vs. Net Benefit (Lamar Smith)

SAFETEA-LU Section 6009 amended existing Section 4(f) legislation to simplify the processing and approval of projects that have only *de minimis* impacts on lands protected by Section 4(f). The revision provides that once the USDOT determines that a transportation use of Section 4(f) property, after consideration of any impact avoidance, minimization, and mitigation or enhancement measures, results in a *de minimis* impact on that property, an analysis of avoidance alternatives is not required and the Section 4(f) evaluation process is complete. A *de minimis* determination is not limited to any project class of action (CE, EA, or EIS).

The *de minimis* finding process requires FHWA to coordinate with the officials with jurisdiction and required their agreement in writing that the impacts to the 4(f) resource meets the *de minimis* impact definitions (either for an historic site or other 4(f) property). For parks, the impact cannot adversely affect the activities, features or attributes. For historic sites, there must be a determination that there are no adverse effects or no historic properties affected, according to the Section 106 process. Prior to making the *de minimis* finding, the public must be afforded an opportunity to review and comment, which will be generally satisfied through the NEPA process for parks, recreation areas and refuges and the Section 106 process for historic properties.

A difference in a "net benefit" and a "*de minimis* impact" is likely the type of impacts and the fact that a "net benefit" determination is an evaluation. There is no impact threshold related to the use of the net benefit programmatic and a "net benefit" – depending on the impact – will require mitigation and compensation. *De minimis* impacts have defined thresholds and any impact above the specified limits cannot be *de minimis* and will require an evaluation. In making a *de minimis* impact finding, mitigation can be relied on but in some cases a *de minimis* impact will be so minor that minimal mitigation will be necessary.

Net Benefits Programmatic	De Minimus Finding
♦ Is a 4(f) Evaluation	♦ Is a finding
♦ No impact threshold (uses range of impacts)	♦ Have defined thresholds
♦ Has public involvement requirement	♦ Has very specific public involvement activities

The guidance was developed by a workgroup of FHWA, FTA, and Federal Aviation Administration (FAA) staff from across the country.

Evolution of the “Feasible and Prudent” Standard (Diane Mobley)

Ms. Mobley gave an overview of Section 4(f)’s requirement that protected resources cannot be used for transportation projects unless there is no feasible and prudent alternative. In the 1971 Supreme Court decision Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, the Court found that “the few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost of community disruption resulting from alternative routes reached extraordinary magnitudes. Since the Overton Park court case, Section 4(f) has been at the center of over 200 additional cases, and the Supreme Court has not heard any more.

The Overton Park opinion has been interpreted differently across regions. The three general approaches that the varying circuits have taken are:

- ♦ The “black box” approach – In this approach an imaginary black box is drawn around the boundaries of the 4(f) resource before any construction activities are planned. Highway construction can never occur across that boundary. Courts following this approach refuse to consider the degree of harm to the 4(f) property, and the relative opportunities to mitigate harm.

- ◆ The “flexible black box” approach – In this approach, the courts have generally agreed with the black box approach but have allowed some flexibility to use minor amounts of 4(f) property when there is no total avoidance alternative.
- ◆ The “balancing” approach – The balancing approach allows the totality of a project’s surroundings and circumstances to be taken into account. With this approach, the impacts of many minor problems can be aggregated to find an alternative not prudent; these courts have interpreted Overton Park as holding that alternative routes must present “one of a kind” problems.

All of the courts generally agree that an alternative is feasible if it is technically possible to design and build the alternative. There is also agreement that an alternative that completely fails to meet the purpose and need identified for the project is not a prudent alternative.

As directed by Section 6009(b) of SAFETEA-LU, FHWA and FTA are working on a revised regulation clarifying the factors to be considered and the standards to be applied in determining the prudence and feasibility of alternatives to using 4(f) property.

Section 4(f) Policy Paper (Lance Hanf)

Mr. Hanf described characteristics of FHWA’s Section 4(f) policy paper available online at www.environment.fhwa.dot.gov/projdev/4fpolicy.asp. Key attributes include:

- ◆ The paper is more reader-friendly;
- ◆ The paper added a number of new Question and Answers, as well as a legal citation section;
- ◆ The paper attempts to move from the “black box” approach;
- ◆ It suggests that studying the end result, or the “net harm” to the 4(f) resource, is a useful approach;
- ◆ The paper suggests that non-4(f) factors could, in unique situations, be used as part of the 4(f) balancing approach to create a “totality test.” Since a number of small, non-4(f) impacts could potentially sum to equal a very substantial impact, such that one of the alternatives that uses more 4(f) land could be viewed as the prudent alternative. In other words, the cumulative weight of small impacts to other resources could make the use of more 4(f) land prudent.

Comments, Questions, and Answers

- ◆ Question: Is there any advice to those who are in black box States? Should those States use caution when reading the new policy paper? Answer: It is a challenge when FHWA has a policy that is interpreted differently across circuits. The policy paper is not law; it has no deference in the courts. However, a number of courts have cited the policy paper – something that indicates judicial deference.
- ◆ Black box States should make an effort to convey to the courts that they are not being ignored. Instead, an effective practice may be to describe what is being proposed in a way that does not take the court off guard. Be forthright, and do not ignore the precedents/opinions previously made in the district. Ask for a change in that Circuit’s law, but understand this will not happen at the U.S. District Court level.
- ◆ Question: Is additional guidance on *de minimus* impacts anticipated? Answer: Yes. Expect to see a supplement to the guidance. There is an expectation that there will be some project-by-project coordination with the State Historic Preservation Office (SHPO).
- ◆ Question: How have the courts received *de minimus*? Answer: This is a blank slate. It has not been litigated anywhere.
- ◆ Question: Are there competency standards that will be used for lawyers working on Section 6005-related cases? Answer: No.

- ◆ Question: What is the status of a revised Technical Advisory (TA)? Answer: Previously, FHWA field staff had indicated that they would collaborate to write a revised TA. That did not happen. FHWA is now currently exploring how it can accomplish revising the TA.

SECTION 106

Moderator

MaryAnn Naber, Federal Preservation Officer, Office of Project Development and Environmental Review, FHWA

Speakers

David Grachen, Environmental Program Specialist, Resource Center, FHWA

Carol Legard, FHWA Liaison, Advisory Council on Historic Preservation

Owen Lindauer, Archeologist, Office of Project Development and Environmental Review, FHWA

MaryAnn Naber, Federal Preservation Officer, Office of Project Development and Environmental Review, FHWA

Description: The Section 106 session discussed specific activities and tools and provided an update on regulations and policies pertinent to Section 106 of the NHPA. The session also provided a how-to for writing effective Section 106 Programmatic Agreements, a discussion on the Advisory Council for Historic Preservation's (ACHP) draft policy for human remains, and an update on the survey of exceptional elements of the Interstate Highway System.

Innovative Approaches to Section 106 Mitigation (David Grachen)

The FHWA Georgia Division Office has worked with its partners to create a variety of activities designed to address Section 106 issues during the project development process. These same practices can be applied to projects in other states as a way to build relationships in a cost-effective manner. Examples include:

Archaeology and SR61

The SR 61 Road Widening in Bartow County, Georgia was of regional importance and included a large archaeological site on both sides of the road, a Leake Site which was a regionally important pre-historic Native American site, and a Middle Woodland Period Indian burial mound beneath the existing pavement. This was the largest environmental mitigation contract in Georgia DOT (GDOT) history. Section 106 awareness activities were designed to maximize the opportunity this project provided to the community. Activities included:

- ◆ Archaeology day during archaeology work by the state to promote public education and awareness, including media coverage and website tool
- ◆ Education seminar for Sheriff's Office to prevent looting entitled "Archeological Resources Protection and Looting Workshop"
- ◆ Land swap with 84 Lumber to prevent potential indirect and cumulative impacts to avoid building on archaeological site

Teaching Trunks

"Archaeology Teaching Trunks" have been developed for elementary, middle, and high school ages. This tool can be developed at a low cost (under \$2,000) and can be shaped to a specific mitigation project. The

FHWA Georgia Division Office worked with the Georgia Department of Education and local school systems to develop these trunks and ensure that they meet the county's educational criteria.

- ◆ Because of the trunks success, GDOT has also embarked on a Native American teaching trunk in conjunction with several tribes having ancestral ties to GA.
- ◆ GDOT is partnering with Morehouse College and Springhill Baptist Church to develop an African American Teaching Trunk for environmental justice mitigation for a project in Augusta, GA.

Archaeology Day

An Archaeology Day at the Jimmy Carter National Historic Site (JCNHS) was developed in partnership with FHWA, GDOT, the Jimmy Carter National Historic Site Education Program, the National Park Service (NPS), and the Eastern Band of Cherokee Indians. The event provided an opportunity to teach students about their cultural heritage through workstations designed to promote historical awareness. See the JCNHS website, www.sowega.net.

These activities and others can help shape positive relationships with tribes, the public, and other local, state, and Federal agencies. Although this change becomes a gradual one, interest and enthusiasm can help strengthen the positive impact that it creates.

Section 106 Programmatic Agreements (Carol Legard)

Section 800.14(b) of 6 CFR Part 800 –Protection of Historic Properties (<http://www.achp.gov/regs-rev04.pdf>) – identifies two types of programmatic agreements: (1) project specific agreements that address the effects of certain complex projects or multiple undertakings, or (2) programmatic agreements that tailor an entire agency's Section 106 program. Both types of programmatic agreements are legally binding between the agency and ACHP. Twenty-six statewide programmatic agreements currently exist, with each signed by the state DOT, FHWA Division Office, SHPO, and ACHP.

Statewide programmatic agreements can follow three different approaches:

- ◆ Delegation Programmatic Agreements – Detail specific tasks that a state can do for FHWA (currently done by West Virginia, North Carolina, South Carolina, New York, and New Jersey)
- ◆ Delegation and Exemption Programmatic Agreements – Identify routine actions exempt from Section 106 requirements (e.g., Maine DOT works with FHWA and FTA on related activities). Current regulations do authorize a Federal agency to have the state initiative Section 106 consultation.
- ◆ Streamlining and Stewardship Programmatic Agreements –Eliminates or reduces the timeframe and includes provisions for good stewardship. Requires some type of checks and balances, including identifying when public involvement is needed. (Currently done by California, Florida, Maryland, Massachusetts, Texas, and Vermont)

The ACHP is creating a Section 106 programmatic agreement template that will ultimately be on their website or FHWA's Historic Preservation website. In order to create a programmatic agreement an agency must be clear on what they hope to accomplish through it. All interested tribes and stakeholders will need to be identified and brought into the process early on.

States that wish to create a programmatic agreement, or are concluding one, are asked to contact Carol Legard at the ACHP at clegard@achp.gov. When a programmatic agreement is concluded, they should be sent to FHWA Headquarters to share with others.

Update on ACHP's Archaeology Task Force and Proposed Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects (Owen Lindauer)

The ACHP Task Force on Human Remains Policy has drafted new policy on burial sites, human remains, and funerary objects. The task force consists of Federal agencies, the National Council of Tribal Historic Preservation Officers, the National Council of State Historic Preservation Officers (NCSHPO), and the Native American Advisory Group.

The ACHP's original policy, created in 1988, was found to be out of date and not reflective of the current ACHP position on the treatment of burial sites, human remains and funerary objects. In September 2005, the task force published a set of working principles in the Federal register and to all Indian tribes to explore if there was a need for a new policy. The ACHP received 76 comments by the close of the comment period and concluded that the policy should be revised.

The draft policy provides guidance in how to treat burial sites, human remains, and funerary objects in a respectful and sensitive manner while acknowledging the public interest in the past. It focuses on what needs to be considered in reaching decisions. The review and comment period for the draft policy closed on June 28, 2006.

The policy focuses on eight principles:

- ◆ Do not disturb unless absolutely necessary
- ◆ Treat with dignity and respect, determined through consultation
- ◆ Agencies are responsible for consultation throughout the process
- ◆ Federal agencies shall conduct consultation with Tribes on a government-to-government basis
- ◆ When disinterring, remove carefully, respectfully, and in a manner developed in consultation
- ◆ The Federal agency is responsible for decisions and must comply with applicable Federal, tribal, state, or local law
- ◆ Federal agencies shall develop plans for the treatment of burial sites, human remains, and funerary objects that may be discovered (after consultation)
- ◆ When there is no legal prescription on disposition of human remains, follow a hierarchy that acknowledges the rights of lineal descendants, tribes, and other descendant communities.

The policy identifies FHWA as the responsible party. In the absence of any direction from the state, agencies should, simply put, try to do the right thing.

Alligator Alley to Zakim Bridge: Exceptional Elements of the Interstate Highway System (MaryAnn Naber)

President Eisenhower signed the Federal-Aid Highway Act on June 29, 1956. It created a Highway Trust Fund and established a 41,000-mile System of Interstate and Defense Highways. Today, the Interstate system consists of 46,876 miles.

With the 50th anniversary of the Interstate, both Section 106 and 4(f) requirements could apply to all or parts of the System. The Section 106 exemption policy was drafted by the ACHP and FHWA with input from FHWA Divisions, SHPOs, American Association of State Highway and Transportation Officials (AASHTO), and NCSHPO. The policy, which releases Federal agencies from considering most of the Interstate Highway System as historic under Section 106, was adopted by ACHP and published in the Federal Register on March 10, 2005. It requires FHWA to designate exceptional elements by June 29, 2006. A Section 4(f) exemption, included in SAFETEA-LU, also releases Federal agencies from considering most of the Interstate Highway System as historic under Section 4(f). This exemption is for Interstate facilities (e.g., tunnel, bridge, rest area, roadbed, engineering feature, etc.) within Interstate right-of-way and does not apply to exceptional elements which meet the following criteria established in the exemptions:

- ◆ 50 or more years old and having National Significance as defined by the National Register
- ◆ Less than 50 years old and having Exceptional Significance
- ◆ Listed on National Register or Deemed Eligible by Keeper
- ◆ Properties 50 or more years old and having state or local Significance, at the discretion of FHWA

To create the list of exceptions to the Section 106 and/or 4(f) exemption, guidance was first drafted to explain the criteria. Then in January and February 2006, FHWA sent the guidance to and held initial state-by-state conference calls with FHWA Divisions, state DOTs, SHPOs, and other pertinent stakeholders. Follow-up calls and emails were made to assist states in reaching consensus and developing a draft list of exceptional elements. The preliminary list of exceptional elements was published June 16, 2006 in the Federal Register. In total, there are 94 bridges, 31 highway segments, 13 tunnels, and 16 rest areas or other areas that are recommended to be protected under Section 106. The comment period on the preliminary list of exceptions ended July 17, 2006.

Out of the 46, 876 miles of Interstate, only 598 miles worth of sections or structures are considered to be exceptional; all others are exempt from Section 106 and 4(f) designation.

Comments, Questions, and Answers

- ◆ Question: Is there anything that addresses programmatic agreements going too far? Answer: The “ACHP Checklist for Drafting FHWA Statewide Programmatic Agreements” grew out of Carol Legard’s experiences over the past two years as FHWA Liaison. The ACHP staff also developed “Preparing an Agreement” about what the Council looks for in a programmatic agreement. This should help to see that the agreements do not go “too far.”
- ◆ Question: Is there standard language to be used in Memoranda of Agreements (MOA)? Answer: The ACHP does have a model of a MOA that has been approved by attorneys. ACHP will see if this is online or if it can be put on FHWA’s website.
- ◆ Question: Do any programmatic agreements incorporate management plans? Answer: Some include management plans to respond to indirect and cumulative effects that may need mitigation.
- ◆ Question: Where did Georgia get all of the ideas for outreach and education? Do you find that models often kill creativity? Answer: The ideas starting by pushing people to do things better. The SHPO came to FHWA Georgia Division office with ideas, but did not have available funding. A san example, the Teaching Trunk can be developed to address other issues and funding constraints. What was discussed here can serve as a template.

INDIRECT AND CUMULATIVE EFFECTS

Moderator

Lamar Smith, Training, Technology and Technical Assistance Team Leader, Office of Project Development and Environmental Review, FHWA

Speakers

Lance Hanf, Attorney Advisor, Western Legal Services, FHWA

Stephanie Stoermer, Environmental Program Specialist, FHWA Resource Center

Jack Gilbert, Attorney, FHWA Texas Division

Kevin Moody, Environmental Program Specialist, FHWA Resource Center

Description: The assessment of indirect and cumulative impacts increasingly has become a focus area of resource agencies and the public. Indirect and cumulative impacts can be challenging and complex issues, and areas where legal challenges can occur. The indirect and cumulative effects breakout session focused on current resources and training available on the topic. The session also featured a dialogue between the panel and attendees about ongoing indirect and cumulative effects practices.

Indirect and Cumulative Impacts Guidance: The California Experience (Stephanie Stoermer)

Ms. Stoermer discussed the innovative indirect and cumulative impacts guidance that agencies have worked to establish in California. She explained the history leading to the guidance, as well as some of the key points in the guidance.

In 2000, the Mare Island Accord agreement between FHWA, EPA Region IX, and California Department of Transportation (Caltrans) addressed the problem of lack of early resource agency involvement in the transportation planning process. One of the Accord's provisions called for the future joint development of cumulative and indirect impacts assessment guidance. To begin creating the guidance, the agencies created two separate, yet related initiatives:

- ◆ Mare Island Accord Work Group (MIAWG), which consisted of FHWA California Division, EPA, and Caltrans; and
- ◆ Merced County Partnership for Integrated Planning (PIP) Cumulative Impacts Advisory Panel, which consisted of FHWA California Division, EPA, Caltrans, and other Federal, state and local agencies.

Merced County PIP

The Panel met from February to November 2003, producing a Cumulative Impacts Analysis Outline (Outline) of considerations for how to analyze the cumulative impacts of a Regional Transportation Plan (RTP). The Panel's recommendations would be used to improve the cumulative impacts analysis in the Merced County Association of Governments' (MCAG) Environmental Impact Report (EIR) for its RTP. MCAG must prepare an EIR for its RTP to comply with the requirements of the California Environmental Quality Act (CEQA); preparation and approval of the CEQA document precedes the issuance of the RTP.

Despite state-level environmental considerations, traditionally there had been little or no opportunity for Federal regulatory agencies to make a meaningful contribution at the EIR documentation stage. The Panel decided its approach would be to develop guidance for MCAG in preparing the cumulative impacts analysis for its RTP environmental document on a regional basis and at a planning level, both of which are unprecedented approaches. The Panel asked an EIR writer to participate in the meetings to contribute valuable feedback about the practicality and feasibility of the recommendations being proposed in the Outline.

Mare Island Accord Work Group

The MIAWG, which included staff from FHWA, EPA, and Caltrans, as well as members of the Merced County PIP, created the cumulative impacts guidance. The group decided early on to separately prepare guidance documents to address cumulative and indirect impact analysis for surface transportation projects in California.

Through a series of facilitated meetings and many teleconferences from 2003 through 2006, the MIAWG worked directly with a consultant team to prepare the guidance. After peer review, the guidance was released. The guidance developed, which is provided in both NEPA and CEQA contexts to the extent practicable, focuses on:

- ◆ Skill building for environmental document preparers;
- ◆ Providing direction on improving the quality of cumulative impacts assessments and identifying common methodologies that the Work Group agreed were reasonable; and
- ◆ Land use and growth inducement issues.

Texas and Cumulative Impacts Analysis (Jack Gilbert)

Mr. Gilbert described the impetus behind creating and steps included in Texas DOT's (TxDOT) development of cumulative impacts guidance. According to Mr. Gilbert cumulative impacts analysis is

increasingly being used as a way to challenge transportation projects in court. In one case, *Tex. Comm. Nat Res. v. Van Winkle* (197 F. Supp. 2d 586, 595), the judge wrote a lengthy opinion regarding what an indirect and cumulative analysis requires.

TxDOT decided to develop guidance to address this range. Not wanting to “reinvent the wheel,” TxDOT studied other States’ cumulative impacts analysis guidance – California’s in particular. After collaborating with several partnering agencies, TxDOT released its *Interim Guidance on Preparing Cumulative Impact Analyses* (March 2006), which consists of the following 8-step process:

- 1) *Identify Resources to Consider* – this includes resources most significantly impacted by the project and those already significantly degraded.
- 2) *Define the Study Area for Each Affected Resource* – Texas defines the study area on a resource specific basis. If there is no direct or indirect impact, then there is no cumulative analysis needed.
- 3) *Describe the Current Health and Historical Context for Each Resource.*
- 4) *Document the Work* – Judges often want to see the information leading to conclusions and decisions made. By documenting work and keeping a thorough administrative record, methods used and results obtained can be more easily explained.
- 5) *Identify Other Reasonably Foreseeable Actions That May Affect Resources*– Currently, TxDOT is interviewing cities, private developers, etc. to help define the potential impacts of reasonably foreseeable projects.
- 6) *Assess the Potential Cumulative Impacts to Each Resource.*
- 7) *Report the Results of the Analysis.*
- 8) *Assess Mitigation for All Adverse Impacts* – the public should be pointed towards who is responsible for mitigation.

Cumulative and Indirect Impacts (Lance Hanf)

Mr. Hanf explained the distinctions between cumulative and indirect impacts. The two types of impacts are different and should be treated as such in environmental documents. Cumulative Impacts, which were first identified in *Kleepe v. Sierra Club*, 427 U.S. 390 (1976), are effects on the environment as a result of incremental action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Indirect impacts can be considered a subset of cumulative impacts, but are distinguished by an established cause and effect relationship to a proposed action (e.g., induced land development from highway projects).

According to *Fritiofson v. Alexander*, 772 F.2d. 1225 (5th Cir. 1985), a meaningful cumulative effects study must include the following factors:

1. The area in which the effects of the proposed project will be felt;
2. The impacts that are expected in that area from the proposed project;
3. Other actions – past, proposed and reasonably foreseeable – that have had or are expected to have impacts in the same area;
4. The impacts or expected impacts from these or other actions; and,
5. The over impact that can be expected if the individual impacts are allowed to accumulate.

For indirect impacts, transportation agencies should realized that transportation projects have at least a synergistic effect on other impacts that may be occurring already. In the past, the highway community may have had a reluctance to acknowledge the impacts of others’ projects – a reluctance that could potentially compromise credibility in court.

FHWA Workshop on Indirect and Cumulative Impacts (Kevin Moody)

Mr. Moody provided an overview of a new FHWA workshop that provides instruction to transportation and resource agencies to do indirect and cumulative impacts analyses better during the transportation decisionmaking process. The workshop is intended for FHWA Divisions, state DOTs, resource

agencies, and contractors/consultants involved in the NEPA and transportation project development process. It explains and familiarizes participants with general concepts and terminology, Council on Environmental Quality (CEQ) requirements, related court cases, and approaches to performing the analyses.

Due to the initial success of the workshops, FHWA is considering development of accompanying modules – perhaps a web-based prerequisite course. The training is offered free of charge, and is one and a half to two days in length. For specific information, contact Kevin Moody (Kevin.moody@fhwa.dot.gov) or Lamar Smith (Lamar.Smith@fhwa.dot.gov).

Comments, Questions, and Answers

- ◆ Question: How should non-regulated versus regulated resources be treated in cumulative analysis? Answer: For both cases, staff should report the number of acres or resources that will be impacted.
- ◆ Question: Should consultants be required to analyze other projects' impacts? Answer: An effort should be made to determine what information is available regarding potential development from other sources. All should be wary of developer-created connections to transportation projects.
- ◆ Question: Are indirect impacts and secondary impacts synonymous? Answer: They are synonymous.
- ◆ Question: Is it necessary to differentiate between direct and indirect impacts? Answer: It is important to identify and call the impacts what they are. Not doing so creates an unnecessary risk in court.

FREEDOM OF INFORMATION ACT

Moderator

Robin Fields, Attorney Advisor, Office of Chief Counsel, FHWA

Speakers

Robin Fields, Attorney Advisor, Office of Chief Counsel, FHWA

Ken Dymond, Senior Attorney, FHWA New York Division

Julia Perry, Federal Lands Legal Services Team, Office of Chief Counsel, FHWA

Description: The Freedom of Information Act (FOIA) breakout session focused on how to handle FOIA requests within the NEPA process. Ms. Perry presented an example on the Fontana Dam in North Carolina. Ms. Fields outlined the FOIA Administrative Appeal process; described FOIA Exemption 5 (frequently used to protect environmental documents); examined common arguments raised by requesters who submit FOIA appeals; and outlined practice pointers that may help reduce the number of FOIA Appeals filed with FHWA. Mr. Dymond presented a practical example of how to manage a FOIA request that spans multiple divisions or agencies, including roles and responsibilities for collecting information when the FOIA request contains documents found in more than one location.

A Case Study on FOIA and NEPA (Julia Perry)

Ms. Perry opened the session describing a FOIA case study that involved North Carolina's Fontana Dam, a dam built from 1942–1944. When the Tennessee Valley Authority built the dam, they entered into an agreement with North Carolina to build a road around the North Shore of the lake. In the 1970's, the NPS tried to build the road, but ran into a problem when a rock bed containing sulfur was encountered. At the time, it was not known how to remove the rock without exposing the sulfur to water, thus creating sulfuric acid. Work on the project was stopped. Ferry service was provided to the shore that would have been accessible by road had the road been constructed.

Since technology now exists that could allow construction in a way that would avoid creating sulfuric acid, the proposed road was earmarked in TEA-21, and over the last few years, FLH has been preparing an EIS for the project. In October 2005, FHWA received a FOIA request for the DEIS, which was still being prepared. The public had been informed on a Federal website that release of the DEIS was expected in December 2005. The problem that this can cause is that FOIA only requires the release of final documents, while NEPA – which refers to FOIA – requires a controlled release of draft documents to the public before the EIS is adopted.

CEQ implementing regulations for NEPA help to address this potential problem. 40 CFR 1506.6(f) states: “Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action.”

For the Fontana Dam example, it was FHWA’s interpretation was that the DEIS, which was still being prepared, and any supporting documents that would suggest the proposed findings of the DEIS could continue to be withheld. There was also a concern that pre-release would be a violation of the Federal Advisory Committee Act (FACA) – allowing the requester by their premature comments to influence a Federal decision-making process inappropriately. Once the DEIS was published in January 2006, the majority of the referenced and supporting documentation was also released.

At this time, FHWA continues to withhold certain underlying documents (such as consultants’ unverified extrapolations of selected field data) and documents that identify sites that require Federal protection (such as wetlands and archeological sites).

FOIA Appeals Involving Environmental Records (Robin Fields)

Ms. Fields discussed Executive Order (EO) 13392 of December 2005 and its attempt to improve agency disclosure. The EO underscored the importance of providing information in a timely manner. It includes new agency positions to strengthen customer service with FOIA requests. New agency positions include:

- ◆ The Chief FOIA Officer;
- ◆ FOIA public liaisons – public liaisons will manage service-oriented response and dispute resolution. The public liaison is the first place a requestor can go to lodge concerns in the FOIA process.

Ms. Fields then provided an overview of the FOIA process. A FOIA request must be in writing, provide reasonable description of records sought, and comply with DOT FOIA regulations.

- ◆ Anyone can submit a FOIA request;
- ◆ The reason(s) for request do not need to be explained;
- ◆ The request cannot be used to circumvent the NEPA process.

A requestor can appeal a FOIA decision for a number of reasons, including withholding information, a “no records” response, denial of fee waiver, or any other decision in initial determination. Requestors can also file a lawsuit in lieu of appeal. An agency has 20 Federal working days with extension of 10 days to address an appeal. FHWA faces more appeals than any other of the USDOT modes.

One reason a request can be denied is because the documents or materials requested are exempt from FOIA. There are nine exemptions, with Exemption 5 frequently used to protect environmental documents from public release. Exemption 5 protects inter- and/or intra-agency memos or letters. These documents could be from three different sources:

- ◆ Attorney work product privileges;

- ◆ Client-attorney relations, including conferences communications and attorney opinions;
- ◆ Deliberative process. To meet the deliberative status, documents must
 - Meet intra- or inter-agency threshold.
 - Be pre-decisional. However, if the agency adopted the pre-decisional decision as the final decision, the pre-decision document loses exemption and is subject to FOIA.
 - Be deliberative, which includes decision analysis such as pro-cons, ex-subordinate policy views and draft documents.

One of the most common arguments raised on appeals is the claim of an inadequate search. To avoid this claim, it is important to be proactive and know what the requestor specifically wants. Communications among and between offices, agencies, and the requestor are also important. Know whether resources are stored in other offices. Share copies of the request with other offices and notify requestor of contact with other offices. If the requested document resides outside the DOT, consult with other agencies and allow them to manage the request.

Practical FOIA Requests (Ken Dymond)

Mr. Dymond described a project in Chittenden, Vermont that was subject to a FOIA lawsuit. Multiple groups made FOIA requests for all records associated with the project. Initially, the Vermont Agency of Transportation (VTrans) contacted FHWA Headquarters for documents relating to the project. However, this proved to be very time consuming. To make the process more efficient, VTrans asked requestors to make requests to the agencies housing the records. VTrans only provided VTrans' documents. Later, VTrans was sued for not providing documents from FHWA Headquarters or the FHWA Resource Center. The lesson learned is that in order to avoid being sued, an agency should make the effort to inquire with other agencies about the availability of any and all records pertaining to the project in question.

Comments, Questions, and Answers

- ◆ Question: Was the FOIA Service Center set up by agencies or DOT? Answer: All information on the FOIA Service Center is posted on the website. There is one FOIA Service Center per agency. A requestor must make a request through a Division Office first; the Service Center should not replace initial contact with the Division Office.
- ◆ Question: Do Divisions have to inform the Service Center of FOIA requests or keep a record with them? Answer: During the process, if a requestor is not satisfied, they can contact the Service Center with questions. No additional notification is necessary.
- ◆ Question: Will the new EO help with inconsistencies between agencies (e.g., DOT vs. USACE)? Answer: It could and should have more significance within DOT. It could have an impact on other agencies since the EO binds them all.
- ◆ Question: How should client-attorney privileges be used appropriately? Answer: If the attorney is the author of a document, the document is covered under client-attorney privileges. It is important to examine who wrote the document and for whom the document is intended. Just because an attorney received a document, does not mean that it is covered under client-attorney (e.g. copying an attorney on an email).
- ◆ Question: How does a Division Office manage requests for the records it specifically has? Answer: Be open with a requestor and tell them, "Here are the records we possess, and here is where others may be found." However, there is no official agency-wide policy on information dissemination. The request has to be submitted where the records are found.
- ◆ Question: How should a request for a document that does not yet exist be managed? Answer: FOIA is only for existing documents. The request can be resubmitted once the document is created.
- ◆ Question: How should archived documents be managed under FOIA? Open communication with the requestor is necessary. If it will take more than 30 days to retrieve the document, the requestor

should be notified (the notification should be documented). If the document was archived within the past three years, the archives will still have the document. If the document has been archived for over three years, the document may have been destroyed.

- ◆ Question: What should be in the Administrative Record? NEPA approval? Is there any specific guidance on emails? Answer: Some email will need to be part of the record. Print and then delete email to avoid over-filled inboxes. Documents considered pre-decisional should also be kept.

ENDANGERED SPECIES ACT / MIGRATORY BIRD TREATY ACT

Moderator

Brian Yanchik, Biology/Water Quality Environmental Specialist, Resource Center, FHWA

Speakers

Rodney Vaughn, Environment/Right-of-Way Engineer, FHWA Wyoming Division

Michelle Eraut, Environmental Program Manager, FHWA Oregon Division

Mary Gray, Environmental Program Specialist, Office of Natural and Human Environment, FHWA

Paul Garrett, Ecologist, Office of Natural and Human Environment, FHWA

Description: The Endangered Species/Migratory Bird Treaty Act session featured presentations on the development of a programmatic consultation and biological assessment/opinion in Wyoming and the implementation of a web-based biological assessment (BA) template and database. The session ended with a discussion on current topics related to compliance with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, highlighting issues, best practices, and current U.S. Fish and Wildlife Service (USFWS) policy.

Wyoming's Programmatic Biological Assessment and Opinion (Rod Vaughn)

The Wyoming Department of Transportation (WYDOT) has taken a programmatic approach to species protection and project streamlining that precludes project-level Section 7 of the Endangered Species Act (ESA) consultation for projects in its five year State Transportation Improvement Program (STIP). The programmatic agreement satisfies regulatory requirements, conserves endangered and threatened species and their habitats, allows more efficient use of agency resources, and strengthens interagency relationships.

In 2003, a joint initiative between WYDOT, FHWA Wyoming Division, and USFWS resulted in a Programmatic Biological Assessment (PBA) for all Wyoming-listed threatened and endangered species, three designated critical habitats, as well as a Programmatic Biological Opinion (PBO). The PBA was submitted to USFWS in March 2005; USFWS issued its PBO in November 2005.

The PBA/PBO streamlines the Section 7 process for all projects planned within the five-year STIP, including new construction/roadway relocation, reconstruction, restoration/resurfacing, and safety improvements. None of these projects will require a separate consultation under Section 7, except for the following reasons:

- ◆ The project specifically requires an Environmental Impact Statement;
- ◆ The scope of work changes creating potential effects to listed species or critical habitats not previously considered; or
- ◆ New information reveals effects of highway projects may impact listed species in a manner not previously considered in the PBA.

The PBA/PBO also allows WYDOT to substitute similar projects in similar locations, without further consultation with the USFWS. For example, WYDOT can substitute a new project for a project on the

STIP without additional environmental evaluations, as long as the effects of the new project are determined to be the same or less than the STIP project.

The PBO is based on an environmental baseline for the action area, the PBA impacts and effects statement, and a cumulative effects assessment. The PBO determined that the effects of the WYDOT STIP are not likely to jeopardize the continued existence of listed species and will not affect critical habitat. It did determine the need for an Incidental Take Statement for two listed species, the bald eagle and the Preble's meadow jumping mouse. The three partnering agencies will meet annually to review the effectiveness of both the conservation measures identified in the PBA and the terms and conditions set forth in the PBO.

Comments, Questions, and Answers

- ◆ Question: Do you revise the programmatic BA every five years? Answer: It looks like the programmatic BA will be updated every five years. Right now, there are summary reporting requirements for the end of each year.
- ◆ Question: What is the FWS argument for wanting to use the STIP versus project by class? Answer: It is not clear why the FWS wants to use the entire STIP for the programmatic BA. Mr. Vaughn did not attend the preliminary meetings with the FWS.
- ◆ Question: How many projects are on the 5-year STIP? Answer: There are roughly 120 environmental documents prepared each year. This includes CEs, EAs, and EISs.
- ◆ Question: If the STIP is amended, is the programmatic BA rewritten? Answer: This is a good question. It would probably require an evaluation of the projects being amended to the STIP.
- ◆ Question: What year is the current programmatic BA valid through? Answer: 2010.
- ◆ Question: Was there any opportunity for public involvement and/or critique in the development of the programmatic BA? Answer: Not certain.
- ◆ Question: Who monitors the baseline data and is it expensive to do? Answer: Wyoming DOT and its consultant monitor the baseline data. The FWS is also involved some in the monitoring. The FWS viewed the development of the programmatic BA as a workload issue. They were willing to collaborate to create the programmatic BA so they could focus their labor to other agency priorities.

Managing Environmental Compliance for Oregon DOT's OTIA III State Bridge Delivery Program (Michelle Eraut)

Ms. Eraut described how Oregon DOT (ODOT) currently manages environmental permitting and compliance for its Oregon Transportation Investment Act III (OTIA-III) State Bridge Delivery program. OTIA-III is Oregon's \$2.5 billion transportation package that was enacted in 2003 by House Bill 2041. The Act represented the largest investment in Oregon transportation infrastructure in 50 years. Of the \$2.5 billion, \$1.3 billion was set aside to repair or replace almost 400 bridges on the state highway system – the State Bridge Delivery program.

This program was structured around the following five goals:

- ◆ Capitalize on funding opportunities
- ◆ Stimulate the economy
- ◆ Employ efficient and cost-effective delivery practices
- ◆ Build projects that are sensitive to their communities and landscape
- ◆ Maintain freight mobility/keep traffic moving

These goals feed Oregon's effort to achieve Context Sensitive and Sustainable Solutions, also known as its "C-S-Cubed" program success measures. C-S-Cubed includes:

- ◆ *Developing "One Process"* – To integrate environmental compliance and build collaborative relationships with resource agencies, ODOT developed a "one process" approach based on batched programmatic permits and agreements. The agreements include a recently signed joint ESA biological opinion with USFWS and NOAA, a Regional General Permit with USACE, and a programmatic approach to managing state archaeological excavation permitting in collaboration with state tribal groups.
- ◆ *Prioritizing Baseline Environmental Reports* – The Bridge Replacement Program places a premium on collecting extensive environmental context data, or baseline reports, before design and programming. The primary purpose of these reports is to develop plans that prioritize impact avoidance.
- ◆ *Promoting a Statewide Mitigation and Conservation Program* – Using a programmatic approach that combines wetland mitigation and ESA conservation into one agreement, ODOT and resource agencies have determined eco-province priorities and identified multiple new sites for mitigation banking.
- ◆ *Agreeing on Performance Standards* – At the inception of the Bridge Replacement Program, ODOT convened a series of meetings with USACE, NOAA, FWS, and Oregon State Lands to develop aesthetic and "green bridge" performance standards.

ODOT's initial implementation strategy for the State Bridge Delivery Program includes five stages that build on each other over the next 10 years. More than 300 state bridges are included in the State Bridge Delivery Program. As the State Bridge Delivery Program is implemented, this list of bridges may change based on new information. An oversight committee approves all changes to the list.

With the passage of OTIA-III, ODOT was not set up to deliver a program of this size. To deliver the program ODOT had to dramatically shift the way business was done. ODOT was decentralized, with project delivery responsibility going out to the State's five regions. ODOT had traditionally used staff for project development and design for about 80% of projects, while consultants with ODOT oversight developed about 20% of projects. ODOT's reorganization positioned them to behave in an oversight only role for about 80% of the projects, with staff now delivering about 20% of the projects, or probably even less than this.

ODOT awarded the contract to manage the bridge program to the Oregon Bridge Delivery Partners, which is a joint venture between Fluor and HDR. The OTIA-III bridge delivery unit within ODOT provides oversight. Several planning tools have been developed to help this unit manage the program including:

- ◆ A web-based, controlled access electronic document management system (EDMS).
- ◆ A Programmatic Agreement Reporting and Implementation Team (PARIT) comprised of liaisons from more than 10 agencies. The PARIT, which meets approximately twice a month, develops effective communication protocols and monitoring/reporting procedures; and, refines the permitting process to better achieve the missions and goals of all involved agencies.
- ◆ A Pre-Construction Assessment (PCA) that consists of a single programmatic permitting application. Agencies have agreed to review the PCA within 30 days.
- ◆ Use of electronic handheld devices for field verification. The handheld devices are linked to databases of environmental data in the EDMS and have helped facilitate the paperless collection and reporting of field data.

The Coast Fork Willamette River Bridge was the first bridge replaced under the program to demonstrate success. Permitting was reduced by over 100 days and costs were reduced by over \$1 million. The cost of implementing the programmatic approaches was recovered with this project.

Comments, Questions, and Answers

- ◆ Question: How many bridges will fall into the program? Answer: Approximately 365. Currently, 14 are in queue to be in the program. Thirteen have been completed, and roughly 108 new bridges are anticipated to be included. Three bridges have been identified as needing an alternate strategy.
- ◆ Question: Has ODOT been working with the regional or state NOAA Fisheries office? Answer: ODOT has been working with the Portland district office.
- ◆ Question: How are construction schedule changes handled? Answer: ODOT holds meetings with the resource agencies every two weeks. At these meetings, schedule changes are discussed. This open communication helps to ensure continued agency support.

FHWA ESA Section 7 Consultation Website (Mary Gray)

Ms. Gray discussed how computerized decision support systems are being integrated with information available on sensitive habitats, endangered species, cultural resources, watersheds, land uses, and transportation networks. In particular, FHWA's ESA Guidance Website was illustrated. The website, which is being developed, aims to link national expertise and information regarding the interactions of transportation improvements and listed species. It is anticipated that this website resource will help to improve consistency for creating Biological Assessments (BA). The website's purpose is to provide:

- ◆ High quality, consistent BAs;
- ◆ Current guidance, standards, and court cases;
- ◆ Access to the most recent and up to date biological information;
- ◆ Availability of supporting documentation and surveys;
- ◆ Establishes the administrative record;
- ◆ Provide an archive of completed consultations including Biological Opinions; and
- ◆ Answers to frequently asked questions;

Features of the website include, among other items, a BA template, draft BA guidance from DOTs, and a "My ESA Projects" page. The "My ESA Projects" page will allow users to create a secure ESA project account that is dedicated to ESA projects entered by that user. The password-protected accounts will offer users the opportunity to create BA templates for their projects, as well as guidance on how to complete the BA. Personalized ESA project websites that are created will also provide species-specific supplements for users' respective States or regions. Users will be able to invite project team members into the project website so that they can access information made available for specific projects.

Visit the website under development at <http://esafhwa.org>.

Comments, Questions, and Answers

- ◆ Question: Where is the coding and web-support coming from? Answer: The template and platform for the website previously existed in Washington State. FHWA is now developing its site using this existing format. The ultimate goal is to have the system as "hands-off" as possible in terms of requiring technical web-support.
- ◆ Question: Who will have access to the website? Answer: The website will be available to the public. However, the "My ESA Projects" Section of the site will be password restricted to verified registrants.
- ◆ Question: Are there Freedom of Information Act concerns? Answer: There should not be. Critical habitat information is public information, and BAs are public documents. If an agency did not want certain information available to website users, then it should not add it to the website.
- ◆ Question: How was website development funded? Answer: Website development was funded using FHWA Office of Planning, Environment, and Realty research funding. It originally cost roughly \$1 million to develop.

- ◆ Question: Are USFWS and NOAA on board with the project? Do they support it? Answer: USFWS and NOAA are involved. Initially, it was difficult to get NOAA brought on board, but their support is likely there now.
- ◆ Question: Could the website be designed to electronically submit biological opinions (BO)? Answer: That is an enhancement that is feasible and could be made in the future.

Migratory Bird Treaty Act (MBTA) (Paul Garrett)

Transportation Activities Potentially Impacting Migratory Birds under the MBTA

- ◆ Clearing and grubbing
- ◆ Bridge cleaning and repair
- ◆ ROW management

Problems Imposed on Transportation Agencies

- ◆ Uncertain permitting/enforcement requirements;
- ◆ Shortened construction season;
- ◆ Difficult survey procedures for nests and nesting birds;
- ◆ Conservation demands not based on MBTA requirements;
- ◆ Potentially ineffective avoidance/minimization measures

MBTA MOUs

In January 2001, EO 13186 required Federal agencies taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations to develop and implement – within 2 years – a MOU with the USFWS promoting the conservation of migratory bird populations. To date, none of the MOUs are complete; the Department of Defense will soon sign one and the Department of Energy is developing another. FHWA does not intend to finalize their MOU at this time, and USFWS has asked the CEQ to intercede.

The USFWS, which has discretionary enforcement authority for the MBTA, wants to

- ◆ Insure consideration of migratory bird conservation in the Federal aid program;
- ◆ Include migratory birds in NEPA analysis;
- ◆ Implement measures to minimize take;
- ◆ Potentially do case-by-case monitoring; and
- ◆ Develop partnerships to conserve migratory birds.

Not all of these activities fall under the MBTA. Currently, transportation agencies attempt to avoid impacts, restrict construction seasons, and conduct pre-construction, habitat analysis surveys. Focusing on birds of management concern, conducting NEPA analysis for migratory bird impacts, and acquiring FHWA Headquarters support in negotiations with the USFWS are some activities that transportation agencies could likely do better.

After providing this introductory information, Mr. Garrett asked session participants the following questions:

- ◆ If a consistent approach to the MBTA is desired, should FHWA write a policy statement to present to FWS?
- ◆ Is it worth developing a policy statement?

The general consensus among session attendees was that a FHWA policy statement was not needed at this time. Mr. Garrett commented that a problem should not be created where there is no problem.

Comments, Questions, and Answers

- ◆ Question: Has USFWS prosecution of the MBTA involved any highway projects? Answer: One case involving highways has been heard.

PUBLIC INVOLVEMENT

Moderator

David Kuehn, Planning Capacity Building Team, Office of Planning, FHWA

Speakers

Cathy Kendall, Transportation Planner, FHWA Florida Division

Mary Gray, Environmental Program Specialist, Office of Natural and Human Environment, FHWA

K. Lynn Berry, Community Impact Specialist, Resource Center, FHWA

Description: The public involvement breakout session examined techniques for involving and informing the public. Mary Gray discussed some of the Washington State Department of Transportation's (WSDOT) visualization techniques, which use computer-generated images of what a road or property looks like pre- and post-construction. Cathy Kendall described methods for how best to reach limited-English populations during the public involvement process. K.Lynn Berry's presentation focused on equity and public involvement – specifically, if and how value-priced lanes are utilized by all income segments of the population.

Visualization: How One State is Doing It (Mary Gray)

Visualization can be defined as the simulated representation of a concept and its contextual impacts or improvements. Traditionally, visualization techniques have been directed towards better communication of what the design will look like. This focus on design considerations has driven a broad application of visualization for public involvement. Ms. Gray showed a video to illustrate how WSDOT has used various visualization techniques. Some examples of WSDOT's visualization application include:

- ◆ Showing property owners a better understanding of how properties will be affected should a proposed project be built;
- ◆ Illustrating the effects of a proposed project on 4(f) and Section 106 resources; and
- ◆ Showing the benefits of CSS, inclusion of various safety enhancements, and the effects of transportation decisions on wildlife (e.g. the development of crossings or stream re-routing).

Comments, Questions, and Answers

- ◆ Question: Is any of the technology from video games spilling over into the visualization techniques transportation agencies use? Answer: Some of the visualizations are meant to not look too realistic. If the visualization looks too real, the public may have the impression that decisions have already been made.
- ◆ Question: Is this technology being used during public involvement? Answer: The Highway 520 Bridge project is an example of how WSDOT has used visualization during public involvement. Visualization was used to show the project's numerous alternatives. Pennsylvania explored using a "café style" public meeting. In this type of meeting, representatives from the project would be available to answer questions and, using visualization techniques, to model changes to alternatives during the course of the meeting.
- ◆ Question: Is visualization used for projects of all types, sizes, and levels of controversy? Answer: Sometimes visualization is used on very high profile projects. Other times, visualization is used to illustrate smaller projects, such as a roundabout vs. a traditional intersection. For examples of how WSDOT has used visualization, visit www.wsdot.wa.gov/eesc/CAE/DesignVisualization/desviz.htm.

Public Involvement for Limited English Proficiency (LEP) Populations (Cathy Kendall)

Ms. Kendall described some of the lessons FHWA Florida Division has learned through its public involvement experiences with LEP populations. In Miami-Dade County, Florida, over one half of the population is born outside of the U.S. Many people in this population, which is comprised of a variety of ethnicities, may only have limited English skills and/or may have a low level of education. Additionally, many people in these populations have left countries with corrupt governments, possibly contributing to a distrust of government or fear of speaking at public meetings. These issues can create a variety of public involvement challenges.

To successfully reach all populations, as directed in Executive Order 13166, some effective practices include:

- ◆ *Know the area, population, and community* – Use the U.S. Census to determine what populations are in the area. Learn about LEP populations' ethnicities and cultures.
- ◆ *Target outreach to locations where public involvement will occur* – Use local meeting spaces, and involve local leaders and media. Use locations that are convenient and easily accessible to the local population. Churches and schools can be good meeting spaces because they offer places familiar to the community. Government buildings, such as courthouses, may be threatening to LEP populations.
- ◆ *Use incentives to encourage attendance* – Free refreshments, childcare, or parking will likely encourage more participation.

There are many methods to ensure information is successfully disseminated to LEP populations. To make the message clear:

- ◆ *Limit the amount of papers used* – Too much written material may be overwhelming. Materials should be available in multiple languages.
- ◆ *Make local population feel comfortable with the information.* Have locals interview the community to learn their wants and needs. Have trusted local authorities announce meetings to local populations.
- ◆ *Always use discretion when working with LEP and/or minority populations.* Do not rely on surnames for language assumptions. Professionally proofread materials written in non-English languages, and do not rely on computer programs for translation. Additionally, be aware of cultural preferences for meetings. For example, one ethnic group may prefer to start meetings at the time announced, while other groups may traditionally start meetings after a period of informal conversation.

Comments, Questions, and Answers

- ◆ Question: Is there a recommended translating strategy for an area with a changing population?
Answer: Take requests for translations. Have translations be part of the larger scope of a project if there is a large minority population.

Value Pricing: Public Involvement and Equity Issues (K. Lynn Berry)

Ms. Berry discussed how value pricing lanes is related to public involvement and equity issues. Public opinion of value pricing has undergone a shift over the past 10-15 years. In the early 1990s, people rejected the idea of value pricing. Now, in 2006, there are numerous initiatives relating to value pricing, including Public Private Partnerships (PPP) projects all over the country, and PPP offices examining how to work with the private sector. SAFETEA-LU and public leaders now encourage PPP. This is not just taking place in the DOT, but in many other areas of the public sector.

Often the initial public response to value pricing is that it is unfair, especially to the working class. However, this view is beginning to change. Some researchers said that the horizontal equity (the ability

for every member of an economic stratum to pay the same amount) is increased because the user pays directly for the benefit. The vertical equity (people who have more of an ability to pay should pay) is achieved through credits, subsidies, and funding other programs with profits. This makes value pricing no more regressive than the gas tax according to some researchers.

- ◆ The financial burden on the user depends of frequency, duration and alternate routes.
- ◆ The burden could decline with predictability and price adjusting.

Some studies have shown that if a cash deposit were required for enrollment, it would turn away low-income users. Many low-income households do not have the start-up money required because they do not possess a credit card or bank account. Twenty seven percent of households do not have a credit card, and one in ten households don't have a bank account. Some specific examples of value pricing lanes use in different States included:

- ◆ *I-15 HOT lanes in San Diego, CA*: Use increased with the greater amount of income (around \$80,000). Low-income drivers still use the HOT lanes, but with less frequency. The lands have broad public support.
- ◆ *SR-91 in Orange County, CA*: Higher income drivers use lanes more than lower income drivers. These lanes are not used to capacity.
- ◆ *I-10 in Texas*: More frequent users are young and of higher income.
- ◆ *I-394 in Minnesota*: Used a community task force, which is a good public involvement tool. Preparation preceded promotion needed to answer every question. Also used visualization techniques.

NEPA DOCUMENTATION ISSUES

Moderator

Carol Adkins, Water and Ecosystems Team Leader, Office of Natural and Human Environment, FHWA

Speakers

Don Cote, Team Leader, Environment, Resource Center, FHWA

Greg Punske, Environmental Program Manager, FHWA Utah Division

Linda Amidon, Attorney Advisor, Office of Chief Counsel, FHWA

Description: The NEPA Documentation Issues session discussed efforts to manage and improve the project development processes in order to produce quality NEPA documents. Presenters focused on a summary of the findings and recommendations from the AASHTO/American Council of Engineering Companies (ACEC)/FHWA Quality Document Initiative; lessons learned from the award winning Legacy Parkway Supplemental EIS; and observations on document quality from the legal perspective, respectively. Questions, answers, and comments were discussed at the conclusion of each presentation.

Improving the Quality of Environmental Documents (Don Cote)

The AASHTO/ACEC/FHWA Initiative on Improving the Quality of NEPA Documents issued a report of the Joint AASHTO/ACEC Committee in cooperation with FHWA in May 2006. The report “documents an initiative of transportation practitioners nationwide to improve the quality of EISs and EAs written to comply with NEPA.” The report is the product of two of the three AASHTO/ACEC task teams: the Quality and Clarity of NEPA Documents Team and the Legal Sufficiency Team. The third task team, the Training and Education Team, is working with FHWA Environmental Competency Building Program.

Reported problems with NEPA documents often include:

- ◆ Too large, wordy, repetitive, complex and cumbersome;
- ◆ Lack of consistency in format and approach;

- ◆ Lack of coherent story – no logical progression;
- ◆ Too much “legalese” versus writing for the public;
- ◆ Too much focus on “the look” of the document versus usability for decisions;
- ◆ Lack of communication among multiple authors.

Research focused on the core principles for NEPA documents, including: The reader can easily understand the purpose and need; describe how each alternative would meet the project goals; and discuss the strengths and weaknesses of each alternative. The Council on Environmental Quality’s regulations in 40 CFR shows that these principles are essential:

- ◆ “Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail” *40 CFR Sec. 1500.1(b)*
- ◆ “Environmental impact statements shall be written in plain language so that decision-makers and the public can readily understand them” *40 CFR Sec. 1502.8*

The findings also relied heavily on information contained in *NCHRP Project 25-25 (01) – Synthesis of Data Needs for EA and EIS Documentation – A Blueprint for NEPA Document Content*. The NCHRP Project 25-25 (01) outlines a blueprint for NEPA documents that can help lead to a more user-friendly document:

Document	+	Main	+	Appendices
Summary		Body		& Technical Reports

Based on the teams’ research, the report offers recommendations on making documents more effective and more engaging and useful for the public and decision-makers. It also focuses on improving the quality and legal adequacy of NEPA documents. The report, which is intended as a resource and not official guidance, promotes that with better NEPA documents, better public involvement and regulatory compliance can occur, ultimately leading to better decisions and a better outcome.

The key themes to follow when writing a NEPA document include:

- ◆ Tell the story in a way that is understandable to a broad audience;
- ◆ Use plain language summaries of technical analyses;
- ◆ Keep it concise – higher page count does not equal improved quality;
- ◆ Put detailed technical analyses in the appendix;
- ◆ Provide a clear path of logic with a consistent thread;
- ◆ Make it clear how decisions are reached or will be reached;
- ◆ Do not burden the document and the reader with irrelevant detail;
- ◆ Include discussion of environmental benefits as well as impacts.

Comments, Questions, and Answers

- ◆ Question: When and in what form will training be done on this subject? Answer: FHWA’s Environmental Competency Building Program will look at what skills are needed to deliver this process. It is not intended that training will be developed as a product of this report, but it will be valuable to determine what training already exists and how it can be assessed.
- ◆ Question: Is there a trend to make everything geared toward the public? Answer: It is not an attempt to simplify the NEPA documents, but it is important to present it in a way that accommodates various audiences.
- ◆ Question: Should Division Offices be implementing this report? Do we need to incorporate these guidelines in EISs we are doing now? Answer: This is a tool, but it is not prescriptive. We need this to describe what “reader-friendly” is. Division offices are asked to use this report accordingly. There is flexibility taken into account.

Legacy Parkway and Preserve: Lesson Learned (Greg Punske)

The Legacy Parkway Project is located to the north of Salt Lake City, Utah and east of the Great Salt Lake. The Legacy was intended to fill the need for an alternate route in the area, in order to meet traffic demand for the year 2020. The EIS process began in 1997. The Utah DOT issued the Notice of Intent and led a scoping effort, created an office for the public, and implemented outreach activities. The initial Legacy project raised concerns by both environmental groups and the public and eventually led to litigation in 2000.

The most important issue to the public was the impact of the Legacy Parkway on the wetlands associated with the Great Salt Lake. In response to this, all resource agencies agreed to preserve the wetlands. Between the DEIS in 1998 and the FEIS in 2000, 317 acres of wetlands were preserved to account for secondary impacts. In 2000, an additional 530 acres were added to be preserved to help address EPA's concerns.

The litigation in 2000 led to the EIS remanding five issues:

- ◆ Narrower right-of-way;
- ◆ Denver and Rio Grande Railroad regional corridor alternatives;
- ◆ Integration of Legacy Parkway with expansion of mass transit;
- ◆ Sequencing of shared solution; and
- ◆ Wildlife impacts.

The Court's remand gave FHWA Utah Division Office a road map to use leading to the FEIS. However, flexibility was still needed. The Supplemental EIS required re-evaluation of the FEIS. In addition, five technical memoranda were created along with a re-evaluation report.

In 2003, an Executive Federal Agency Partnering Meeting was initiated. Standing meetings were held monthly and three technical committees were created. Agencies involved included the USFWS, EPA, FHWA Utah Division, FHWA Director of Field Services-West, USACE, and FHWA Office of Project Development and Environmental Review. The objectives were to:

- ◆ Establish working relationships;
- ◆ Presentation of proposed approach to SEIS;
- ◆ Seek cooperation in preparation of SEIS;
- ◆ Determine coordination milestones; and
- ◆ Agree upon conflict resolution process.

Public Involvement began again in 2003 through a scoping meeting. Five focus group meetings were held in April 2003, five Community Planning Input Committee (CPIC) meetings were held between June and November 2003, and continuous coordination with interest groups took place.

Some of the lessons learned throughout the project are as follows:

- ◆ Parallel re-evaluation/SEIS worked best for Legacy;
- ◆ Establish commitment from cooperating agencies;
- ◆ Identify milestones/conflict resolution process;
- ◆ Coordinate with interest groups;
- ◆ Establish positive messaging and education program;
- ◆ Coordinate with experts in FHWA; and
- ◆ Establish early and ongoing coordination with legal services.

Comments, Questions, and Answers

- ◆ Question: What was the participation by resource agencies? Answer: Agencies dedicated resources.

- ◆ Question: What was the wetland mitigation? Answer: There was preservation and re-creation of wetlands but no new creation of them.

Observations on Document Quality from the Legal Perspective (Linda Amidon)

Questions received by FHWA Council Office (and answers to them) often include:

- ◆ Who does the legal sufficiency reviews? – The field attorneys and FHWA Headquarters’ Office of Chief Counsel;
- ◆ What do they examine? – Attorneys review EISs, 4(f) evaluations, and other items like Purpose and Need;
- ◆ Why do legal sufficiency reviews? – These reviews ensure that all laws are adhered to and that the agency’s decision prevails as much as possible. Depending on the technical expertise available, they also help to evaluate risk.

Legal sufficiency reviews do not guarantee a litigation-free project, therefore, it is important to maintain an updated Administrative Record in case litigation does occur. The Administrative record includes any and all documents that explain the Record of Decision and what the agency did what they did. The NEPA document does not do this, and should stand alone as public document.

Some of the problems the Council’s Office encounters are:

- ◆ Improper classification of a project
 - Often the plaintiff says an EIS should have been done instead of an EA; explain in the document why and EA was done instead of an EIS, and be sure to not make any judgments.
- ◆ Purpose and Need is not explained properly;
- ◆ Alternatives Analysis does not develop each alternative at the same level of comparison;
- ◆ Failure to address indirect and cumulative impacts as a reasonable and foreseeable issue;
- ◆ Poor response to public comments

In order to avoid these problems or others that may lead the project to litigation, it is important to work to “get it right the first time.” The classification should be correct and FHWA should meet early with the state to concur on the classification. The Council’s Office should review DEISs to identify any “fatal flaws” that could be potential litigation issues. Furthermore, it is essential that the Administrative Record be accurate and up-to-date. All NEPA documents are ultimately FHWA documents, so if the state drafts the Record of Decision, FHWA must review it and support the ROD.

Comments, Questions, and Answers

- ◆ Question: Do we have to do an alternative analysis if the legislative earmark was so specific that it introduced no other alternative analysis? Answer: If Congress has not exempted NEPA in the earmark, NEPA (and the alternative analysis) must be done.

MAJOR PROJECTS / DESIGN BUILD / PUBLIC PRIVATE PARTNERSHIPS

Moderator

Ruth Rentch, Project Development Specialist, Office of Project Development and Environmental Review, FHWA

Speakers

Jim Sinnette, Highway Engineer, Major Projects Team, Office of Infrastructure, FHWA

Gerry Yakowenko, Contract Administration Engineer, Office of Infrastructure, FHWA

Jim March, Industry and Economic Analysis Team Leader, Office of Transportation Policy Studies, FHWA

Description: This plenary session focused on new SAFETEA-LU criteria and directives as they relate to “major projects;” how new FHWA regulations currently being develop will affect design-build scenarios; and, how public private partnerships may impact future FHWA business in regards to Special Experimental Projects 14, 15 and tolling projects.

Major Projects and the Environment (Jim Sinnette)

Mr. Sinnette commented that his presentation would be a “primer on FHWA Major Projects,” and he began by defining what they are. FHWA Major Projects:

- ◆ Have Federal financial assistance;
- ◆ Cost \$500 million or more;
- ◆ Include other projects of “special” interest; and,
- ◆ Are defined by its NEPA limits.

FHWA’s Major Project website is www.fhwa.dot.gov/programadmin/mega/index.htm.

SAFETEA-LU Requirements for Major Projects

SAFETEA-LU made several significant changes to the requirements for Major Projects. The monetary threshold for classification as a Major Project was lowered from an estimated total cost of \$1 billion to \$500 million or greater. Under TEA-21, there were 21 projects in 13 States categorized as major projects. With the lowered monetary threshold, there are now 37 projects in 21 States classified as Major Projects, and over 80 projects in 17 future States that are anticipated to also be classified as Major Projects.

A Project Management Plan (PMP) prepared by the state DOT is now also required for all Major Projects. The PMP serves as a "roadmap" to help the project delivery team maintain a constant focus toward delivering the Major Project in an efficient and effective manner. The ultimate purpose of the PMP is to clearly define the roles, responsibilities, processes, and activities, which will result in the Major Project being completed on time, within budget, with the highest degree of quality and safety, and in a manner in which the public trust, support and confidence in the project will be maintained. The Division Office should review PMPs.

In conjunction with the PMP, a Finance Plan should also be developed. The Finance Plan helps staff to look out across project horizons and estimate whether there will be enough financial resources to finish the project.

Checklist of Major Project Questions

FWHA has developed a list of the kinds of questions that Division Administrators (DA) should be asking early in Planning, as soon as they become aware of a Major Project taking shape in their respective States. Early in Planning, the Division's ability to answer the checklist questions may be rudimentary and speculative, so DAs should revisit these questions periodically as the project becomes refined throughout the Planning and Environmental stages. The checklist of questions can be found at www.fhwa.dot.gov/programadmin/mega/majorquestions.cfm.

Interim Major Project Guidance on SAFETEA-LU’s Major Project requirements, which was released on January 27, 2006, is available at www.fhwa.dot.gov/programadmin/mega/012706.cfm#guidance.

SAFETEA-LU Section 1503: Overview of FHWA’s Notice of Proposed Rule Making (Gerry Yakowenko)

Mr. Yakowenko provided an updated on FHWA’s Notice of Proposed Rule Making (NPRM) for SAFETEA-LU Section 1503. The Section eliminates the \$50 million floor on the size of contracts that can use design-build contracting without special approval. It also removes an obstacle contained in

FHWA's existing design-build rule. Specifically, the rule prohibited agencies from issuing requests for proposals (RFP) and entering into contracts until after issuance of NEPA approval. This has been a particular problem for public-private partnerships where the expectation is that the private sector partner will be involved in the project definition process.

SAFETEA-LU Section 1503 directs the Secretary to revise the regulations applicable to design-build contracts to permit transportation agencies to proceed with certain actions relating to design-build contracts, prior to receipt of final NEPA approval. The Act directs the Secretary to issue the revised regulations no later than 90 days after the date of enactment of SAFETEA-LU.

Section 1503 NPRM

The primary revision to its design-build contracting regulations that FHWA has proposed would involve a statutory requirement that FHWA not preclude state DOTs or local transportation agencies from issuing RFP documents, awarding contracts, and issuing notices-to-proceed for preliminary design work prior to the conclusion of the NEPA process. This proposed revision offers transportation agencies greater flexibility in design-build contracting.

The proposed rule, which also proposes revisions to provisions in 23 CFR Part 36 to facilitate the use of public-private partnerships, offers several new definitions. These include:

- ◆ *Qualified project* – any design-build project (including intermodal projects) funded under Title 23 that meets the requirements of this part and for which the contracting agency deems to be appropriate on the basis of project delivery time, cost, construction schedule and/or quality.
- ◆ *Preliminary design* – all design activities necessary to complete the NEPA alternatives analysis and review process.
- ◆ *Final design* – any design activities following preliminary design. Final design activities are not necessary to complete the NEPA process as outlined in 23 CFR 771.
- ◆ *Developer* – each entity with whom the contracting agency has executed a public-private agreement for the development, design, construction, financing, operation, and maintenance of one or more projects under a public-private partnership. Depending on the context of the public-private agreement, the term “developer” may include affiliated entities of the developer.
- ◆ *Public-private agreement* – an agreement between a public agency and a private party under which the private party shares in the responsibilities, risks and benefits of constructing a project. Such agreement may involve an at-risk equity investment by the private party in the project.

Public-Private Partnerships (Jim March)

Public-private partnerships (PPP) are contractual agreements between public and private sector partners to renovate, construct, operate, maintain, and/or manage a facility or system. While the public sector usually retains ownership of the facility or system, the private party may be given responsibility for major elements of the facility. PPPs consist of:

- ◆ Contracts for operations only;
- ◆ Contracts for designing, building, and operating a facility;
- ◆ Contracts for designing, building, operating, owning the facility with a possibility for transfer; or
- ◆ A long-term lease of existing facilities.

Other models are likely to be used in the future, although only a few states currently have PPP-enabling legislation.

PPPs are particularly important because they can help manage increasing investment requirements caused by problems such as aging infrastructure, growing congestion, increasing construction costs. Furthermore, projected Federal, state and local highway revenues are insufficient to meet estimates of future highway investment requirements. The private sector may have solutions to these and other challenges that the

public sector has not pursued. For example, though not currently a big contributor to financing highways, tolling, an activity the private sector can play an important role in, is one way to supplement traditional revenue.

Mr. March listed benefits and risks of PPPs. Some benefits identified include:

- ◆ Accelerates project start-up and completion
- ◆ Integrates design, construction, and operational considerations
- ◆ Fixes price early in design phase
- ◆ Guarantee completion date
- ◆ Allocates project risks among parties
- ◆ Provides life cycle cost efficiency
- ◆ Improves operational efficiency
- ◆ Takes advantage of each sector's strengths

Some risks can be:

- ◆ Asset devaluation due to roadway deterioration;
- ◆ Investors do not gain anticipated revenues if schedules slip; and
- ◆ Maintenance funds are generated from toll revenues and not annual budgets.

Mr. March indicated that FHWA's PPP website (www.fhwa.dot.gov/PPP) is a good resource for additional PPP information.

Comments, Questions, and Answers

- ◆ Question: If a state had a project that was a Major Project under NEPA, but construction was being completed in phases, under the Major Project threshold, how would this be dealt with? Answer: If the phases cannot be individual projects, then they probably cannot be viewed outside the Major Project definition.
- ◆ Question: Have there been any FHWA Headquarters discussions regarding how to sell facilities? Who is responsible when a sold road needs to be widened or connected to? Answer: This is a very challenging subject. Issues like this should be worked out in negotiations with the private entity. The state will be responsible for ensuring that all of the negotiations' conditions and requirements are met.
- ◆ Question: In the PPP realm, there have been some controversial sales. Does FHWA help a state make a decision regarding whether a sale was successful? Answer: If requested, FHWA would provide technical assistance. Otherwise, FHWA would not get involved in financial discussions between the state and the private entity.
- ◆ Question: Under SAFETEA-LU Section 1503, what is FHWA's role if, one day after the ROD is signed, construction begins? Answer: The state and FHWA Division Office have the responsibility to ensure that construction proceeds in accordance with the planned schedule and budget.

LINKING PLANNING AND NEPA

Moderator

Mike Culp, *Project Development Specialist, Office of Project Development and Environmental Review, FHWA*

Speakers

Shari Schaftlein, *Program/Policy Development Team Leader, Office of Project Development and Environmental Review, FHWA*

David Whitehurst, *Wildlife Diversity Division, Virginia Department of Game and Inland Fisheries*

Ann Campbell, *US Environmental Protection Agency*

Deborah Suci Smith, *Environmental Protection Specialist, FHWA Pennsylvania Division Office*

Description: This session on linking planning and NEPA processes addressed integrated planning concepts as they apply to the new environmental consultation and mitigation provisions of SAFETEA-LU Section 6001. Presentations included information on Wildlife Action Plans, Watershed Planning concepts, and Historic Preservation Plans and inventories and how these can be used to inform decision-making in both in transportation planning and project development. There was also an overview presentation that explained the "linkages" between integrated planning and other FHWA initiatives.

Linking Planning and NEPA (Shari Schaftlein)

The challenge in integrating planning and environment is how to look at all the plans in a system, integrate them, and optimize them. The integration needs to be shaped relative to the transportation system and project development.

SAFETEA-LU provisions address integration in various ways:

- ◆ Section 6001– Transportation Planning Process Provisions: Consultation with Resource Agencies, Consideration of Resource Maps and Inventories, Discussion of Possible Mitigation Activities, and Visualization of Plans
- ◆ Section 6002 – Environmental Review Process
- ◆ Section 1119 – Wildlife Vehicle Collisions
- ◆ Section 6008 – Context Sensitive Solutions

Linking Planning and NEPA enables the connections of Section 6001 and 6002. Section 6001 seeks better environmental screening through early coordination with resource agencies and consideration of land use, while Section 6002 encourages early coordination for improving the project development process and increasing predictability. Linking Planning and NEPA provides mechanisms and tools to facilitate early coordination, and provides ideas for planning products that can be used to increase predictability in NEPA and permitting. To implement 6001, partners will work together to define what issues should be dealt with, and can create a flowchart to show expected timelines.

One example of a FHWA Linking Planning and NEPA initiative is scenario planning, which helps to produce harmony between players through early and consistent interaction. The publication *Eco-Logical* (www.environment.fhwa.dot.gov/ecological/eco_index.asp) is also a good example of an interagency agreement focusing on linking planning and NEPA.

Research has established new drivers and trends for Linking Planning and NEPA. NCHRP has produced policy and legal papers on Linking Planning and NEPA, as well as technical products and case studies. A new TRB committee was formed to discuss the subject at both the summer and annual meetings. Current FHWA activities include sponsoring two Linking Planning and NEPA workshops and three workshops on conservations and transportation planning.

Virginia Wildlife Action Plan (David Whitehurst)

The Virginia Department of Game and Inland Fisheries (DGIF) has worked closely with the Virginia DOT's (VDOT) environmental office to address wildlife issues. Wildlife Action Plans were Congressionally mandated and funded under USFWS Wildlife Conservation and Restoration Program and State Wildlife Grants program since FY 2001. In order to continue to receive funds, all states and territories were required to submit their plans to the USFWS by October 1, 2005. Similarly, Former Secretary Murphy also tasked DGIF after the 2003 Virginia Natural Resources Leadership Summit to "Develop a Comprehensive Wildlife Conservation Plan by 2005."

The Plan can be used as a strategy and common vision for conservation for the Commonwealth, and not just DGIF. It provides updates on Virginia's wildlife and habitats and agrees with Virginia's long-term strategic plan to "protect, conserve, and wisely develop our natural, historical and cultural resources." The Plan can also be used to prioritize and leverage funding across agencies and programs within and outside of Virginia government.

Mr. Whitehurst explained that Virginia is heading toward a wildlife crisis, which is now much more difficult to solve than in the past. They are working to "keep common species common," despite 925 species identified as being in decline. Under the Plan, the species are assigned to four different tiers, according to the severity of the species population decline. A tier 1 species is defined as "critical conservation need." An example of a tier 1 species is the mussel population; most mussels are endangered due to poor water quality from coal mining in the state.

The Wildlife Action Plan was developed with input from multiple partners, stakeholders, and residents. The Plan evaluates and assesses:

- ◆ Location and abundance of wildlife and habitats;
- ◆ Problems facing species and habitats;
- ◆ Conservation actions to address problems; and
- ◆ Research and monitoring needs.

A better way of balancing highway projects and wildlife impacts still needs to be determined. The VDOT recently gave funding to DGIF to provide all updates and information on species to VDOT and its regional offices.

Transportation-related conservation actions that can help address wildlife protection and related transportation impacts, include:

- ◆ Better local and regional land use planning, including sustainable development,
- ◆ Removal or alteration of impediments to fish movement,
- ◆ Wildlife crossings,
- ◆ Replace wooden bridges, and
- ◆ Reduce salt application to roadways.

Watershed Planning: A Key to Integrated Planning (Ann Campbell)

Watershed Planning is planning designed to improve and maintain water resources in an area of land making up a watershed drainage area. Both people (human activities and political decisions) and technical challenges influence water quality and quantity.

EPA's watershed approach looks to the states to be the drivers, but provides assistance as needed. The EPA can also help to identify opportunities for tradeoffs. FHWA and EPA are working together to determine where watershed planning is being used and what the cost and time savings are. Watershed planning must include the planning level staff to see how low impact techniques can be implemented with coordination and support by MPOs and local or state government. Because watershed grants are not mandated, EPA is using grants to help states develop their own watershed plans.

Although several EPA water programs have planning components and funding opportunities, developing and adopting a watershed plan still remains a challenge. Several resources exist to assist with watershed planning: The EPA has created a draft Handbook for Developing Watershed Plans to Restore and Protect our Waters, and also has a Guidebook available online. Finally, EPA's website "Watershed Plan Builder," is an interactive, web-based tool to promote the development of comprehensive watershed protection and restoration plans. It is designed to help local watershed organizations develop integrated watershed plans to meet state and EPA requirements and speed water quality improvement. The application results in a

user specific outline of a comprehensive watershed plan populated with relevant links to EPA, other Federal agencies, and State water programs. It also provides a unified vision and guidance for implementation of Clean Water Act and EPA's watershed strategic goals.

Linking Planning and NEPA: Consideration of Cultural Resources (Deborah Suci Smith)

Integrating the consideration of cultural resource data into the planning process can be a valuable step to add to project development. In order to do this, MPOs need to be educated on the Section 106 process and cultural resources, and cultural resource specialists need to be educated on the planning process. The language used to explain the two processes, and their integration, to tribes and other groups needs to be consistent from the beginning.

For planners and MPOs, it is important to learn about techniques and available resources for considering cultural resources early on. These include how to:

- ◆ Identify groups or individuals with an interest in history or historic preservation,
- ◆ Use meetings or other forums to solicit information from the public or public officials,
- ◆ Use electronic resources for data collection, and
- ◆ Share known public information on websites and through other forums.

Pennsylvania's Cultural Resource GIS Center is one example of how a state can help its partners access information on historic structures. Visit <https://www.dot7.state.pa.us/ce/SelectWelcome.asp> for more information.

Questions, Answers, and Comments

Question: How should the following scenario be handled: A project is better for the watershed approach but worse for the permitted object? Answer: To address this issue, look at the project design and the transportation plan. Study the transportation project's needs versus the needs of the watershed. Consider the watershed plan within the transportation plan to allow for flexibility.

Question: How can agencies and their different plans and objectives be integrated to distribute costs? Answer: The Wildlife Action Plans have been well received by the DOT, FWS, and other agencies. This has given agencies the opportunity to address wildlife problems more easily than before. Ms. Schaftlein also noted that one should not bias financing with only available resources; a level playing field is needed for all information.

Question: Are there effective ways to integrate GIS into Division Offices? Answer: Use the Resource Center for technical assistance. Open up lines of communication with state DOTs and resource agencies, which may have resources or information they can share. There is also an NHI course in GIS. Contact Mark Sarmiento for questions regarding statewide planning and GIS.

SAFTEA-LU ENVIRONMENTAL REVIEW PROCESS

Moderator

Pam Stephenson, Program/Policy Development, Office of Project Development and Environmental Review, FHWA

Speakers

Janet Myers, Program Manager, Office of Real Estate Services, FHWA

Rob Ayers, Environment Program Specialist, FHWA North Carolina Division

Joseph Ossi, Environmental Planner, Office of Planning, Federal Transit Administration

Description: The Environmental Review Process session reviewed the major points of SAFETEA-LU Section 6002, which established a new environmental review process for FHWA and FTA projects. Each panelist introduced a new aspect of the process and then opened up the discussion for specific questions and comments on that aspect. This section describes the aspects of Section 6002 that were discussed in the session.

The “Notice of Availability of Proposed Guidance on Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) and Request for Comments” was published in the Federal Register on June 28th and is posted on FTA’s website at http://www.fta.dot.gov/17973_18395_ENG_HTML.htm. The “SAFETEA-LU Environmental Review Process Proposed Guidance” can be found at <http://www.fta.dot.gov/Section6002.doc>.

Flexibility with Project Management

The purpose of this guidance is to be flexible because every state has different ways of doing business. FHWA and FTA developed guidance that is broad enough to modify and adapt to particular state’s activities. The guidance also makes clear what has to be done through project management.

Congress designed Section 6002 to be in line with the CEQ regulations and 771 CFR, but also wanted to make the process more predictable so lead agencies can follow the process. For this reason, Section 6002 focuses more on predictability and less about streamlining the process.

Environmental Review Process Project Initiation

The project initiation process applies to EISs only. The timing of the project initiation is flexible but usually occurs prior to the publication of the Notice of Intent (NOI). To initiate the project, the state DOT or project sponsor needs to send a letter to the Division Office or FTA Regional Office saying that it is ready to proceed with the evaluation of impacts and alternatives. The letter can have the draft NOI attached and needs to identify expected issues so the participating agencies can also be identified.

Comments, Questions, and Answers

- ◆ Question: For FLH, if the NPS is a sponsor, do they do the initiation even if the project will use Title 23 funds? Answer: Yes
- ◆ Question: How much can you do with the initiation if the purpose and need statement is not developed yet? Answer: SAFETEA-LU says that the NOI only needs to: (1) describe the type of work (e.g., highway, multi-modal, etc.), (2) refer to planning process, and (3) show that the sponsor is serious about moving forward.
- ◆ If you have an NOI in the Federal Register post-August (when SAFETEA-LU was enacted), do you need to go back and get the letter for initiation? Answer: You can call the draft NOI the project initiation as long as it has the information that needs to be in the initiation letter.
- ◆ Question: What is the definition of project sponsor? Answer: This is defined in SAFETEA-LU.

Lead, Cooperating, and Participating Agencies

A lead agency is defined as the USDOT if the project is USDOT funded. There can also be joint leads; for example, the state DOT needs to be a co-lead if it is a project sponsor. Agencies like the USACE and NPS can also be co-leads.

A cooperating agency is the same as defined by CEQ.

A participating agency is some other entity that has interest in the project. It cannot be a private or non-government agency. The lead agency is obligated to invite participating agencies. The participating agency needs to be involved in the purpose and need, range of alternatives, and methodologies. They can

help to gauge issues and prevent any showstoppers. Participating agencies can also help address comments from non-Federal agencies.

If a Federal agency is invited as a participating agency, they must accept the invitation unless they meet all of the following criteria:

- ◆ They do not have jurisdiction
- ◆ They do not have the proper expertise
- ◆ They do not intend to submit comments

Most Federal agencies invited will likely accept the invitation. Those that decline may do so because they do not have the resources; lead agencies need to work closely with their partners to express the importance of working together even with limited resources. FHWA will be holding a webinar for EPA Regions to explain Section 6002 and their role as a participating agency.

If a non-Federal agency is invited as a participating agency, they need to respond in the affirmative. If they fail to respond in the timeframe given they will not be considered a participating agency. However, if the invited agency declines and the project lead(s) believe they should be interested, the agency should again be encouraged to participate.

Comments, Questions, and Answers

- ◆ Question: What if a state or resource agency is not aware of SAFETEA-LU requirements?
Answer: The lead agency needs to reach out to these agencies prior to sending the invitation letter. It is recommended that staff reach out to contacts that they usually work with, and try to create a standardized programmatic agreement or process.
- ◆ Question: Are local agencies required to be participating agencies? Answer: Only if they have an interest.
- ◆ Question: For Division Offices that fund liaisons, can their performance agreements be expanded to that they are required to participate? Answer: Yes, flexibility allows for this.

Coordination Plan and Schedule

Lead agencies are responsible for establishing the coordination plan for coordinating with the public. It includes defining lead and participating agencies' roles and responsibilities. Although Section 6002 does not mandate scheduling, FHWA has been requiring a negotiated schedule as part of its strategic performance measures. When the coordination plan includes a project schedule, it must be prepared in consultation with the participating agencies, the project sponsor and the state.

Comments, Questions, and Answers

- ◆ Question: What about the "significance" issue? Answer: For something to be addressed in an EIS, there needs to be significant impact. Make it clear that the EIS will only address significant impacts.

Purpose and Need and Alternatives

Section 6002 states that, as listed in previous CEQ guidance, the lead Federal agency, in consultation with the other lead agencies, is ultimately responsible for making the decision regarding the purpose and need used in the NEPA evaluation. SAFETEA-LU describes the purpose and need statement as identifying objectives that the proposed project is intended to achieve for improving transportation conditions. The objectives may include, but are not limited to, the following outlined in SAFETEA-LU:

- ◆ Achieving a transportation objective identified in an applicable statewide or metropolitan transportation plan;
- ◆ Supporting land use, economic development, or growth objectives established in applicable Federal, state, local, or tribal plans;

- ◆ Serving national defense, national security, or other national objectives, as established in Federal laws, plans, or policies.

Some state DOTs also have a merger in place with other agencies to concur with the purpose and need and alternatives. Florida, for example, has grandfathered its merger into the Section 6002 process as a way to improve its own process. Other states have been asked to revisit their merger to ensure that FHWA has the final approval authority.

The development of the range of alternatives should also be a collaborative process. Lead agencies will provide the opportunity to receive comments from both the public and other agencies. After considering this input, the lead Federal agency, in consultation with the other lead agencies, is ultimately responsible for deciding the range of alternatives to be considered.

Comments, Questions, and Answers

- ◆ Question: What do you do about the purpose and need statement in the 404 process, when the USACE has jurisdiction over that? Answer: Merger agreements can help address this issue, however, the decision is ultimately FHWA's. If a dispute occurs and it cannot be remedied, the dispute will have to be elevated.

Consultation on Methodology

Collaboration with participating agencies is essential to assess impacts, determine methodologies, and define level of detail. When discussing methodologies, parties need to provide a preferred methodology and discuss it with the group, instead of saying they simply do not like a particular option. FHWA's role is to collect this methodology information in the discussions and make a final decision.

Preferred Alternative Level of Detail

Section 6002 explicitly recognizes that the preferred alternative can have more level of detail than the other alternatives, based on the following conditions:

- ◆ Lead agencies have to be clear that the level of detail will not bias other alternatives, and
- ◆ It can include what is needed to facilitate mitigation or permits.

FHWA should look to the state for their request to develop the preferred alternative to a higher level of detail. However, it is the lead agency's decision whether to go to a higher level of detail even if others are not in agreement. A "locally preferred alternative" that has not been accepted by the lead Federal agency as the preferred alternative cannot be developed to a higher level of design detail. The state's request for a higher level of detail should include:

- ◆ Reasons why the agency wants to develop the preferred alternative to a higher level of detail before completion of NEPA review, including the specific Federal laws, impacts, resources, and mitigation measures that are being facilitated by the proposed differential treatment of the alternatives;
- ◆ The general nature and extent of the work the agency would perform on the preferred alternative if the request is approved; and
- ◆ The reasons why greater design detail will not prejudice the lead agencies' consideration of other alternatives.

Comments, Questions, and Answers

- ◆ Question: Why include a greater level of detail on one alternative if it is doubtful it will influence the other alternatives? Answer: When one alternative is taken to a higher level of detail, compensation to balance the others will be needed. This may mean a need to apply similar mitigation descriptions for the others. Resource agencies have mixed opinions on this topic.

- ◆ Question: Why perform a higher level of detail for a preferred alternative? Answer: After all of the alternatives are set out equally (with the cooperating agencies), it can become apparent that one has fewer impacts and has public support. The state may request that this be considered first to save money and time, and to help to streamline the process. At some point in time the level of detail becomes clear that this alternative will happen.
- ◆ Comment: A higher level of detail can be used to address permit issues and mitigation details. Resource agencies involved in specific mitigation options should be included in the discussion.
- ◆ Comment: EAs can use the Section 6002 process on a case-by-case basis, if there are adequate reasons why it should be done.
- ◆ Question: What if a state does use Section 6002 for an EA without FHWA approval? Answer: Then they are doing so at their own risk.

Dispute Resolution

Dispute resolution can be addressed in the coordination plan. The first step is to do a local elevation process, initiated by the project sponsor or state government. If a problem continues to be elevated it will go up to the proper House or Senate committee, however, it is in the best interest to achieve resolution at the local level and avoid sending the project to committee.

It is important to talk about the dispute resolution clause with partners when the project begins. For states that have a merger agreement, parties may want to include a staff-level dispute resolution process in their merger with resource agencies, and also include this process in their coordination plans.

Paying for Resources

SAFETEA-LU allows for Federal-Aid funding to be used for funded positions in order to help streamline the environmental review process. Performance plans should be created to outline the expectations and process. Funded positions should be used to help save time during the environmental review process, and not to replace staff. SAFETEA-LU states that funded positions can be for Federal, state, or tribal positions. It allows state DOTs to pay for additional FHWA Division Office positions in case they need more staff. FHWA sent a request to Division Administrators to determine the interest in doing this, however, most did not see the need or see it as a practical approach.

Statute of Limitations

The proposed guidance in the Federal Register includes changes made from the interim guidance. The guidance states that a project's decision can be sued up to 180 days after the statute of limitations (SOL) notification has been published in the Federal Register. Only one SOL notice should be issued per project because of the cost to do this. FHWA expects that every EIS will publish a SOL notification, EAs that have regulations that would normally be in an EIS will have SOL notices, and some CEs may as well.

The FHWA Division Administrator decides to publish the SOL notification, in conjunction with the state agencies. After coordination is done with other agencies so they are aware of the SOL provision, the FHWA Division Administrator will work with the field's council to draft the notice.

FTA's policy on SOL varies slightly from FHWA's policy. FTA will publish SOL from Headquarters on Record of Decisions or Finding of No Significant Impacts for the following issues. These will also be posted in the Internet.

- ◆ NEPA
- ◆ 4(f)
- ◆ Air Quality Conformity

Comments, Questions, and Answers

- ◆ Question: What has changed since the interim guidance? Answer: When permits are done, resource agency contacts need to be listed within the SOL notice. Also, language was clarified on what is needed in the Administrative Record.
- ◆ Question: How are SOL notices applied to tiered projects? Answer: It is still being worked out. Coordination with the Department of Justice is needed to determine what is considered the final project action. Field Council will also be able to assist with this determination.
- ◆ Question: What process should be used on join-FTA projects? Answer: Separate notices will need to be created for both FHWA and FTA. Coordinate with both agencies prior to drafting the notices.

NOISE

Moderator

Mary Ann Rondinella, Environmental Program Specialist, Resource Center, FHWA

Speakers

Geoffrey Pratt, Project Engineer, William Bowlby and Associates

Mark Ferroni, Highway Traffic Noise Team Leader, Office of Natural and Human Environment, FHWA

Chris Corbisier, Highway Traffic Noise, Office of Natural and Human Environment, FHWA

Description: The Noise breakout session consisted of a presentation that discussed the roles of highway agencies in promoting noise compatible land use planning, highlighted the latest developments in use of various pavements to reduce tire noise, and described the current state of practice in quiet pavement pilot programs and research. The Interactive Sound Information System (ISIS), a software program that generates noise from various sources, was also demonstrated.

Ms. Rondinella introduced the session and its presenters. She commented that the ISIS demonstration would be the first time the software had been exhibited to an audience.

ISIS Demonstration (Geoffrey Pratt)

The Interactive Sound Information System (ISIS) is software designed to deliver accurate information about environmental noise. The system mixes digital recordings, sound control, and graphic imagery to illustrate noise principles and noise management issues.

After calibrating two speakers to the center of the breakout session room, Mr. Pratt demonstrated features of the software and how it could be tailored to present highway-specific noise scenarios. To begin, he explained that noise regulations consider a highway noise impact to be noise that approaches or exceeds the threshold of 67 decibels (dB). A recording of highway noise at 67 dB was then played for reference. Since ISIS was designed to quickly show differences between dB levels, various other dB levels were played.

Other examples that were demonstrated follow:

- ◆ Since dB levels are expressed on a logarithmic scale, a 65 dB noise and another 65 dB noise would not equal a 130 dB noise. Instead, the two sounds would sum to a sound approximately 68 dB. To illustrate, as Mr. Pratt commented that 65 dB was generally considered twice as loud as 55 dB, he controlled ISIS to simultaneously play two noises at each dB level. The 55 dB noise could not be heard.
- ◆ Human ears naturally attenuate different frequencies. Low frequencies at a given dB level are not perceived by the inner ear nearly as much as frequencies between 1000-4000 hertz (htz). To demonstrate, Mr. Pratt played tones of varying frequency at the same dB level. Low frequencies were nearly inaudible.

- ◆ ISIS has the ability to illustrate and track changes to the noise environment over time. The software can also show the maximum noise in a given noise event. Using noise over time information, ISIS can show the sum of energy from the given timeframe and condense it into one level to show the average noise level.
- ◆ Mr. Pratt used ISIS to illustrate the principle of noise interference. He showed how events such as listening to a radio outside or watching TV inside an air conditioned (additional noise) house are affected by or can affect highway noise events such as trucks driving by.
- ◆ Finally, ISIS was used to simulate inserting noise barriers. Several set back distances were used to show how the distance a barrier is built from a highway alters the amount of noise attenuated.

Comments, Questions, and Answers

- ◆ Question: Is there an earthen berm feature instead of the brick barrier option? Answer: Not currently.
- ◆ Question: Can the pavement surface be changed in ISIS? Answer: Changes in pavement surface type are not currently built into the ISIS demo.
- ◆ Question: How might noise from trains be incorporated into the highway noise demonstration? Answer: Noise from trains would be an energy addition to the existing noise environment.
- ◆ Question: Could you explain the air conditioning example again? Answer: Interior situations have criteria for what constitutes interior noise. To estimate noise levels internal to a building, the outside ambient noise level is reduced (by noise sources within the building such as air conditioners).
- ◆ Question: Will the software come with a disclaimer indicating that it should be used for illustrative purposes only? Answer: “Illustrate” is the key word for the system. A disclaimer would be helpful. Comment: Explaining noise to the public has sometimes been difficult. ISIS could be very helpful tool to do this.

Pavement Issues (Chris Corbisier)

Mr. Corbisier described the types of noise research related to pavement types that is being conducted. He also spoke about various FHWA-sponsored events that have been designed to enhance the noise/pavement body of knowledge.

In a highway context, noise is defined as unwanted sound from vehicles. Pavement is sometimes mentioned as a factor in traffic noise. While it is true that noise levels do vary with changes in pavements and tires, it is not clear that these variations are substantial when compared to the noise from exhausts and engines, especially when there are a large number of trucks on the highway. Additional research is needed to determine to what extent different types of pavements and tires contribute to traffic noise.

The most common practice of reducing noise is to construct noise barriers. These barriers can cost over \$1 million per mile and must be maintained in perpetuity. Tire and pavement interactions are being studied in order to potentially offer other noise reducing options. However, it is very difficult to forecast pavement surface condition into the future and not much research is being focused on this topic. Unless complete information is available on the pavement type and condition and its noise generating characteristics, no adjustments should be made for pavement type in the prediction of highway traffic noise levels. Although some studies have shown open-graded asphalt pavement can initially produce a benefit of 2-4 dB-Attenuated reduction in noise levels, any noise reduction benefit is lost as the aggregate surface becomes polished over time.

FHWA Tire/Pavement Noise Mitigation Policy

The current FHWA tire/pavement noise mitigation policy prohibits making adjustments for specific pavement types in predicting noise levels. Only “average” pavement type (Dense-Graded Asphalt Concrete and Portland Cement Concrete) is allowed in traffic noise models. The policy also prohibits the

use of pavement types/surface textures as noise abatement measures. FHWA's noise program policy related to tire/pavement noise can be found at www.fhwa.dot.gov/environment/polguid.pdf.

Quiet Pavement Pilot Program (QPPP) vs. Quiet Pavement Research

Mr. Corbisier compared and contrasted QPPPs and quiet pavement research. In general, both must be able to demonstrate safety and durability. Also, the types of data gathered for QPPP and quiet pavement research are exactly the same, allowing for direct comparison of data and determination of any correlation between pavement characteristics and safety, durability, and noise reduction.

For QPPP there is some knowledge and understanding of how much noise reduction a specific pavement type will provide. This means that pavement type can be used in traffic noise models, and specific pavement types can be used as mitigation measures. In contrast for quiet pavement research, no "universal truths" have been identified. There is not much understanding of how much quiet pavement will reduce noise. Traffic noise model adjustments and pavement types as mitigation measures cannot be used.

For more information see the "Highway Traffic Noise - Guidance on Quiet Pavement Pilot Programs and Tire/Pavement Noise Research," which provides guidance to state DOTs that want to develop a QPPP or conduct tire/pavement noise research: www.fhwa.dot.gov/environment/noise/qpppepl.htm.

Tire/Pavement Noise Resources and Events

Some FHWA events related to tire/pavement noise that have occurred or are planned to occur include:

- ◆ Noise Strategic Planning Workshop in September 2004 - www.fhwa.dot.gov/resourcecenter/teams/environment/eq_1.cfm;
- ◆ Tire/Pavement Noise 101 Workshop - www.tfhrc.gov/focus/nov05/05.htm;
- ◆ Tire/Pavement Clearinghouse website – should be available by late summer 2006

Comments, Questions, and Answers

- ◆ Question: Is California looking at quiet pavements? Answer: California has studied rubberized asphalt and open-graded surfaces. The state has an ambitious pavement research agenda that FHWA is helping to shape.
- ◆ Question: EPA is asking States to use rubberized asphalt, which has a very high life cycle cost. There is a policy issue here larger than just noise. What is FHWA Headquarters doing to address this issue? Answer: Currently, FHWA Headquarters is not doing anything with this policy issue. Some States are looking into life cycle cost analysis based on pavement type used.
- ◆ Question: Porous pavements have stormwater and other environmental benefits. Has this been factored into pavement ranking models? Answer: No. It is suggested that environmental offices study this. As time goes on, policies and the ways pavements are analyzed are likely to evolve. Each state has the flexibility to do its noise analyses differently.
- ◆ Question: A question about multiple existing noise sources – how should feasibility analyses be approached for small projects that will create noise that will be "hidden" by existing sources? Answer: The policy, which applies to all actions within a state, would not change.

Noise Compatible Land Use Planning (Mark Ferroni)

The compatibility of the highway and its neighbors is essential for the continuing growth of local areas. Local government officials need to know what noise levels to expect from a highway and what techniques can be used to prevent future impacts. Mr. Ferroni explained that there are three major approaches to highway traffic noise control:

- ◆ Source Control
- ◆ Highway Facilities Measures
- ◆ Noise Compatible Land Use Planning

For source control, the Noise Control Act of 1972 gives EPA the authority to establish noise regulations to control major sources of noise, including transportation vehicles and construction equipment. Highway facilities measures consist of making considerations regarding location (alignments and existing terrain), operations (e.g., speed reduction, lane restrictions), and/or design (e.g. buffers, vegetation, barriers). Noise compatible land use planning involves local governments working with planners, developers, and builders to guide the development of undeveloped land near existing highways. In this latter case, strategies such as promoting non-residential uses, increasing buffer zones and setbacks, and adopting land use compatible standards into city codes can be effective. Builders might also consider constructing single-story units adjacent to roadway, installing double paned windows, and using efficient insulation.

Comments, Questions, and Answers

- ◆ Question: FAA uses noise contour zones. What is FHWA's view on and use of noise contours?
Answer: FHWA has the ability to use noise contours. However, the Administration is hesitant to do so because contours may not be as accurate as desired. Noise contours are viewed as appropriate for discussions with planning partners.

COLLABORATIVE DECISION MAKING

Moderator

Ruth Rentch, Project Development Specialist, Office of Project Development and Environmental Review, FHWA

Speakers

Dr. Andy Rowe, Principle Consultant, GHK International

Description: The Office of Management and Budget has directed Federal agencies to increase the use of collaborative processes to address environmental issues and demonstrate the results. The Collaborative Decision Making (CDM) breakout session described what agencies can expect to achieve from collaborative processes and how those results compare with traditional decisionmaking approaches.

Systematic Evaluation of Economic and Environmental Results Process (Dr. Andy Rowe)

CDM is an initiative aimed at improving information exchange among the various interests involved in environmental resource decisions. The Systematic Evaluation of Economic and Environmental Results (SEEER) Process, which has been in development for the past three years in conjunction with EPA's Office of Conflict Resolution and Preservation, is a CDM approach to examining environmental effects. SEEER, which is the first known systematic assessment of the environmental effects of collaborative decisions, is a process driven by an understanding that outcomes matter and that the government is accountable for its work.

SEEER Process Steps

The process, which costs between \$10,000 and \$20,000 to complete, is as follows:

- ◆ A project is selected;
- ◆ Construction alternatives, environmental effects and ecological effects are formulated;
- ◆ The three independent groups – scientific panel, advisors, and parties – assess the project. Science advisors and study teams using secondary sources validate outcomes, which leads to a final judgment.

Sometimes scientists are reluctant to estimate effects on dependent variables, because dependent variables are impacted from changes in the independent variable. SEEER focuses on assessing direct actions, or the

independent variables. In the SEEER process, three independent groups of judgments are made (or triangulation) to evaluate information. The three groups are:

- ◆ A Scientific Panel;
- ◆ Advisors; and,
- ◆ Parties (planners and implementers).

Under SEEER, the ways to judge an effect include assessing the:

- ◆ *Importance of an effect* – For example, adding scenic views to an already scenic place may not be as important as conserving a meadowland for a certain animal;
- ◆ *Probability of effect occurring* – Determining if the effect that is desired is likely to result from the decision being made;
- ◆ *Magnitude of the effect* – For example, will opening of a Dam create one mile or many miles of salmon breeding areas.

The effects are measured on an “environmental index.” The environmental index is calculated by multiplying the likelihood of effect occurring by the expected magnitude of the effect, then dividing by the maximum possible score. Each variable is measured on a scale of 0-4.

SEEER Outcomes and Next Steps

SEEER can lead to increased organizational effectiveness, where there is greater cooperation and information sharing among involved parties. The Federal government can benefit from the process because it can avoid being viewed as having an adversarial role on projects. State government has appreciated the effectiveness of SEEER to address environmental issues, while the private community has welcomed the process’ ability to reduce risk and uncertainties.

The next step for SEEER is for EPA to share the technique and case study results with other Federal agencies. The process will also be implemented on both Superfund and Department of Interior (DOI) cases.

Comments, Questions, and Answers

- ◆ Question: How much does it cost to use SEEER on a case? Answer: This depends on how large case is, but most range within \$10,000 – \$20,000.
- ◆ Question: What background information is given to panels? Answer: An effort is made to ensure that panels understand project background and alternatives. Panels are given boundaries for the decision.
- ◆ Question: If planners and implementers already have a historical knowledge, how do they decide what is valid? Answer: They assess the independent variable on effects, construction and natural alternatives. It takes about 25-35 minutes to complete the questionnaire.
- ◆ Question: What is the timeframe for the evaluation and final decision? Answer: It has taken anywhere from 1-12 years to complete.
- ◆ Question: What is the nature of decisions for criteria for evaluation case studies? Answer: In the past, CDM has been used to test the methodology. The criteria are more relaxed now that the methodology is proven.
- ◆ Question: Is this process adaptive to larger scale projects? Answer: This can only work if focused on the independent variable. It could not be applied on a road that stretched from Michigan to South Carolina, for example, but could be used on specific locations or sites within the larger project.

Moderator

Harold Aikens, Program Legal Services Division, Office of the Chief Counsel, FHWA

Speakers

Jack Gilbert, Attorney Advisor, Office of Chief Counsel, FHWA

Linda Amidon, Attorney Advisor, Office of Chief Counsel, FHWA

Lance Hanf, Attorney Advisor, Western Legal Services, FHWA

Sharon Vaughn-Fair, Assistant Chief Counsel, Eastern Legal Services, FHWA

Description: The NEPA Litigation session reviewed practices and tips to ensure that a NEPA document is legally sufficient, and that there is a comprehensive administrative record. Other issues that can impact a NEPA document's legal sufficiency were also addressed.

Deputy Chief Counsel's Opening Remarks (Ed Kussy)

FHWA's Office of Chief Counsel has two goals: (1) to avoid litigation, and (2) if going to litigation, to win. The coordination among FHWA's Counsel and environmental staff is very strong and helps to achieve these goals.

No part of the project development process is as vulnerable as the NEPA process. Parties that often sue FHWA because of its NEPA documents are organized environmental associations or NIMBY groups (not in my back yard) that are opposed to a project for reasons that may or may not be related to environmental issues. In order to avoid these lawsuits FHWA can:

- ◆ Decide not to do a project, or do what the opponent wants;
- ◆ Persuade the opponent that FHWA is right; or
- ◆ Find a mutual solution.

Both NEPA and Section 4(f) are equally shaped by court and case law. These documents are so complicated and complex that mistakes can be made, so it is important to work with field counsel to identify these mistakes early on.

NEPA Challenges: The Horrid Message (Jack Gilbert)

The goal of a NEPA challenge is to address the opponents' issues. If NEPA loses in court, usually a specific portion will need to be done again. Before it reaches this point, it is important to be flexible in order to address potential lawsuits. For example, expanding the public education/outreach even after a ROD or Finding of No Significant Impact (FONSI) have been published can help explain to the public what changes were made based on their comments. Other tips to consider to avoid a lawsuit include:

- ◆ Be Proactive not Reactive;
- ◆ Fully Engage with the Project's "Opponents;"
- ◆ Maintain Project Flexibility;
- ◆ Assemble the Necessary Team;
- ◆ Educate the Public – Be on Message;
- ◆ Issue Spotting (e.g., Purpose & Need, Alternatives, Indirect or Cumulative Impacts, etc.);
- ◆ Respond Fully to All Comments;
- ◆ Keep Counsel updated on projects or anything that could become a potential lawsuit;
- ◆ But Always Remember – Even if everything is done perfectly you can still be sued.

Legal viability, political support, and economic viability are the key ingredients to see a project completed. However, to address the NEPA challenges that may arise, there needs to be an integrated and strategic approach, a major investment of time and resources, and leadership, dedication and commitment.

Legal Sufficiency (Linda Amidon)

In compliance with 40 CFR 1507, FHWA issued its own regulations that require a legal sufficiency review for all EISs and Section 4(f) evaluations before the Division Office can approve the document. Legal sufficiency reviews can help ensure that the project is in compliance with NEPA and all other Federal regulations and laws. It also can be used to evaluate potential risks of litigation and ensure that the agency's decisions prevail as much as possible in court.

Litigation is determined through the Administrative Procedures Act, which allows a lawsuit against an agency on a final agency action, and authorizes judicial review of that action. Courts look at the Administrative Record to see what decisions were made and why a specific document classification (CE, EA, or EIS) was used.

Issues that often arise in litigation are the purpose and need, alternatives, and indirect and cumulative Impacts. Counsel has the opportunity to help with these NEPA documents pre-litigation and can review the draft EISs and provide input on any potential risks.

Some useful documents that explain the purpose behind a legal sufficiency review include chapter five of the AASHTO/ACEC/FHWA Report "Improving the Quality of Environmental Documents" and FHWA's Technical Advisory.

Administrative Record (Sharon Vaughn-Fair)

The Administrative Record serves as the written record supporting the agency's decisions and plays an important role once a project is litigated. It must show that:

- ◆ Agency decision makers understood the legal standard applying to the decision;
- ◆ The standard was applied properly; that they 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 also show why the classification was chosen and why the agency acted the way it did.

The Administrative Record file, in its entirety, 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:

- ◆ Whether they support or do not support the final agency decision;
- ◆ Which were available to the decision-making office at the time the decision was made;
- ◆ That were considered by or relied upon by the agency;
- ◆ That were before the agency at the time of the challenged decision, even if they were not specifically considered by the final agency decision-maker; and
- ◆ That provides both privileged and non-privileged information.

The Administrative Record can be organized in various ways –in chronological order, by issue, or by type of information. It is also important that an index be created to allow a reader easy access. After FHWA Counsel reviews the Administrative Record, the FHWA DA must certify it. In order to have a complete and thorough Administrative Record it is suggested that it begin being created at the inception of the project. This will help ensure that no information gets lost and it can begin being organized in a logical manner.

Litigation Overview (Lance Hanf)

In order to sue, the party must show that they are environmentally hurt and not just opponents to the project. The U.S. Department of Justice and U.S. Attorney's office represents the Federal agency in court, while the FHWA Counsel assists with the Administrative Record and drafts motions. There are no monetary damages; instead, the court can remand a section(s) of the NEPA document.

When compiling the Administrative Record, the Division Office should:

- ◆ Search files;
- ◆ Search e-mail and back-up tapes;
- ◆ Write facts and narrative;
- ◆ Put items in chronological order;
- ◆ Review court documents like plaintiff's statement of facts; and,
- ◆ Serve as resource.

The state should also be engaged as much as possible to show that they are also considering issues.

Generally, FHWA Counsel's role is to:

- ◆ Coordinate with DOJ;
- ◆ Know the Law, especially 49 and 23 USC;
- ◆ Draft Pleadings and Motions;
- ◆ Work with Division Offices;
- ◆ Work with State Attorney General's Office; and,
- ◆ Formulate Strategy

FHWA should write a thorough and complete Administrative Record, use counsel at the pre-draft EIS stage, and focus on the controversial issues. All Division Offices should be prepared in case litigation does come, and should follow these guidelines.

Comments, Questions, and Answers

All questions were directed to the "Meet Your Attorney" session.

AIR TOXICS AND HOT SPOTS

Moderator

Bill Haas, *Metropolitan Transportation Planner, FHWA Colorado Division*

Speakers

Kevin Black, *Air Quality Modeling Specialist, Resource Center, FHWA*

April Marchese, *Director, Office of Natural and Human Environment, FHWA*

Gary Jensen, *Air Quality Specialist, Office of Natural and Human Environment, FHWA*

Description: The Air Toxics and Hot Spots breakout session discussed toxic emissions standards and concerns for highway projects, including the new requirements for PM2.5 hot spot analysis, MSAT guidance, and best practices for addressing air toxics in environmental documents. Both the legal/policy implications as well as the technical tools were presented.

Air Quality Issues on Highway Projects (April Marchese)

Air toxic emissions can be a concern to highway projects because the pollutants can pose health risks to the population, and the transportation sources often contribute to particulate matter. Mobile source air toxics (MSAT) emissions, for example, can cause adverse health effects and have been proven to have a

probable cancer risk in animal studies. Particulate matter (PM) can also impact health by contributing to respiratory diseases. Although it is difficult to evaluate these health impacts at a project level, it is important to analyze the levels of exposure to those who live, work, commute, etc. in and around the project area.

Air toxics emissions do play a role in NEPA because they are not addressed in the conformity process, but yet still pose a potential health hazard. MSATs are not criteria pollutants so there is no National Ambient Air Quality Standard (NAAQS) for them to refer to during a project. Even so, MSATs have recently become a NEPA area being challenged in court, resulting in lawsuits against FHWA. It is important that NEPA documents discuss the impacts in order to inform decision-making, including addressing:

- ◆ Impact analysis and comparison of impacts of project alternatives;
- ◆ Public disclosure and information dissemination; and
- ◆ Discussion of uncertainties.

New NAAQS have been developed by EPA that include a more stringent PM 2.5 standard, new PM coarse standard, and revised ozone standard. As transportation sources continue to contribute to greenhouse gases, climate change is increasingly becoming an issue of concern. The Congestion Mitigation and Air Quality (CMAQ) Improvement Program includes many mitigation strategies which can help address these air toxics and trends. FHWA Division Offices and states are encouraged to work with the EPA to receive more information on how to address these issues.

PM Hot-Spot Analysis (Gary Jensen)

Hot-spot analyses have historically been done for carbon monoxide (CO) and PM10, but are now also being applied to PM2.5. Hot-spot analysis is defined in 40 CFR 93.101 as an estimation of likely future localized pollutant concentrations and a comparison of those concentrations to the relevant air quality standard. This analysis assesses impacts on a smaller scale than the entire nonattainment or maintenance area and demonstrates that a transportation project meets Clean Air Act (CAA) conformity requirements.

PM hot-spot analysis must be done on all Federal projects that:

- ◆ Are within a PM nonattainment or maintenance area;
- ◆ Are not exempt under either 40 CFR 93.126 or 93.128; and
- ◆ Fit criteria under 40 CFR 93.123(b)(1) – projects of air quality concern (see below).

Projects of air quality concern, under 40 CFR 93.123(b)(1), include:

- ◆ New or expanded highway projects with a significant increase in diesel vehicles;
- ◆ Projects affecting intersections that are at LOS D, E, or F with a significant number of diesel vehicles, or those that will change to LOS D, E, or F because of increased traffic volumes from a significant number of diesel vehicles related to the project;
- ◆ New bus and rail terminals and transfer points that have a significant number of diesel vehicles congregating at a single location;
- ◆ Expanded bus and rail terminals and transfer points that significantly increase the number of diesel vehicles congregating at a single location; and
- ◆ Projects in or affecting locations, areas, or categories of sites which are identified in the PM10 or PM2.5 applicable SIP as sites of violation or potential violation.

Non-exempt projects not needing hot-spot analysis will still do project-level conformity determinations.

FHWA has developed a series of frequently asked questions regarding PM2.5 project-level conformity, including clarifying questions on examples of projects of air quality concern and how to implement the requirements in projects already under development.

For more information on PM project-level conformity and hot-spot analysis, please visit:
www.fhwa.dot.gov/environment/conform.htm.

Air Toxics Compound Analysis: A New NEPA Requirement (Kevin Black)

The Clean Air Act (CAA) of 1970 originally established NAAQS for the criteria air pollutants, based on data from health studies. During subsequent amendments to CAA and periodic standard reviews, revisions have been made to the NAAQS. In the CAA Amendments (CAAA) of 1990, hazardous air pollutants (HAPs) were defined and regulated, but only when applied to stationary sources. However, the CAAA also required EPA to evaluate impacts from mobile sources. This led the EPA to conduct the Motor Vehicle Air Toxics Study (MVATS) in 1993 to determine the emissions from vehicles (compounds, quantities, toxicity, etc.). As a result of this Study, the Mobile Source Air Toxics Rule was implemented in March 2001. The Rule designated 21 compounds emitted by vehicles or fuels that were HAPs and referred to these as MSATs. Six were identified as priorities for regulation because they are particularly toxic.

Interim Guidance has been developed by FHWA on MSAT Policy. FHWA believes that it is important to address MSATs in environmental documents because of the health impacts that can develop. FHWA determined that project sponsors must be “encouraged” to analyze MSATs because failure to do so could result in the sponsor and FHWA being sued. A three-tiered approach was established in the Interim Guidance, which divided projects into groups:

- ◆ Projects not requiring analysis—those exempt under NEPA and conformity rules or that are CEs or result in FONSI after an EA and would likely not have to do MSAT analysis;
- ◆ Projects requiring qualitative analysis—those identifiable as having some impact, although likely a smaller impact (for example capacity expansion);
- ◆ Projects requiring quantitative analysis—those larger, high profile, often drawing significant negative comments from the community (about 10 percent of projects).

The Guidance was issued in February 2006, and allowed for a 6-month timeframe to be implemented. It is now effective for all projects that have not completed the NEPA process. The guidance can be viewed at <http://www.fhwa.dot.gov/environment/airtoxic/020306guidmem.htm>.

Questions, Answers, and Comments

- ◆ Question: If the NEPA document is already being developed, what is the timeframe to implement the guidance? Answer: Any project already in progress in February does not need to look at MSATs.
- ◆ Question: What should be done if the FONSI does not address MSATs, but does address PM2.5? Answer: If you think someone will have an issue with air quality beyond what has been addressed, then MSATs should be considered.
- ◆ Question: What about CEs? Answer: If it is automatically a CE, it is exempt. If it is yet to be determined that it is a CE, you may need to look at MSATs, but probably will be fine. With PM2.5, interagency coordination with EPA is needed.
- ◆ Question: Regarding the timeline of a project in the pipeline, how difficult is quantitative analysis to do? Answer: For most projects, the analysis could take one to two weeks, but for the Maryland Intercounty Connector (ICC), the analysis took several months.
- ◆ Question: Has EPA signed off on the MSAT Guidance? Answer: No, EPA wants dispersion analysis to be included and it is not.
- ◆ Question: For PM2.5 interagency coordination, the EPA is timely but what if the MPOs and state resource agencies are not and impact schedule? Answer: Address the issue in both the long-term and short-term: Include in the state implementation plan how to work together in coordination

(long-term) and weigh the risk of not receiving their input and how important their input may be (short-term).

- ◆ Question: How much grandfathering is there for reevaluation? Answer: There is none in the CAA conformity revisions. For MSATs, you need to do the analysis as soon as reasonably possible.
- ◆ Comment: To determine the significant increase in PM2.5 in diesel trucks, compare between the build and no-build counts in the peak emission year.
- ◆ Comment: FHWA should not do dispersion analysis even if EPA requests it. For the PM2.5 hot-spot rule, the EPA chose not to do a dispersion model because the speed does not vary in the model. For MSATs, emission factors do vary by speed.
- ◆ Comment: For PM2.5, 10,000 trucks is the baseline. Eight percent (which is 10,000 trucks) is the national default number from the mobile6 model. An interagency consultation group was convened to determine where unhealthy effects begin. The threshold was determined to be 10,000.
- ◆ Comment: EPA Regions often give pressure to the Division Offices to do risk assessments, although EPA Headquarters does not assume FHWA will do risk assessments. EPA Headquarters and Regions need to better understand their position on this.

SECTION 404 AND WETLANDS BANKING

Moderator

Brian Smith, Biology/Water Quality Specialist, Resource Center, FHWA

Speakers

Rob Ayers, Environment Program Specialist, FHWA North Carolina Division

Bonnie Harper-Lore, Restoration Ecologist, Office of Natural and Human Environment, FHWA

Dennis Durbin, Ecologist, Office of Natural and Human Environment, FHWA

Gregory Culpepper, Project Manager, Norfolk District Corps of Engineers Regulatory Branch

Description: The Section 404 and Wetlands Banking breakout session highlighted the results of the FHWA Domestic Scan of Successful Wetland Mitigation Programs and provided a summary of the USACE/EPA Proposed Rule for Compensatory Mitigation. One of the session's speakers, a USACE project manager, offered insights from the USACE regarding benefits, responsibilities, operation, establishment and the future of existing in-lieu fee programs. The importance of noxious weed control, the establishment of native plants, and the new provisions for these activities under SAFETEA-LU were also discussed.

Results of the FHWA Domestic Scan of Successful Wetland Mitigation Programs (Rob Ayers)

From March through June 2005, FHWA conducted a domestic scan tour of eight state DOTs that have implemented successful wetland mitigation initiatives involving some form of wetland banking. The scan team members included FHWA Headquarters, the Resource Center, and division staff as well as representatives from the USACE, EPA, FWS, and the Center for Transportation and the Environment at NC State. The States visited (in chronological order) were Texas, North Carolina, Alabama, Nebraska, Ohio, Pennsylvania, Kentucky, and Minnesota. The scan team examined the mitigation banking review team (MBRT) process, the monitoring and measurement of mitigation results and effectiveness, and other related topics that have led to successful wetland banking programs. Problems and pitfalls in the mitigation process were also noted. Mr. Ayers highlighted the results of this scan.

Some of the continuing challenges that States participating in the scan tour include the following:

- ◆ The categorical restriction of mitigation banks to Hydrological Unit Codes (HUC)-8 geographic service areas will inhibit mitigation banking;

- ◆ The long-term management of mitigation sites is uncertain;
- ◆ Stream mitigation requirements are vague;
- ◆ Federal-aid dollars are not often used to establish mitigation bank sites, and state DOTs should explore all options available to them to meet their mitigation needs;
- ◆ The MBRT review process has become more stringent, performance standards have become more austere, and there seems to be subjective interpretations of what constitutes the most reasonable boundaries for geographic service areas; and
- ◆ Impacts to isolated waters may not need to be mitigated and, therefore, may have some effect on the construction of wetland mitigation banks.

The scan team offered the following recommendations to improve the overall effectiveness and efficiency of wetland mitigation banking for state transportation agencies:

- ◆ Adopt flexibility where prudent in the use of geographic service areas.
- ◆ Improve the effectiveness of the MBRT process.
- ◆ Issue guidance on the use of Federal-aid highway funds for mitigation banks.
- ◆ Engage inter-agency input in the adoption of functional assessment methodologies.
- ◆ Invest more research and technology transfer in invasive plant control and vegetation management.
- ◆ Actively promote and share success stories about innovative partnerships.
- ◆ Clarify the definition of a "bank."

The scan team's final report is available at www.fhwa.dot.gov/environment/wetland/scanrpt/index.htm

Compensatory Mitigation for Losses of Aquatic Resources: Proposed Rule (Dennis Durbin)

Mr. Durbin discussed aspects of the USACE and EPA proposed rule for compensatory mitigation for losses of aquatic resources. Most notably, the rule does not alter the circumstances for which compensatory mitigation is required. Agencies must continue to adhere to the sequencing of avoidance, minimization, and mitigation. Some specific characteristics of provisions in the proposed rule follow:

- ◆ Under the new rule, project-by-project mitigation and in-lieu fee programs would now be subject to operational, financial, and ecological standards equivalent to those already established for mitigation banks. Mitigation banks have high standards regarding ecological performance, site protection, and management requirements.
- ◆ New Section 404 permit application requirements are created. Applicants will now have to submit a statement in the permit application explaining how impacts to U.S. waters are to be avoided, minimized and compensated (This statement can be conceptual). Additionally, project-by-project mitigation proposals will have to present a very detailed mitigation plan for approval during the Section 404 permit application. Some components of the plan include:
 - A description of the impacted site, avoidance and minimization efforts, and proposed compensation;
 - Site selection;
 - Site protection instrument;
 - Baseline information on the proposed mitigation site;
 - A determination of credits to be provided by mitigation;
 - A work plan describing geographic limits, hydrology, grading plan, species, etc.;
 - A maintenance plan, long term management plan, and adaptive management plan;
 - Ecologically based performance standards;
 - Monitoring requirements; and,
 - Financial assurances to ensure performance.

Finally, the proposed rule may end in-lieu-fee programs. According to the proposed rule no new in-lieu fee programs can begin after 90 days from the date of the final rule. Existing in-lieu fee programs would be able to continue to operate for up to five years and then would need to be converted to a banking program.

Virginia Aquatic Resources Trust Fund (Gregory Culpepper)

The Virginia Wetlands Restoration Trust Fund was established as a cooperative partnership between The Nature Conservancy (TNC) and the USACE Norfolk District in an August 1995 MOU (available at www.deq.state.va.us/wetlands/pdf/vartfDec182003.pdf). The Fund is one of several compensatory mitigation options for permitted impacts to wetlands and other waters, available only after avoidance and minimization, into which applicants pay money in lieu of other forms of mitigation. It is utilized when other on-site or off-site compensation alternatives are determined to be impracticable. Mr. Culpepper described the goals of the fund, as well as the history that led to its implementation.

Goals of the fund are to:

- ◆ Provide an efficient mitigation alternative for applicants and agencies;
- ◆ Compensate for impacts within watersheds;
- ◆ Provide higher ratios than other options (in 2005, 86 acres of non-tidal impacts resulted in approximately 2900 acres protected);
- ◆ Provide mitigation with landscape context; and,
- ◆ Improve Connectivity.

On December 19, 2001, the Virginia Department of Environmental Quality (DEQ) approved use of the fund as an acceptable form of compensatory mitigation for impacts to state waters permitted under Virginia Water Protection individual and general permits. The fund is now utilized when other on-site or off-site compensation alternatives are determined to be impracticable. The USACE Norfolk District reviews and has the final authority to commit to potential VA Wetlands Restoration Trust Fund projects that TNC proposes.

Mr. Culpepper ended his presentation by showing several satellite images of selected tracts of land the trust fund has helped to protect. See the 2006 Environmental Conference presentations list (www.environment.fhwa.dot.gov/conference/conference_2006.asp) to view the images.

Invasive Threats to Wetland Banks (Bonnie Harper-Lore)

Invasive species means a non-native species whose introduction does or is likely to cause economic or environmental harm or harm to human health. Effects on aquatic ecosystems result in decreased native populations, modified water tables, changes in run-off dynamics and fire frequency, among other alterations. Ms. Harper-Lore described various ways to avoid wetlands devaluation due to invasive species, as well as effective practices to prevent invasive species introduction.

Avoid wetlands devaluation due to invasive species by:

- ◆ Eradicating invasive plants first;
- ◆ Not planting known invasive plants;
- ◆ Specifying construction best management practices; and,
- ◆ Conducting lifetime monitoring.

Some effective practices for the prevention of invasive species introduction include:

- ◆ Disturb existing wetland as little as possible;
- ◆ Specify weed control;
- ◆ Avoid soil importation;
- ◆ Use weed-free mulches only;
- ◆ Carefully select seed sources and design seed mixes to match; and,

- ◆ Use a reference wetland to develop a baseline.

Comments, Questions, and Answers

- ◆ Question: When TNC is acquiring land for banks, do they comply with the Uniform Act?
Answer: If the bank property is bought before Federal funds are involved, then the Uniform Act does not apply. The Act is designed to protect property owners from eminent domain. There are likely other answers to this question based on the circumstances in different areas/projects. For example, in North Carolina's Ecosystem Enhancement Program, it has been determined that the Uniform Act does apply.
- ◆ Question: What might States be describing in their state/MPO plans regarding banking? Given the new SAFETEA-LU Section 6001 planning requirements, presumably States would be bringing in watershed data early in the planning process. Answer: In North Carolina, watershed planning is being done. The data collected from this effort allows planners to add more information to maps (e.g. by using GIS) and helps them to better predict impacts early in the planning stages.
- ◆ Comment: Mitigation banks can have a temporal loss in its early years.

MEET YOUR ATTORNEY

Description: The Meet Your Attorney regional breakout sessions were intended to provide conference participants the opportunity to meet with their respective attorneys, ask questions and discuss their ideas. The breakout sessions addressed particular issues in the West, Midwest, South, and Northeast on the Federal-Aid side, with a separate session for FLH. Notes were not taken during these sessions.

RIGHT OF WAY (ROW)

Moderator

Rodney Vaughn, Environment and Right-of-Way Engineer, FHWA Wyoming Division

Speakers

Bob Kleinburd, Right-of-Way Officer, FHWA Delaware Division

Cecil Vick, Right-of-Way Officer, FHWA Mississippi Division

David Whitworth, Area Engineer, FHWA Kentucky Division

Description: The ROW breakout session included a panel discussion of ROW and related actions undertaken as part of environmental mitigation. FHWA staff provided discussions on mitigation actions from their respective States that involved ROW acquisition and/or replacement of real property.

Glenville Wetlands Mitigation Bank (Bob Kleinburd)

Mr. Kleinburd described Delaware DOT's (DelDOT) effort to purchase land in one Delaware community, relocate its residents, and turn the area into a wetland mitigation bank. To summarize, the Glenville community, which is located in a highly urbanized area of Newcastle County, Delaware (between Newark, DE and Wilmington, DE), is situated on the floodplain of the Red Clay Creek and an unnamed tributary. Since 1990, Glenville has experienced three disastrous flooding events. Due to these floods, some houses became uninhabitable.

After the most recent flood event (2001), the community petitioned the city government to help Glenville residents resolve the problem the floods had caused. The community argued that the basin's ability to absorb Red Clay Creek floodwaters had been compromised because of the development the county had allowed. To illustrate how land use in the Glenville community had changed over time, Mr. Kleinburd

shared a series of historical aerial images, beginning in 1937 and ending in 2003. Over this period, significant clearing and construction was noticeable.

After discussions, the community and city reached an agreement that any home falling within the 100-year floodplain would be bought by the city. One hundred sixty-one homes met this criterion. Thirty-one homes were above the floodplain. DeIDOT decided to work with the city to purchase the land in order to make it wetland to serve as future mitigation. FHWA recommended that DeIDOT treat the project as a Federal-aid project and comply with the Uniform Act Standards and help relocate the inhabitants. Following FHWA's recommendation, DeIDOT appraised the pre-flood property value, bought the land, and provided relocation assistance. Funding for the relocation has come from Newcastle County (approximately \$15 mill), the state (approximately \$15 mill), and the Federal Emergency Management Agency (approximately \$1 mill). DeIDOT has now demolished the homes falling below the floodplain.

Recently, a wetland banking committee, which includes DeIDOT, resource agencies, and other stakeholders, decided to make the land a self-standing wetland bank. Currently, viability studies are being conducted, and the project is a work in progress. When finished, the project will be one of the few urban wetland banks in the country. The project will create 22 wetland acres, restore 26 wetland acres, create a 20-acre buffer, and a new community with approximately 41 houses. DeIDOT expects to request \$12-18 million from FHWA for assistance.

Newtown Pike Extension (David Whitworth)

Mr. Whitworth described the proposed Newtown Pike Extension Project. The project, which has been a part of Lexington, Kentucky's comprehensive planning process for many years, involves the construction of a new four-lane highway through Lexington's downtown area (Main Street to South Broadway). The project's purpose and need statement focused on:

- ◆ Drawing unnecessary traffic out of downtown;
- ◆ Improving flow of through traffic;
- ◆ Minimizing impact on the University of Kentucky's central campus;
- ◆ Reducing automobile congestion in downtown Lexington;
- ◆ Improving downtown redevelopment opportunities;
- ◆ Not imposing undue burden on other areas; and
- ◆ Increasing opportunities for transit, pedestrian and bicycle facilities.

A Small Area Planning process was created in order to provide a framework for the proposed Southend Park Redevelopment area, which is a 4(f) resource adjacent to a section of the proposed road extension. The Southend Park area, also known as the Davistown neighborhood, would likely be disproportionately impacted (including indirect and cumulative impacts) from the project. The neighborhood, which is over 43 percent minority and 74 percent low income, has experienced deteriorating housing conditions due to landlord neglect. The neighborhood has been called the most economically disadvantaged neighborhood in Lexington.

However, people living in the project's immediate area and the proposed redevelopment area want to maintain their residency there, as well as minimum disruption to their lives. Residents have lived in this location for an average of 31 years, housing is affordable, and the community has access to social services.

In response, project partners created the Southend Park Urban Village Plan. The plan is an innovative plan that would allow current residents to be protected from development that could change the neighborhood's overall character and affordability. Specifically, a community land trust would be created. Since residents in the neighborhood cannot afford fair market price elsewhere in Lexington, the land trust removes the land cost from the prices of their houses.

The community land trust would also:

- ◆ Allow the neighborhood to own commercial property and its use;
- ◆ Allow support services to be provided its homeowners;
- ◆ Place restrictions on absentee ownership;
- ◆ Be governed by a board of directors made up of community representatives;
- ◆ Provide a way for homes to remain affordable via pre-set resale formulas; and,
- ◆ Prevent land from being sold to developers.

The mitigation measures that are proposed include:

- ◆ Purchase entire 25 acre tract of community and rebuild sustainable, affordable housing in stages (with the goal being to only moving residents once), including:
 - Mixed use development and construction of a noise wall is planned;
 - An enhanced Southend Park baseball field/recreation area and improved roads, drainage, utilities are proposed.
- ◆ Provide temporary housing, if necessary; and,
- ◆ Implement community services to help maintain community cohesion and minimize community disruption;

The expected completion date for the Final EIS is the end of 2006. For more information, visit www.newtownextension.com/.

Integrating the ROW and Environmental Processes (Cecil Vick)

Mr. Vick's presentation focused on how the ROW and environmental processes could be integrated better. Since ROW staff often have good interpersonal skills (critical for public involvement and environmental justice issues) and are adept at providing realistic cost and schedule estimates for acquiring ROW, they can contribute significantly to the environmental review process.

Potential outcomes of NEPA and ROW integration include:

- ◆ A streamlined NEPA process;
- ◆ Effective CSS;
- ◆ Improved alignment selection and refinement;
- ◆ Accurate cost estimates during both planning and the NEPA process; and
- ◆ Mitigation of direct impacts beyond what is available under traditional ROW procedures (In Mississippi, ROW can take a non-publicly owned facility and do the equivalent of "functional replacement" as environmental mitigation.
 - For example, Mississippi's Gulfport community is minority community consisting of elderly and handicapped residents. Each day, the Gulfport residents congregate at a neighborhood church for lunch. Mississippi DOT had plans to build a highway that was aligned through the church. One design alternative avoided the church, but would have taken half of the community and would have cost more. The community was asked what it wanted. Residents agreed that Mississippi DOT should buy and relocate both the community and the church as environmental mitigation. Mississippi DOT agreed and started relocating the community in fall 2005.

In Mississippi, work has been done move towards integrating ROW and NEPA. Specifically:

- ◆ Mississippi DOT's Environmental Division is staffed with two experienced ROW Specialists, and coordination with the ROW Division occurs on all issues.
- ◆ ROW Specialists help write and review both ROW and community impact sections of NEPA documents.

- ◆ Close coordination occurs with ROW especially during planning and execution of public meetings and hearings.

Comments, Questions, and Answers

- ◆ Question: How many residents are in the neighborhood impacted by the Newtown Pike project? Answer: There are 10 homeowners and 25 renters. Follow-up Question: So there are 35 homes and the project is costing roughly \$37 million? Answer: Yes, but the Nathaniel Mission is also included and factored into that cost estimate.
- ◆ Question: My state has a Tier 2 final EIS underway for which ROW purchases were made based on a Tier 1 Record of Decision. Has anyone had a similar experience? Answer: If you can clearly show that the ROW purchased was common to all alternatives then there should not be any problems. Follow-up Comment: Actually, the ROW purchased was not common to all alternatives. Answer: If that is the case, then the state may be taking a chance. The NEPA issue is that project proponents should be able to demonstrate that obtaining ROW does not predispose the decision made. A state cannot properly influence a NEPA document by acquiring ROW.
- ◆ Question: Is Mississippi back to business as usual since Hurricane Katrina? Answer: No, but we are rapidly moving in that direction. Actually, about half the community that the DOT was buying for the Gulfport project was destroyed; Katrina arrived roughly two weeks before ROW acquisition was to begin. The DOT debated whether or not to begin the ROW acquisition so soon after the hurricane. Finally, a project team went to the community to ask if they were ready to proceed. The overwhelming response from the community was “yes!”

CONTEXT SENSITIVE SOLUTIONS

Moderator

K. Lynn Berry, Community Impact Specialist, Resource Center, FHWA

Speakers

Keith Moore, Program/Policy Development, Office of Project Development and Environmental Review, FHWA

Mark Taylor, Design Project Manager, Central Federal Lands Division, FHWA

Nick Artimovich, Highway Engineer, Office of Safety Design, FHWA

Description: The Context Sensitive Solutions (CSS) breakout session provided an update on FHWA’s CSS program, describing new training opportunities, how CSS can be used for improving road safety, and the FLH’s CSS perspective. Keith Moore addressed FHWA’s efforts to develop CSS outreach and training materials. Mark Taylor spoke about the CSS use in FLH projects. Nick Artimovich showed a video titled “Highway Safety and Trees: The Delicate Balance.” This video explored how trees can be a hazard if located incorrectly on the roadside.

Context Sensitive Solutions: Current Activities and Training Opportunities (R. Keith Moore)

There are many informative sources for CSS available in transportation professionals involved in planning, design, and/or maintenance. Resources Mr. Moore described are listed:

- ◆ *Planning:* FHWA’s CSS Website (www.fhwa.dot.gov/csd/index.htm) is a very informative resource. Review the frequently asked questions section in particular. Website visitors are able to ask questions and find out what is going on in CSS;
- ◆ *Maintenance:* FHWA’s Road Weather Management Best Practices CD-ROM is a good resource to learn about effective traffic management issues relating to weather.

CSS training opportunities exist nationwide. Opportunities described during this breakout session include:

- ◆ The University of Kentucky and FHWA have partnered to develop a course. This course has trained over 1,700 participants to date, and now plans to extend the training to other locations, including Puerto Rico.
- ◆ The National Highway Institute and FHWA have teamed to produce a CSS course, which was first offered in early 2006. The course explains the collaborative, interdisciplinary CSS approach and its associated benefits, such as making effective and timely decisions, gaining public trust and support, building positive relationships with resource agencies, delivering safe and financially feasible project solutions, and improving the overall project delivery process. Requests to schedule the course should be made to the NHI Training Coordinator at (703) 235-0534 or nhitraining@fhwa.dot.gov.
- ◆ FHWA Resource Center's CSS Training Kit is a useful tool. The Resource Center does on-call training to community groups and state DOTs.
- ◆ NC State's Center for Transportation and Government is an academic network where selected universities can come together and learn about CSS.

Comments, Questions, and Answers

- ◆ Question: Is CSS going to move into planning? Answer: CSS has a long way to go to get there, but steps are being made in the right direction. CSS, which grew out of Context Sensitive Design, is expanding to other parts of the planning process. The website www.contextsensitivesolutions.org is a place where States can highlight their effective CSS practices with the public.
- ◆ Question: Are there any upcoming CSS workshops? Answer: In Baltimore, some state and FHWA staffs are holding a peer exchange later this year to address how to promote CSS. Maryland is one of the leaders in CSS and should be encouraged to share its knowledge with other states.
- ◆ Question: What is a "pilot state" versus a "focus state?" Answer: The CSS pilot states are Maryland, Connecticut, Utah, Minnesota, and Kentucky. The pilot states are teaching neighboring states about CSS. This is a reason Kentucky has developed a training program. Minnesota has held a national CSS conference, and Maryland has done work internally and with surrounding states. Internally, FHWA has named focus states. These states are doing work in CSS, but have room for improvement. They are being assisted in transitioning from the "check the box" application of CSS to a process that better integrates CSS into the planning process.
- ◆ Question: Is there a concern about using CSS in urban redevelopment, in regards to transit development and/or airport redevelopment? Answer: Linking Planning and NEPA brings CSS earlier into the planning process. Through SAFETEA-LU, Congress has been involved in helping bring CSS elements into the planning process.

Federal Lands Highway Approach to Context Sensitive Solutions (Mark Taylor)

Thirty percent of the nation is under the jurisdiction of Federal Lands Highway (FLH), which includes over 60,000 miles of roads. FLH is responsible for investing and improving these roads, and is often able to demonstrate new technologies for FHWA. The entire program is run through partnerships with other agencies, and the partnerships help determine projects priorities. FLH has an annual program of about \$400 million, of which \$300 million is direct construction costs. Mr. Taylor described how FLH is working to incorporate CSS into its program.

FLH promotes an interdisciplinary and collaborative approach that encourages all partners in a planning process to be involved. It empathizes public involvement early to establish purpose and need, and to understand the larger context of the community and its values. This process can easily be transferred from the expert to stakeholder level of decisionmaking. Using CSS approaches enables FHL to achieve a more unified vision for a project. This serves both the FHWA vision of "Improving Transportation for a Strong

America” while serving FLH’s vision of “Create the best transportation system *in balance* with the values of Federal and tribal lands.”

FLH uses many design techniques that incorporate CSS. Some examples are:

- ◆ *Curvilinear alignment* follows the nature architecture of the land and helps a project fit into its surrounding landscape;
- ◆ *Aesthetic traffic barriers* use natural stone and more flowing lines blend the facilities into the surrounding environment; and
- ◆ *Environmental enhancements* blend features into the natural landscape. Examples of this are the adjustment of a roadway location away from critical and sensitive areas; the restoration of drainage to original stream channels; the restoration of native trees, shrubs and grasses.

In general, it is recommended to “find the right solution for the right problem,” in regards to using CSS. FLH suggests being flexible while considering alternatives. Some effective practices include:

- ◆ During the design process, use the problem, data, and tools, paired with ideas, criteria and analysis, to define the solution;
- ◆ Use visualization tools, because they can promote CSS and help keep stakeholders actively involved; and
- ◆ Read through AASHTO’s “green book” of standards.

Comments, Questions, and Answers

- ◆ Question: What is a good way of getting around the higher cost of implementing CSS? Answer: CSS expedites delivery and streamlines costs. The whole process is geared towards streamlining, which is where the savings come in. Be careful of “over-designing” when using CSS, which could end up costing more in time and resources. For example, the Guanella Pass was able to determine not to reconstruct, and instead repair using CSS in a section-by-section approach. NCHRP has been researching cost savings associated with CSS.
- ◆ Question: Where can more information on the use of natural barriers be obtained? Answer: The FLH website has more information on natural barriers.

Highway Safety and Trees: The Delicate Balance (Nick Armovich)

Trees – the only living “part” of a road – add aesthetic value and can improve the environment around roadways. However, with safety a major concern on the Interstate, special consideration should be made regarding the placement of trees near roadsides. Depending on the species, trees can grow very large and turn from an aesthetic feature to a sight-blocking interference to drivers. In the past year, over 4,000 people have been in run-off-the-road crashes involving trees.

Trees and safety can be successfully balanced. One example is from South Carolina, a state that designs wider curves and larger buffers between road edges and where trees are planted. There, guardrails are also often placed in front of trees as a protection for both drivers and trees. To illustrate other examples and to help state DOTs educate the public about the interaction between trees and roads, FHWA has developed a video *Highway Safety and Trees: The Delicate Balance*.

Comments, Questions, and Answers

- ◆ Question: How should CSS be paired with EAs and EISs? Answer: It is necessary to tailor CSS to the project. A standard cannot be used, as every project is different.
- ◆ Question: How can the public be involved in the early stages of developing CSS and planning? Answer: There are a number of tools to get the public involved, especially in land use and land management. FHWA’s planning website (www.fhwa.dot.gov/hep/) has several tools. The Resource Center can also help (Contact Ben Williams, Ben.Williams@fhwa.dot.gov). Scenario

planning and collaborative decisionmaking tools can also be very useful. North Carolina is developing case studies on this topic, and New Hampshire has a community of locals working on purpose and need and cumulative and indirect impacts.

- ◆ Question: How does one fund a facilitator for the public involvement process? Answer: Include a neutral facilitator as part of the direct project expense.

TRIBAL CONSULTATION

Moderator

Cheryl Martin, Environmental Engineer, FHWA Minnesota Division

Speakers

MaryAnn Naber, Federal Preservation Officer, Office of Project Development and Environmental Review, FHWA

Deborah Suci Smith, Environmental Protection Specialist, FHWA Pennsylvania Division Office

Ronald Hall, Director, Tribal Technical Assistance Program, Colorado State University

Description: This session focused on two areas of tribal coordination: Section 106 tribal consultation and trust resources. Section 106 of the National Historic Preservation Act (NHPA) requires consultation with Tribes that have historic ties to the geographic area of a proposed Federal project. The speakers discussed ways FHWA can be more effective and efficient when consulting with Tribes through coordination among FHWA Division Offices.

FHWA, as a Federal agency, is also responsible for protecting and preserving tribal trust resources. Ron Hall described what is meant by a tribal trust resource, and provided an historical and legal look at trust resources over time.

Consulting with Tribes in Section 106 (MaryAnn Naber)

Section 106 of the NHPA requires Federal agencies to:

- ◆ Take into account the effects of their actions on historic preservation, and
- ◆ Afford the ACHP an opportunity to comment.

Section 106 participants are divided into four categories: Federal agencies, Advisory Council, consulting parties who have the right to participate (e.g., SHPO/THPO/tribe, local government, etc.), and the public.

The Section 106 process contains four steps: (1) Initiate Section 106 Process; (2) Identify Historic Properties; (3) Assess Adverse Effects; and (4) Resolve Adverse Effects. When identifying historic properties, historic significance needs to be evaluated. To do this, the Tribe needs to identify religious or cultural significance. The archaeologist does not do this step.

The THPO is the official representative in the Section 106 consultation process when the Federally recognized tribe has assuming SHPO responsibilities under NHPA 101 (d)(2). Over 50 Tribes have THPOs to act in the place of the SHPO, and are also certified by the NPS. The Tribes and Native Hawaiian Organizations must be consulted when they link religious and cultural significance to affected historic properties. As part of the consultation process, an agency must make a good faith effort to identify the Tribes that may have interests, and whether the Tribe is currently located in the state.

Some frequently asked questions related to the consultation process include:

- ◆ *Where is there a list of which Tribes to consult?* The U.S. Department of Interior's Bureau of Indian Affairs has a list of Federally recognized Tribes. The Native American Graves Protection

and Repatriation Act's (NAGPRA) Native American Consultation Database (NACD) also has a list.

- ◆ *What is a “reasonable and good-faith effort” to identify Tribes?* The SHPO and ACHP can assist with this, but it is recommended that agencies talk with Tribes that do have an interest and see if they know of others. Also, ask resource agencies like the USACE who may also consult with Tribes.
- ◆ *Is consultation with an Indian tribe only required when the project is on Tribal land?* No, consultation should also be used to avoid project shutdowns in case the testing shows nothing, but the history of the area still plays an important role. Agency programmatic agreements or MOUs should contain a contingency process to address unanticipated discoveries.
- ◆ *Do we have to pay Tribes to obtain their comments?* FHWA can provide funds to facilitate a Tribe's participation (e.g., travel and per diem for attending a meeting), but should not pay for comments specifically. THPOs also receive limited funds through the Historic Preservation Fund. Regardless of funding, the ACHP requires Tribes to respond within thirty days in order to have their comments considered.
- ◆ *If Tribes have asked to sign the agreement as signatories, what do you do?* THPOs must be signatories if the Tribe has a THPO and the project is on tribal land. If the project is on tribal land and the Tribe does not have a THPO, the Tribe itself can sign. If the project is not on tribal land, Tribes or THPOs can be invited as a consulting party.
- ◆ *What are the basic principles of tribal consultation outlined in the ACHP regulations?* (1) Tribes are a sovereign government. (2) Agencies should make a reasonable, good-faith effort. (3) Communication should be on a government-to-government basis, (4) Act in a respectful manner.

The Ties That Bind: Tribal Consultation in Pennsylvania (Deborah Suci Smith)

Although Pennsylvania has no resident Tribes in the state, they set out to determine if any Tribes –and which ones, specifically–needed to be consulted in the Section 106 process. To do this, the Pennsylvania SHPO and FHWA Division office researched which Federally recognized Tribes might have had ties to Pennsylvania in the past. Fourteen Tribes were identified, and in 1999 consultation was initiated with the 14 Federally recognized Tribes. Consultation began with phone conversations by the Division Office and was followed by a letter from the FHWA Division Administrator formally introducing the Division Office and acknowledging FHWA responsibilities. Additional discussions, meetings, and letters also established the role of the Pennsylvania DOT's (PennDOT) Cultural Resource Professionals.

Pennsylvania maps and projects were introduced to these out-of-state Tribes, which were located primarily in New York, Wisconsin, and Oklahoma. At the beginning of the consultation process, Tribes wanted to see everything, but the relationship with Pennsylvania has matured and most prefer now to only see areas that have potential impacts. Tribes have agreed to work with the PennDOT archaeologists, but are able to work directly with FHWA if they prefer.

Pennsylvania found that Tribes have varying interests and preferred mechanisms to communicate. For example, some Tribes are interested in certain regions or areas of the state, while other Tribes have interests in specific time periods in different parts of the state, and other Tribes are interested in certain resources throughout the state. Also, some prefer receiving reports, and others abstracts, when Pennsylvania has project information to share with them.

Pennsylvania's consultation techniques continue to evolve based on their growing relationships with the Tribes. Current techniques include:

- ◆ Updating forms with the goal to be electronic
- ◆ E-mail
- ◆ PennDOT Cultural Resource Website
- ◆ Project Website

- ◆ Video conference calls
- ◆ Tribal Access to the Cultural Resource Geographic Information System (CRGIS)

Pennsylvania's consultation techniques must continue to be fluid and evolve as needed. Based on the success of these techniques, two formal MOUs are currently being finalized, which took over four years to complete. Several lessons learned were reported based on Pennsylvania's experience:

- ◆ Many Tribes are in support of electronic consultation as a means to reduce travel for every project consultation. Soon, all correspondence will be electronic and web-based, including, forms, notifications, etc.
- ◆ The consultation process can be a timely one because Tribes need time to consult with elders.
- ◆ Trust is often based on history.
- ◆ E-mail and phone follow-ups are appreciated. Self-addressed stamped reply envelopes encourage a faster response.
- ◆ Tribal input can provide valuable insight into an archaeological site's features.
- ◆ Every meeting, phone call, and training provides new information on a Tribe and about the Federal responsibilities.
- ◆ While the Tribe is not like the public or other Section 106 consulting parties, they do have similar confusions regarding the role of FHWA. The Tribes and the Federal Agencies need to continue to educate each other.

Section 106 Tribal Consultation (Cheryl Martin)

Beginning in August 2000, the Minnesota FHWA Division Administrator initiated meetings with the eleven Federally recognized Tribes in Minnesota. Twelve Tribes located out-of-state were also found to have historical ties to Minnesota. All eleven Tribes have been consulted with and four Memorandum of Agreements (MOAs) have been executed, which detail the consultative process. In addition, one MOA is now ready to be executed; the Tribe is reviewing one MOA; three other MOAs are being drafted; and two MOAs are being developed. The next phase of the consultation process will also include meeting with the twelve out-of-state Tribes.

Minnesota found that each Tribe wants their consultation process to work differently. Some Tribes were insistent that FHWA lead the consultation process, however, they now are more comfortable with the Minnesota DOT (Mn/DOT) being the lead on the condition that FHWA is ultimately responsible.

Lessons learned stemming from Minnesota's consultation process include:

- ◆ Each tribe is unique,
- ◆ Priority issues vary from tribe to tribe,
- ◆ Be proactive and persistent,
- ◆ Some tribes will want the Federal agency (e.g. FHWA) to take a lead role in consultation,
- ◆ Follow-up, and
- ◆ Both Tribes and agencies require varying amounts of education.

Comments, Questions, and Answers

- ◆ Question: How can Division Offices help each other, especially regarding out-of-state Tribes?
Answer: Other Offices can help reach out to Tribes within their state that may need to be part of another state's Section 106 consultation process. The Environmental Network can also help to share information by compiling a database of Tribes, a list of who has MOAs, and more. A database can also provide information and agreements to FHWA Headquarters and ACHP and can provide links to useful websites.
- ◆ Comment: If you know of Tribe turnover, please let the state know.

Federal Trust Responsibility (Ron Hall)

The trust responsibility can be between the Federal government and a Tribe, or the Federal government and an individual. The history of Federal Trust responsibility helps to explain the current environment. The first real trust case occurred in 1942—Seminole Nation v. United States. A treaty from 1856 promised a \$500,000 trust fund, with an annual interest of \$25,000 to be paid per capita annuity. The Seminole Nation sued the U.S. claiming violations of the treaty, including the manner in which payments were made because between 1870 and 1874, at the request of the tribal council, payments went to the tribal treasurer and not directly to individuals.

Federal officials knew tribal officials were misappropriating the funds and depriving individuals of benefits. The U.S. claimed payment was at the request of the Tribe, and the treaty was between the U.S. and the Tribe, not the tribal members. The rule of equity that the third party (in this case the U.S.) who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money, is a participant in the breach of trust and liable therefore to the beneficiary. The payments did not discharge the treaty obligation if the Federal officials actually knew the Council was defrauding the members of the Seminole Nation.

The most recent cases involving trust resources, U.S. v. Mitchell (1980) Mitchell I (General Allotment Act) and U.S. v. Mitchell (1984) Mitchell II, claim money damages by members of Quinault Tribe for Federal mismanagement of the timber on their allotments under. Since these cases, the rule of law is as follows: “Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing statute about a trust fund, or a trust or fiduciary connections.”

The current trend of Federal Trust actions includes:

- ◆ U.S. v. Navajo Nation (2003)
- ◆ The Indian Mineral Leasing Act of 1938
- ◆ The 1987 amendments to 1964 coal lease
 - Tribe claims Secretary of Interior breach of trust for dealings with Peabody Coal contrary to tribal interests
 - Act says minerals “may” be leased for mining purposes with approval of Secretary by authority of tribe
- ◆ The court found no obligations resembling the detailed fiduciary responsibilities that Mitchell found in timber statutes

Comments, Questions, and Answers

- ◆ Question: How does this affect highway projects or what issues FHWA runs into? Answer: Highway projects deal with trust resources (e.g., land) and ROW issues. Construction may also impact resources (e.g., water) and the quality, diversion, and use of it. Minnesota, for example, may have impacts to tribal trust resources like timber.
- ◆ Question: What about natural acts like flooding? Answer: Tribes can say there is a trust duty by the U.S. to protect the land, but Congress will ultimately have to decide this.

RE: NEPA LIVE

Moderator

Lamar Smith, Training, Technology and Technical Assistance Team Leader, Office of Project Development and Environmental Review, FHWA

Description: This session was designed to be a live version of Re:NEPA (<http://nepa.fhwa.dot.gov/ReNepa/ReNepa.nsf/home>), FHWA's online community of practice, which has been a tremendous success for sharing information and discussing issues. Conference participants were invited to submit anonymous questions throughout the conference. The purpose of the session is to address issues and questions appearing in RE: NEPA as well as related topics. Participants were also able to ask additional questions during the session.

Comments, Questions, and Answers

- ◆ Question: Are Divisions still supposed to be sending all EISs to Headquarters? If so, how many copies and to who? Answer: When Division offices submit the ROD into the Environmental Document Tracking System (EDTS), the system instructs the user to send the ROD to Headquarters. Headquarters still wants a copy of the ROD, as well as a copy of the NOI. However, all EISs do not need to be sent to Headquarters, but Headquarters should be kept informed as to what is happening. If prior concurrence has been obtained, one copy of the EIS should be sent to Headquarters. RODs and NOIs (EISs if on CD, web, etc) should be sent to the appropriate project contacts at Headquarters.
- ◆ Question: Is there any clarification on the conflicting advice that has been given regarding the following scenario: A state acquires ROW for a road project. The road project is completed and the state retains some residual, unused ROW for future road projects. Fifty years later, the unused ROW becomes a contributing element to an historic district. The state now wants to use the ROW for a new project. How should this be handled with respect to Section 4(f)? Answer: Section 4(f) does apply. First, a few questions need to be answered: What is that parcel and what is its purpose? What is its use? If you are unsure, contact the SHPO for the context to know why the property is eligible.
- ◆ Question: There have been variable messages from the presenters this week. Please clarify mitigation responsibilities relative to NEPA and direct, indirect, and cumulative impacts. Answer: Under NEPA, states are required to consider mitigation for adverse impacts (direct and indirect) and to look at cumulative impacts. Other things to consider include:
 - ◆ Resource agencies with regulatory authority (e.g., USACE and Section 404 of the CWA) have the authority put conditions with the permits they issue and may require mitigation as part of that permit.
 - ◆ If noise mitigation is proposed that is not consistent with Title 23, Part 772, than it is not eligible for Federal funding.
 - ◆ There may be pressure from resource agencies to buy properties and protect them from development. FHWA's role is to work with local agencies.
 - ◆ A lot of mitigation can also be built into CEs (e.g. noise walls).
 - ◆ If economic development is part of the purpose and need, there must be a transportation purpose. Something that is "reasonably foreseeable" must be based on facts and be likely to occur.
- ◆ Question: When is it wise to do mitigation enhancements? Answer: Enhancement features should be included in design. They can be viewed as part of the project rather than as mitigation. Engage all stakeholders during the process to help leverage mitigations. A challenge is justifying expenditure of CSS funds to TEs. Transportation plays a legitimate role in building public works projects that are aesthetically pleasing.
- ◆ Question: Who is Re:NEPA's frequent commenter Tom King? Answer: Dr. Tom King worked for approximately 10 years with the ACHP and was instrumental in developing Section 106 guidance and the 1988 policy on human remains. He also helped draft the bulletin on cultural and religious significance. Dr. King is now a consultant.
- ◆ Question: Who is delegated authority to sign environmental documents at Division Offices? Specifically, can area engineers or environmental coordinators/specialists sign RODs and/or FEISs? Answer: Division Administrators must sign FEISs and RODs.

- ◆ Question: Does FHWA have an affirmative responsibility to review and determine whether the “official with jurisdiction’s” decision that 4(f) impacts are not adverse is reasonable? Answer: Yes. In de minimus findings, FHWA should expect to receive written concurrence that project impacts are not adverse. FHWA should also ensure that the decision that 4(f) impacts are not adverse is reasonable. However, it is not FHWA’s responsibility to de-commission 4(f) properties.

On the reverse side of the issue, there may be political pressure on local projects. With local projects, a proposed road may go through a park and politicians may want the project to work even if the area is a 4(f) area. FHWA has met with advocacy groups to discuss Section 6009 and recognizes the political pressure locally, and are concerned. The reverse can also occur: politicians may make something a park to avoid a road being sited in that location. The de minimus impact finding may create a challenge because States may make a de minimus finding, when it is not.

- ◆ Question: When should agencies be notified of the intent to complete a de minimus finding based on the Section 106 determination? Answer: The de minimus finding is based solely on the Section 106 interpretation of no adverse effect. FHWA has the authority to make a de minimus finding if there is no adverse effect. The other agencies concur in writing.
- ◆ Question: Should States with existing Section 106 programmatic agreements amend these agreements to include the de minimus provisions? Answer: If a state has an existing programmatic agreement, it can discuss this topic with the SHPO. The SHPO needs to be involved in the de minimus finding. The guidance allows for communication between FHWA and SHPO for existing agreements, but for new programmatic agreements, it may be wise to not include de minimus finding language.

In the ACHP’s view, making a programmatic agreement where the SHPO does not see the paperwork and cannot concur is not a good process. However, ACHP does believe the process can occur.

- ◆ Question: Will there be supplemental guidance on de minimus findings? Answer: the Section 4(f) policy paper will be revised once the NPRM on feasible and prudent alternatives is done.
- ◆ Question: How is the 180-day limitation notice to be used? For what classifications of environmental documents? Answer: The decision to use the 180-limitation notice for all EAs and EISs is a judgment call for the Division Office based on project risks, etc. Some states are trying to balance the cost of publication against the risks of the project. For CEs, the notices can be batched. The notice can be used for Tier I documents to define what decisions were made.
- ◆ Question: How much does it cost to publish a NOI? Answer: NOIs cost roughly \$500 to publish. It is difficult to determine a way this cost can be factored as part of the project cost because of appropriations laws.
- ◆ Question: Can the 180-day limitation notice be used for other Federal permits? Answer: Yes. The 180-limitation notice applies to all other agency decisions made. If a permit is issued after the ROD (for example a 404 permit), it will be necessary to determine utility of publishing a notice for FHWA’s decision first and the other agency’s decision second. If the decisions are being made close to each other, they can be combined into one notice.
- ◆ Question: Has any state completed a net benefit programmatic agreement for historic sites with adverse effects to a resource, but still agrees that there is an overall net benefit to the resource? Answer: This has not happened yet.
- ◆ Question: Are there plans for updating the 1987 Technical Advisory? Comment: The existing TA is a great document and there is no need to start from scratch. Additional details could be given and minor revisions made. It may be helpful to add language describing where information can be found online. Answer: There are two options on the table for updating the TA: (1) Form a volunteer TA team that would get together to shape the revisions, and (2) Add a few amendments

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and web addresses. Conference participants should send their preference to Lamar Smith. An informal volunteer list will be kept for option 1.