



Back to the Basics: How FHWA Legal Staff Can Help with Project Delivery

Attorneys in the Federal Highway Administration's (FHWA) Legal Services Divisions offer a range of legal services in support of project development and delivery, including assistance with legal sufficiency reviews, related matters associated with the preparation of environmental documents, and work with the Department of Justice (DOJ) in the defense of challenged environmental actions.

This issue of Successes in Stewardship addresses common questions that practitioners may have about how FHWA's legal staff can assist in the transportation planning and project development process.

Has Recent Legislation Changed What Counts as Legally Sufficient Documentation?

The process that FHWA attorneys follow when reviewing documentation for legal sufficiency is much the same as it was 20 years ago. Legally sufficient means that an environmental review and documentation meets the legal standards applicable at the time the attorney reviews the document. These standards are established through current statutes, regulations, Executive Orders, case law, and agency procedures and policies. FHWA environmental reviewers and attorneys need to take into account changes from legislation, such as the Fixing America's Surface Transportation (FAST) Act and the Moving Ahead for Progress in the 21st Century Act (MAP-21), as well as changes in case law, Executive Orders, and regulations to develop a legally sufficient document.

Recent legal standards encourage development of concise environmental documents that integrate environmental reviews as much as possible. This concept is captured in initiatives such as

Look What's New!

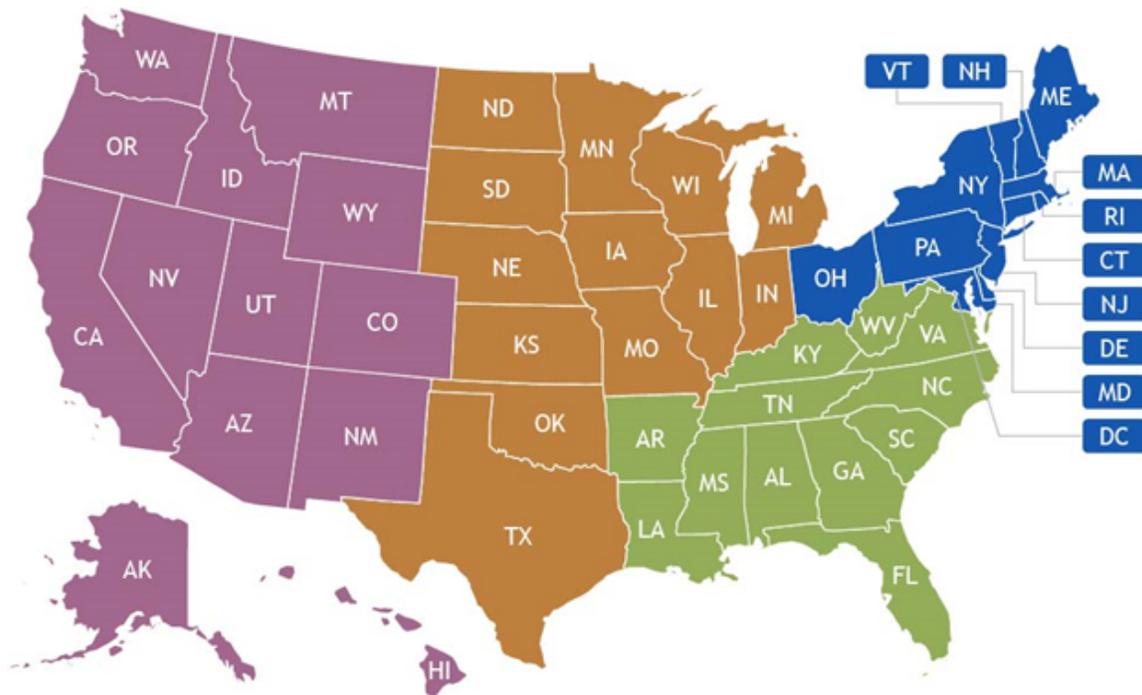
FHWA's Environmental Review Toolkit has recently been redesigned and improved! The website still serves as the one-stop shop for topics related to the FHWA's environmental program, but has been redesigned to be more intuitive and user-friendly.

Implementing Quality Environmental Documents and Every Day Counts. Although legal standards change from time to time, the FHWA and Department of Transportation (DOT) procedures continue to require legal sufficiency reviews for Final Environmental Impact Statements (EISs) and for individual Section 4(f) determinations.

Who Do I Contact with Legal Issues?

The FHWA Legal Services Offices are the first line of support for Division Offices and Directors of Field Services. These offices are divided into five geographical units and program areas: HCC Legal Services North, HCC Southern Legal Services, HCC Mid-America Legal Services, HCC Western Legal Services, and Federal Lands Highway Legal Services. You should contact these offices first when you have a legal question on environmental review matters.

The FHWA Field Legal Services Divisions directly serve the FHWA field offices, including FHWA Division Offices, within their geographic boundaries (see map below). All legal sufficiency reviews, related matters associated with the preparation of environmental documents, and work with the DOJ in the defense of challenged environmental actions are handled by the Field Legal Services Divisions. In addition, these offices provide legal support on external and other program matters such as Freedom of Information Act (FOIA) requests, employee testimony requests, grants administration, Disadvantaged Business Enterprises (DBEs), tort claims, and the Americans with Disabilities Act (ADA), and on such internal matters as personnel actions, employment discrimination, and ethics training and issues. For more information on who to contact, visit [this page](#).



Map of the geographic boundaries of the FHWA Field Legal Services Divisions. (Image courtesy of Volpe)

These geographical units work together with HCC Program Legal Services (HCC-30) located in Washington, DC. This office provides legal support to FHWA's external programs (except fiscal law, appropriations law, Intelligent Transportation Systems, and technology-related programs), and for issues arising from Federal statutes and regulations that are applicable to projects funded or administered under Chapter 1 of Title 23 U.S. Code (Federal-aid highway programs). In general terms, the Program Legal Services Division provides legal counsel and assistance on the environmental, social, and economic aspects of the Federal-aid highway program, including the application of all environmental and civil rights laws to the Federal-aid, intermodal, metropolitan, and statewide programs. It is also responsible for all issues related to transportation planning and all land acquisition, land use, condemnation, control of right-of-way, and relocation assistance matters. Typically, Program Legal Services is the direct contact of Headquarters offices such as the Office of Planning, Environment, and Realty and Office of Infrastructure.

When Should I Consult FHWA's Legal Team?

FHWA legal staff can provide guidance on legal issues that may arise at any point, but it is generally productive to involve them early in the project development and delivery process. FHWA's legal staff rely on practitioners in the field to spot issues early that signal that legal involvement may be beneficial. Some examples of issues and areas that typically require legal assistance include:

- Projects involving tolling;
- Projects with community resistance, environmental justice concerns, or health impacts;
- Land-use forecasting or modeling legal issues;
- Federalization;
- High-visibility projects; and
- Any additional potential issues identified by the Division Office.

However, in any instance, legal staff can advise on how to prepare an administrative record, create legally sufficient environmental documentation, and how to navigate the environmental review process, among other things. Once project development has progressed to the point of preparing these records, FHWA legal staff can review draft versions of documents, or when a project is nearly complete, formally review environmental documentation for legal sufficiency. Although the legal sufficiency requirement only applies by regulation to Final EIS and Individual Section 4(f) evaluations, the legal staff can assist in determining the standards applicable to any environmental review.

While FHWA's legal staff primarily focus on FHWA's legal responsibilities, they can provide general legal advice to State DOTs at all points in the project development process. In clearly defined legal situations, FHWA legal staff will provide advice that is similar to legal counsel. FHWA legal staff can indicate where the line of the law is, and when passing that line creates a legal risk for the State and FHWA. In areas where there is no clear-cut interpretation of the law, FHWA legal staff can advise how a State could proceed, and provide strategies to help the State move forward to implement a project.

In addition to these types of advice, FHWA legal staff can assist a State with preparing documentation so that messaging is clear and concise, along with being legally sufficient.

A Project Has Received a Legal Challenge—What Happens Now?

When a lawsuit is filed challenging an FHWA decision, the agency and/or the DOJ will receive the complaint and the FHWA field legal staff jump into action. The FHWA legal staff work together with the Division staff to compile and submit an administrative record of the documents and materials considered in making that decision. Compiling a strong administrative record is a critical aspect of the environmental review process, as a strong record supports the agency's ability to defend its decision.

Beyond compiling a strong administrative record, various parties play a role when a project receives a legal challenge:

- The **State DOT** drives the project development process, and establishes how funds will be used. The State agency's legal team sometimes develops a preliminary strategy for the environmental review, and the State is responsible for creating the administrative record for the project.
- As a project is being developed, **FHWA Division Office field staff** serve as the first line of review. As mentioned, FHWA legal staff rely on field staff to spot issues signaling that a project is likely to receive a legal challenge. FHWA environmental staff in the field will also determine how the environmental review process will proceed.
- Before a lawsuit is filed, **FHWA legal staff** focus on assessing risks during project development and delivery, such as at what point a project is likely to be litigated, and identifying vulnerabilities for the project. FHWA legal staff will discuss these issues with environmental staff in the field and the appropriate Program Office, and communicate with the State, so that, together as a team, they can develop a strategy to reduce the risk of an adverse decision against the project.
- When a lawsuit has been filed, the **DOJ** becomes involved as the litigator for the Federal government. FHWA legal staff work with the DOJ to develop the litigation strategy for the project.

For information on how to prepare a strong administrative record, see:

[AASHTO Practitioner's Handbook 1: Maintaining a Project File and Preparing an Administrative Record for a NEPA Study](#)

Can FHWA Legal Staff Help My State Avoid Legal Delays and Accelerate Project Delivery?

The FHWA legal staff aim to accelerate both the environmental review process and project delivery by addressing litigation risks that could delay the construction process and assisting with the development of a strategy that would achieve prompt project delivery with reduced litigation risk.

The most effective way to do this is by involving FHWA legal staff early in the project development process. Attorneys can be of great assistance in the setup of the environmental review process, especially for projects that are complex, or are a priority for a State's leadership. When FHWA attorneys are involved early in the process, they can help State DOTs address potential issues at the onset of a project, so that design decisions don't need to be revisited during the environmental review consultation process. If FHWA attorneys are familiar with a project from its beginning, it can accelerate their review of administrative records and other documentation later in the process.

CONTACT

Jomar Maldonado

Attorney Advisor
FHWA Program Legal Services
202-366-1373

Jomar.Maldonado@dot.gov

Stephanie Stoermer

Environmental Program Specialist
FHWA Resource Center
303-594-8556

Stephanie.Stoermer@dot.gov

Damaris Santiago

Environmental Program Specialist
FHWA Office of Project Development and
Environmental Review
202-366-2034

Damaris.Santiago@dot.gov

Successes in Stewardship is a Federal Highway Administration newsletter highlighting current environmental streamlining and stewardship practices from around the country. [Click here](#) to subscribe, or call (617) 494-2013 for more information.