

2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000, I hereby determine that the objects to be included in the exhibition “Pastel Portraits: Images of 18th-Century Europe,” imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, New York, NY, from on or about May 17, 2011, until on or about August 14, 2011, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (*telephone:* 202/632–6473). The address is U.S. Department of State, SA–5, L/PD, Fifth Floor, Washington, DC 20522–0505.

Dated: January 24, 2011.

Ann Stock,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA–2010–0151]

Surface Transportation Project Delivery Pilot Program; Caltrans Audit Report

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final report.

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

FOR FURTHER INFORMATION CONTACT: Ms. Ruth Rentch, Office of Project Development and Environmental Review, (202) 366–2034, *Ruth.Rentch@dot.gov*, or Mr. Michael Harkins, Office of the Chief Counsel, (202) 366–4928, *Michael.Harkins@dot.gov*, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

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

Background

Section 6005 of SAFETEA–LU (codified at 23 U.S.C. 327) established a pilot program to allow up to five States to assume the Secretary of Transportation’s responsibilities for environmental review, consultation, or other actions under any Federal environmental law pertaining to the review or approval of highway projects. In order to be selected for the pilot program, a State must submit an application to the Secretary.

On June 29, 2007, Caltrans and FHWA entered into a Memorandum of Understanding (MOU) that established the assignments to and assumptions of responsibility to Caltrans. Under the MOU, Caltrans assumed the majority of FHWA’s responsibilities under the National Environmental Policy Act, as well as the FHWA’s responsibilities under other Federal environmental laws for most highway projects in California.

To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) requires the Secretary to conduct semiannual audits during each of the first 2 years of State participation; and annual audits during each subsequent year of State participation. The results of each audit must be presented in the form of an audit report and be made available for public comment. The FHWA solicited comments on the fifth audit report in a **Federal Register** Notice published on December 3, 2010, at 75 FR 75532. The FHWA received no comments. This notice provides the final draft of the fifth FHWA audit report for Caltrans under the pilot program.

Authority: Section 6005 of Pub. L. 109–59; 23 U.S.C. 315 and 327; 49 CFR 1.48.

Issued on: January 20, 2011.

Victor M. Mendez,
Administrator.

Surface Transportation Project Delivery Pilot Program

Federal Highway Administration Audit of California Department of Transportation
July 26–30, 2010

Overall Audit Opinion

Based on the information reviewed, it is the Federal Highway Administration (FHWA) audit team’s opinion that as of July 30, 2010, the California Department of Transportation (Caltrans) continued to make progress toward meeting all responsibilities assumed under the Surface Transportation Project Delivery Pilot Program (Pilot Program), as specified in the Memorandum of Understanding (MOU)¹ with FHWA and in Caltrans’ Application for Assumption (Application).

The FHWA commends Caltrans for its implementation of corrective actions in response to previous FHWA audit report findings. The FHWA also observed that Caltrans continued to identify and implement on a statewide Pilot Program basis best practices in use at individual Caltrans Districts (Districts).

With the completion of FHWA’s fifth audit, Caltrans has now operated under the Pilot Program for 3 years. In compliance with the time specifications for the required audits, FHWA completed four semiannual audits in the first 2 years of State participation and has begun the annual audit cycle, beginning with this audit, which was completed July 30, 2010. Collectively, the FHWA audits have included on-site audits to 9 of the 12 Districts and to the Caltrans Regional Offices supporting the remaining 3 Districts. The audit team continues to identify significant differences across the Districts in terms of implementing Pilot Program policies, procedures, and responsibilities. Examples of such differences include: Resource availability and allocation; methods of implementation; methods of process evaluation and improvement; and levels of progress in meeting all assumed responsibilities. It is the audit team’s opinion that the highly decentralized nature of operations across Districts continues to be a major contributing factor to the variations observed in the Pilot Program. As a result of this organizational structure, clear, consistent, and ongoing oversight by Caltrans Headquarters (HQ) over Districts’ implementation and operation of the Pilot Program responsibilities is necessary. A robust oversight program will help foster the exchange of information and the sharing of best practices and resources between Districts and will put the entire organization in a better position to more fully implement all assumed responsibilities and to meet all Pilot Program commitments.

Due to the multiyear timeframes associated with more complex and controversial projects, the full lifecycle of the environmental review aspect of project

¹ Caltrans MOU between FHWA and Caltrans available at: http://environment.fhwa.dot.gov/stmrlng/safe_cdot_pilot.asp.

development (proceeding from initiation of environmental studies and concluding with the issuance of a Record of Decision or equivalent decision document) has yet to be realized within the Pilot Program to date. Caltrans continues to gain experience in understanding the resource requirements and processes necessary to administer its Program. It is the audit team's opinion that Caltrans needs to maintain this continuous process improvement to refine its approaches and use of resources to meet all Pilot Program commitments, especially given the increasing resource demands associated with managing ever-more complex and controversial projects under the Pilot Program.

Caltrans staff and management continue to request feedback from the FHWA audit team regarding program successes, best practices, and areas in need of improvement. By addressing all findings in this report, Caltrans will continue to move toward full compliance with all assumed responsibilities and Pilot Program commitments.

As of the conclusion of the fifth FHWA audit, Caltrans has participated in the Pilot Program for 3 years. It is FHWA's opinion that Caltrans has continued to improve its processes and procedures and has benefited from participation in the Pilot Program. However, it also is FHWA's opinion that while Caltrans participation in the Pilot Program has been successful thus far, it is still functioning in a development context and has yet to reach full maturity. Ongoing repeat findings and program areas still in the process of being developed or improved contributed to this opinion.

Requirement for Transition Plan

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) Section 6005(a) established the Pilot Program, codified at 23 U.S.C. 327. Under the provisions of 23 U.S.C. 327(i)(1), as enacted in SAFETEA-LU, "the program shall terminate on the date that is 6 years after the date of enactment of this section" which will be August 10, 2011. Additionally, the MOU between FHWA and Caltrans contains a provision designed to implement 23 U.S.C. 327(i), as enacted by SAFETEA-LU. Specifically, the provision provides that Caltrans and FHWA must jointly "develop a plan to transition the responsibilities that Caltrans has assumed back to the FHWA so as to minimize disruption to the project, minimize confusion to the public, minimize burdens to other affected Federal, State, and local agencies, and, ensure, to the maximum extent possible, Caltrans will be able to complete by August 10, 2011, all anticipated environmental approvals." The MOU further provides that the transition plan must be completed and approved by both Caltrans and FHWA no later than March 10, 2011. In the section 2203(c) of the Surface Transportation Extension Act of 2010, Part II, Public Law 111-322, Congress modified 23 U.S.C. 327(i)(1) by extending the program termination date to 7 years after the date of enactment of SAFETEA-LU. As a result of this amendment, the program termination date is now August 10, 2012. The MOU will need to be amended to take this new

termination date into account by delaying actions on the development of the transition plan by one year.

Effective Practices

The FHWA audit team observed the following effective practices during the fifth audit:

1. Caltrans HQ has sought out, shared, and implemented (or is implementing) best practices in use at the District level to use on a statewide basis. Examples include:

- (a) Use of a standard form to document Class of Action determination;
 - (b) Use of the File Maker Pro environmental database system to track projects and milestones; and
 - (c) Creation of a Section 4(f) point of contact in each District to serve as a technical resource for District staff.
2. Use of monthly newsletters and e-mails from HQ environmental coordinators to inform District environmental staff of key issues, timely topics, and changes in practices.

3. The Sacramento Legal Office permanently assumed responsibility for all environmental law issues in two Districts where staff turnover resulted in limited expertise to support legal sufficiency reviews. As the number of legal sufficiency reviews performed under the Pilot Program has not been significant, concentrating reviews amongst a key group of attorneys should assist with a consistent level of review of environmental documents and the development of expertise under the Pilot Program.

4. Development of an on-line training course on Section 4(f) determinations that is nearing completion.

5. Expansion of the scope of the Caltrans self-assessment process to include review of Pilot Program areas identified as potential weaknesses by HQ Environmental Coordinators.

6. A variety of approaches are being used by individual Districts to capture, track, and ensure that environmental commitments identified in environmental documents are being met. Identified District specific approaches used to accomplish this include:

- (a) Training environmental staff in environmental commitments tracking;
- (b) Dedicating resources to track commitments, ensuring that the commitments are circulated at key stages of the project cycle, and checking that the commitments have been met at the completion of a project;
- (c) Using dedicated formats to capture, describe, and ensure that environmental commitments are transferred and incorporated into contract documents;
- (d) Requiring environmental awareness training for construction personnel prior to the start of construction; and
- (e) Training appropriate staff on incorporation of environmental commitments into plan, specification, and estimate packages.

Background

The Pilot Program allows the Secretary of Transportation (Secretary) to assign, and the State to assume, the Secretary's

responsibilities under the National Environmental Policy Act (NEPA) for one or more highway projects. Upon assigning NEPA responsibilities, the Secretary may further assign to the State all or part of the Secretary's responsibilities for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review of a specific highway project. When a State assumes the Secretary's responsibilities under this program, the State becomes solely responsible and is liable for carrying out the responsibilities it has assumed, in lieu of the FHWA.

To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) mandates that FHWA, on behalf of the Secretary, conduct semiannual audits during each of the first 2 years of State participation; and annual audits during each subsequent year of State participation. The focus of the FHWA audit process is four-fold: (1) To assess a Pilot State's compliance with the required MOU and applicable Federal laws and policies; (2) to collect information needed to evaluate the success of the Pilot Program; (3) to evaluate Pilot State progress in meeting its performance measures; and (4) to collect information for use in the Secretary's annual Report to Congress on the administration of the Pilot Program. Additionally, 23 U.S.C. 327(g) requires FHWA to present the results of each audit in the form of an audit report published in the Federal Register. This audit report must be made available for public comment, and FHWA must respond to public comments received no later than 60 days after the date on which the period for public comment closes.

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

Scope of the Audit

This is the fifth FHWA audit of Caltrans participation in the Pilot Program. The on-site portion of the audit was conducted in California from July 26 through July 30, 2010. As required in SAFETEA-LU, each FHWA audit must assess compliance with the roles and responsibilities assumed by the Pilot State in the MOU. The audit also includes recommendations to assist Caltrans in successful participation in the Pilot Program.

The audit primarily focused on assessing compliance with assumed responsibilities. Key Pilot Program areas evaluated during this audit included:

- Section 4(f) process determination and documentation;

- The reevaluation process;
- The impact of furloughs and loss of staff;
- Project files;
- Resource agency consultation and coordination;
- Training;
- Quarterly reports;
- Quality Assurance Quality Control (QA/QC) process; and
- NEPA process documentation.

Prior to the on-site audit, FHWA completed telephone interviews with Federal resource agency staff at the U.S. Army Corps of Engineers (USACE), the National Park Service, the National Oceanic and Atmospheric Administration, the Advisory Council on Historic Preservation, and the Environmental Protection Agency. The on-site audit included visits to the Caltrans Offices in District 3/North Region (Marysville), District 4 (Oakland), District 5 (San Luis Obispo), District 7 (Los Angeles), District 8 (San Bernardino), and District 12 (Irvine). Additionally, FHWA auditors visited the Sacramento offices of the USACE and U.S. Fish and Wildlife Service (FWS) to interview staff.

This report documents findings within the scope of the audit as of the completion date of the on-site audit on July 30, 2010.

Audit Process and Implementation

The intent of each FHWA audit completed under the Pilot Program is to ensure that each Pilot State complies with the commitments in its MOU with FHWA. The FHWA does not evaluate specific project-related decisions made by the State because these decisions are the sole responsibility of the Pilot State. However, the FHWA audit scope does include the review of the processes and procedures (including documentation) used by the Pilot State to reach project decisions in compliance with MOU Section 3.2.

In addition, Caltrans committed in its Application (incorporated by reference in MOU Section 1.1.2) to implement specific processes to strengthen its environmental procedures in order to assume the responsibilities assigned by FHWA under the Pilot Program. The FHWA audits review how Caltrans is meeting each commitment and assesses Pilot Program performance in the core areas specified in the Scope of the Audit section of this report.

The Caltrans' Pilot Program commitments address:

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

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

- FHWA Office of Project Development and Environmental Review.
- FHWA Office of the Chief Counsel.
- FHWA Alaska Division Office.
- FHWA Resource Center Environmental Team.
- Volpe National Transportation Systems Center.
- FWS.

During the onsite audit, FHWA interviewed more than 70 staff from 6 District offices and the USACE and FWS. The audit team also reviewed project files and records for over 80 projects managed by Caltrans under the Pilot Program.

The FHWA acknowledges that Caltrans identified specific issues during its fifth self-assessment performed under the Pilot Program (required by MOU section 8.2.6), and is working on corrective actions to address the identified issues. Some issues described in the Caltrans self-assessment may overlap with FHWA findings identified in this audit report.

In accordance with MOU Section 11.4.1, FHWA provided Caltrans with a 30-day comment period to review this draft audit report. The FHWA reviewed comments received from Caltrans and revised sections of the draft report, where appropriate, prior to publishing it in the **Federal Register** for public comment.

Limitations of the Audit

The conclusions presented in this report are opinions based upon interviews of selected persons knowledgeable about past and current activities related to the execution of the Pilot Program at Caltrans, and a review of selected documents over a limited time period. The FHWA audit team's ability to conduct each audit and make determinations of Caltrans' compliance with assumed responsibilities and commitments under the Pilot Program has been further limited by the following:

- Select Districts visited by FHWA audit team. The FHWA audit team has not visited each District during the audit process. Each audit (including this audit) has consisted of visits to Districts with significant activity under the Pilot.
- Caltrans staff availability during audits. Some Caltrans staff selected to be interviewed by the audit team were out of the office and unavailable to participate in the onsite audit. This limited the extent of information gathering.
- Incomplete project files. Project files and associated project documentation have, when reviewed by the audit team, not always been complete. This is especially true for projects where the project or related studies were initiated prior to commencement of the Pilot Program. A full assessment of compliance with Pilot Program policies and procedures is not possible unless all required documents are available for review.
- Limited scope of Pilot Program project development activity. Caltrans has not operated under the Pilot Program for a sufficient period of time to manage the full lifecycle of most Environmental Impact Statements (EIS) and other complex projects. Therefore, FHWA is not yet able to fully determine how Caltrans will comply with its

responsibilities assumed under the Pilot Program for these project situations.

- Insufficient data to determine time savings reported by Caltrans in the completion of environmental documents. Due to the short period of time that the Pilot Program has been in place, a sufficient number of projects of varying complexities have not been completed to adequately support a determination on the potential time savings resulting from participation in the Pilot Program.

- Distinction between the two Categorical Exclusion (CE) assumption processes—Section 6004 and Section 6005. Since the assumption by Caltrans of the SAFETEA-LU Section 6004 CE process is not a part of these audits, it is not possible to validate the correctness of determinations placing individual CEs under the aegis of each assumed responsibility.

- Continued errors in the quarterly reports. The quarterly reports prepared by Caltrans listing all environmental approvals and decisions made under the Pilot Program continue to contain omissions and errors. As a result, it is difficult for FHWA to exercise full oversight on Pilot Program projects unless a complete accounting of all NEPA documents produced under the Pilot is available and taken into account during the FHWA audit.

Status of Findings Since Last Audit (July 2009)

As part of the fifth audit, FHWA evaluated the corrective actions implemented by Caltrans in response to the "Deficient" and "Needs Improvement" findings in the fourth FHWA audit report.

1. Quarterly Reports—The quarterly reports Caltrans provided to FHWA under MOU Section 8.2.7 continued to include inaccuracies related to environmental document approvals and decisions made under the Pilot Program. The FHWA does acknowledge that Caltrans is in the process of implementing the File Maker Pro environmental database system on a statewide basis to assist in the developing of a comprehensive database of environmental projects and milestones to improve the accuracy of the information reported in the quarterly reports.

2. QA/QC Certification Process—Project file reviews completed during the fifth audit continued to identify incorrect and incomplete QC certification forms. Caltrans continues to address inadequacies in this process through staff specific training when inconsistencies are identified, most notably during the self-assessment process.

3. QA/QC Assurance—Under the Pilot Program, NEPA documentation must clearly identify that FHWA has no role in the environmental review and decisionmaking process for assigned projects. However, environmental document reviews continued to identify instances when FHWA was referenced as being involved in the decisionmaking process.

"Needs Improvement" audit findings status:

1. Inadequate Guidance in the Standard Environmental Reference (SER)—Caltrans updated the SER to address FHWA's

concerns regarding several instances where guidance provided was unclear, misleading, or incomplete. However, additional instances were observed during the fifth audit regarding unclear, misleading, or incomplete information in the SER.

2. **Procedural and Substantive Requirements**—The identified areas of confusion regarding implementation of the Endangered Species Act (ESA) Section 7 process have been addressed and the process of consulting with the FWS under ESA Section 7 has been improved.

3. **Section 4(f) Issues:**

(a) **Documentation**—Project file reviews and interviews with Caltrans staff confirmed continuing inconsistencies in the documentation required to meet the Section 4(f) provisions.

(b) **Circulation of a Draft Section 4(f) Evaluation**—Project file reviews and interviews with Caltrans staff identified confusion regarding the requirement to circulate Section 4(f) Evaluations to the Department of the Interior for review.

(c) **Section 4(f) Implementation**—Project file reviews and interviews with Caltrans staff identified several inconsistencies with the implementation and general understanding required in carrying out Section 4(f) provisions.

Caltrans is continuing to address each issue. For example, Caltrans requested and received two FHWA-led Section 4(f) trainings, each 2 days in length, with specific requests to address areas that FHWA has identified as problematic during the Pilot Program audit. Caltrans is also completing an on-line Section 4(f) training that will be posted on the "Training on Demand" Web site.

4. **Legal Division Staff**—Significant variability existed in the Federal environmental law experience of the attorneys in the four Caltrans legal offices. Most notably, the retirement of a highly experienced attorney near the end of 2008 resulted in two of Caltrans' legal offices serving some of Caltrans' largest and busiest Districts with no attorneys on staff with substantial experience in Federal environmental law. Since October 2009, the Sacramento Legal Division assumed permanent responsibility for all environmental law issues in the legal office affected by the retirement of the experienced attorney in 2008.

5. **Training**—In the past, inconsistencies in training were identified in the areas of Section 4(f) and Section 7 processes. There were also observed inconsistencies in the use of tools to identify training needs and to track employees' training histories, as well as no method for employees to track completion of any online training available on the Caltrans Web site. A method to record the completion of on-line trainings by Caltrans staff is now available with implementation of its use underway.

6. **Maintenance of Project and General Administrative Files**—Caltrans has instituted specific procedures for maintaining project files in accordance with the Uniform Filing System (UFS) and has provided training on these procedures. Inconsistencies in the application of these procedures, reported in

previous audit findings, were also identified in this audit.

Findings Definitions

The FHWA audit team carefully examined Pilot Program areas to assess compliance in accordance with established criteria in the MOU and Application. The time period covered by this audit report is from the start of the Caltrans Pilot Program (July 1, 2007) through completion of the fifth onsite audit (July 30, 2010) with the focus of the audit on the most recent 12 month period. This report presents audit findings in three areas:

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

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

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

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

or
Audit determined that for a past Needs Improvement finding, the rate of corrective action has not proceeded in a timely manner; is not on the path to timely resolution of the finding.

Summary of Findings—July 2010

Compliant

Caltrans was found to be compliant in meeting the requirements of the MOU for the key Pilot Program areas within the scope and the limitations of the audit, with the exceptions noted in the Deficient and Needs Improvement findings in this audit report set forth below. Caltrans continues to provide FHWA with all required oversight reports, per MOU Section 8.2 (e.g., Quarterly Reports listing project approvals and decisions made under the authority of the Pilot Program and the Self-assessment Summary Reports) and has fully cooperated with FHWA during the audit process. Even with the loss of staff, furloughs, and budget constraints Caltrans continues to be compliant in their commitment of resources needed to carry out the responsibilities assumed under the Pilot Program.

Needs Improvement

(N1) **Maintenance of Project and General Administrative Files**—MOU Section 8.2.4 requires that Caltrans maintains project and general administrative files pertaining to its discharge of the responsibilities assumed under the Pilot Program. Caltrans has

instituted specific procedures for maintaining project files in accordance with the UFS and has provided training on these procedures. Inconsistencies in the application of these procedures, which have been reported in previous audit findings, were also identified throughout the Districts visited in this audit. Examples of inconsistencies observed in 10 of the approximately 80 project files reviewed during the audit included:

(a) Instances where required documentation was missing in project files but was produced by Caltrans staff at the request of the auditors. Examples of such missing documents included a letter documenting the State Historic Preservation Officer's concurrence on effect determination; correspondence between Caltrans and FWS regarding a Biological Opinion for a project; and project level conformity determinations by FHWA; and
(b) Missing, out of order, or incomplete UFS tabs.

(N2) **Performance Measure**—"Monitor relationships with agencies and the general public"—MOU Section 10.2.1.C requires Caltrans to "assess change in communication among Caltrans, Federal and State resource agencies, and the public." Caltrans conducted the first annual resource agency survey in 2009 and a second survey in February 2010. The Second Annual Resource Agency Survey Report was delivered in May 2010. Each report lists an average rating for each survey question and a comparison is made from the previous report average ratings. The Survey Report does not report each agency's rankings separately, which would produce a more accurate assessment of Caltrans' individual relationship with Federal and State agencies. It is FHWA's recommendation that the specific agencies' rating information be shared with FHWA so that agency specific relationship issues could be identified and corrective actions could be discussed.

(N3) **Coordination with Resource Agencies**—Through interviews with resource agency staff, the audit team learned the following:

(a) Under MOU Section 7.1.1, Caltrans "agrees to seek early and appropriate coordination with all appropriate Federal, State, and local agencies in carrying out any of the responsibilities and highway projects assumed under Part 3 of this MOU." Based on information obtained during audit interviews with representatives from a USACE District office, the audit team learned that Caltrans is not conducting pre-application coordination with this office nor engaging in appropriate coordination on NEPA reviews which is limiting the agencies' flexibility to develop project alternatives and mitigation options.

(b) MOU Section 7.1.2, Caltrans "agrees to make all reasonable and good faith efforts to identify and resolve conflicts with all appropriate Federal, State, and local agencies during the consultation and review process in carrying out any of the responsibilities assumed under Part 3 of this MOU." Interviews with representatives from a Caltrans District Office, a USACE District Office, and a FWS Field Office, determined that longstanding conflicts (i.e., insufficient

information provided, lack of compliance with environmental commitments and disagreements on regulatory timeframes, action areas and compensative mitigation requirements) are not being addressed and “good faith” efforts to resolve conflicts between these Federal agencies and a few Districts are lacking. These agencies reported that due to these conflicts, efforts to carry out responsibilities under applicable Federal laws are not being implemented to the fullest extent.

(N4) Procedural and Substantive Requirements—MOU Section 5.1.4 states that Caltrans will work with all other appropriate Federal agencies concerning the laws, guidance, and policies that such other Federal agencies are responsible for administering. Project file reviews and staff interviews identified the following inconsistencies:

(a) The Section 7 consultation was incomplete and the Section 7 finding was not included in the NEPA documentation of a project’s Finding of No Significant Impacts (FONSI); and

(b) An Environmental Assessment document did not identify that the project was in a 100-year flood zone and therefore, a “practicability” finding was not made in the FONSI. As a result, the project was not in compliance with Executive Order 11988 Floodplain Management and 23 CFR 650.

(N5) Compliance with Procedural and Substantive Requirements—MOU Section 5.1 requires Caltrans to be subject to the same procedural and substantive requirements that apply to the U.S. Department of Transportation (DOT) in carrying out the responsibilities assumed under the Pilot Program. Such procedural and substantive requirements include compliance with Federal laws, Federal regulations, Executive Orders, DOT Orders, FHWA Orders, official guidance and policy issued by tDOT or FHWA, and any applicable Federal Court decisions, and interagency agreements such as programmatic agreements, memoranda of agreement, and other similar documents that relate to the environmental review process. Documentation errors during the NEPA process were noted in 11 of approximately 80 project files reviewed during the audit. Project file reviews identified incomplete or inaccurate NEPA documents and other related project materials. Some of these instances included:

(a) A FONSI that did not include a response to comments received on the Environmental Assessment regarding traffic operations and their impacts on the project;

(b) A FONSI that did not include a statement that the Section 7 consultation had been performed in compliance with the ESA;

(c) Two CE determinations failed to reference the most current noise studies performed prior to the approvals of the CEs;

(d) One CE determination failed to reference the most current traffic analysis performed prior to the approval of the CE and;

(e) A project file contained a fact sheet for the project that contained incorrect information on the level of environmental documentation. Even if this fact sheet was not released to the public, it is part of the

project file and would become part of the administrative record, and thus contain incorrect information.

(N6) Re-evaluation Process—MOU Section 5.1 requires Caltrans to be subject to the same procedural and substantive requirements that apply to DOT in carrying out the responsibilities assumed under the Pilot Program. This includes the process and documentation for conducting NEPA re-evaluations to comply with 23 CFR 771.129. Additionally, SER Chapter 33 discusses re-validations and re-evaluations. Project file reviews and staff interviews identified varying degrees of compliance with these procedures. Project file reviews completed in some Districts determined that the re-evaluations completed complied with SER Chapter 33. However, in other Districts project files identified the following inconsistencies:

(a) A re-evaluation was used to combine portions of two EISs. The FHWA re-evaluation process does not accommodate such an approach. Other elements of this re-evaluation that appeared to deviate from established procedures included: (1) A change was made to the project that was not evaluated in either of the original EISs or the subsequent re-evaluations performed on the respective projects and (2) a previous conformity determination was relied on for the segment covered by one of the EISs, whereas a new conformity determination was done on the segment from the second EIS. There was no conformity determination for the combined project;

(b) In another project file review, no evidence was found that a Section 106 Area of Potential Effect (APE) was revised after a post-final environmental document change occurred that expanded the footprint of the proposed project outside of the original APE. No documents in the project file were identified to support that Caltrans had performed an evaluation to determine if the change had an effect on the validity of the original environmental document or the Section 106 determination of effects;

(c) A re-evaluation of an original CE determination contained, as a part of the re-evaluation, the addition of another project CE determination. The District concurrently issued a Section 6005 CE for the “combined” project, without including a new project description. The project file contained the new CE with the re-evaluation attached. Documentation in the file indicated that the second project was not to be added to the original CE, since that would make the first project ineligible for a Federal funding category;

(d) A re-evaluation did not include documentation of an affirmative determination that the NEPA document was still valid; and

(e) Instances were observed by the audit team that re-evaluations were approved without the original project file or approved environmental document being in the District Office. In one instance, a re-evaluation was approved by a District without reviewing the project file or final environmental document. According to information provided to the audit team, the project file had been removed from the office and could not be located.

The audit team feels that additional clarification and guidance needs to be provided by Caltrans to the environmental staff as to the purpose and use of the re-evaluation process. A re-evaluation is done to determine if the approved environmental document or the CE designation remains valid. In the re-evaluation process, the original decision and analysis needs to be reviewed for its validity.

(N7) Section 4(f) and “Locally Significant” Historic Resources—MOU Section 5.1.1 affirms that Caltrans is subject to the same procedural and substantive requirements that apply to the DOT in carrying out the responsibilities assumed under the Pilot Program. The SER Chapter 20, *Section 4(f) and Related Requirements*, sets forth procedures for documenting impacts to Section 4(f) properties in Caltrans-assigned environmental documents, while the *Forms and Templates* section of the SER contains annotated outlines for such documents. However, the SER does not address how Caltrans should determine whether a historic resource which is significant at the local level should be considered eligible for protection under Section 4(f). In the case of one project reviewed by the audit team, it was unclear from review of the project file and from interviews with Caltrans staff what process was used for making the determination and what internal and external coordination and consultation was required. It is the audit team’s opinion that the SER should include a process to ensure consistency in the determination of the historic significance of local resources.

(N8) Training: Inconsistent Level of Training for Staff—MOU Section 12.1.1 requires Caltrans to ensure that its staff is properly trained and that training will be provided “in all appropriate areas with respect to the environmental responsibilities Caltrans has assumed.” Section 4.2.2 of the MOU also requires that Caltrans maintain adequate staff capability to effectively carry out the responsibilities it has assumed.

The audit team found an inconsistent application of the training plan for generalists in two Districts. Interviews with several SEPs in two Districts indicated that oversight or tracking of training for generalists is not uniform and identified the need for a more systematic approach. The interviews found that training attended by generalists is not consistently monitored by their SEPs, nor is the training plan consistency applied or tracked to ensure employees attend the proper training given to support the generalist’s responsibilities. While the audit team did learn that a more systematic training plan for generalists (i.e., the generalist roadmap) had recently been developed, it remains an important issue to ensure that staff attends the training prescribed by the plan to ensure they have the proper skill set to effectively carry out responsibilities under the Pilot Program.

(N9) Training: Inconsistent Understanding of Required Processes—MOU Section 4.2.2 requires Caltrans to maintain adequate organizational and staff capacity to effectively carry out the responsibilities it has assumed under MOU Section 3. The following inconsistencies were noted during interviews with Caltrans staff:

(a) Interviews with two SEPs and project file reviews indicated a lack of understanding of the Section 4(f) process and options available for implementation and documentation of the Section 4(f) process. A lack of understanding and knowledge was identified in the areas of the determination of *de minimis* impacts findings, the use of established Section 4(f) programmatic agreements, and the required documentation, evaluation, and explanation to be included in the environmental documents;

(b) Interviews with one HQ Environmental Coordinator and one SEP reflected a lack of awareness of any policy or guidance for the use of the Statute of Limitations notice and;

(c) Interviews with SEPs in two Districts reflected a lack of awareness and knowledge of the "Blanket" CE for approval of design exceptions. While the use of this may be limited, a general understanding and awareness is expected by Caltrans staff. Several SEPs either did not know of the "Blanket" CE or were unaware of how and when to use it.

Deficient

(D1) Reports Listing Approvals and Decisions (i.e., Quarterly Reports)—MOU Section 8.2.7 requires Caltrans to submit a report listing all Pilot Program approvals and decisions made with respect to responsibilities assumed under the MOU with FHWA (each quarter for the first 2 years; after the first 2 years no less than every 6 months). Caltrans has chosen to continue to provide quarterly reports to FHWA. Inaccurate project reporting continues to be an ongoing issue affecting the quarterly report process and has been identified in every previous FHWA audit report. Among the reporting errors identified in this audit were:

- (a) Omission of two EAs;
- (b) Omission of one FONSI;
- (c) Omission of a biological opinion;
- (d) Incorrect approval date for a CE determination;

(e) Incorrect listing of a re-evaluation/revalidation for a Section 6004 CE determination as Section 6005 CE determination; and

(f) Incorrectly included a re-evaluation/revalidation of a project with no Federal funding or required approvals, and therefore not a part of the Pilot Program.

The current Caltrans approach to developing the quarterly reports continues to be deficient. The accuracy of the reports on project approvals and decisions affects the FHWA oversight of the Pilot Program. The FHWA acknowledges that Caltrans is in the initial stages of statewide implementation of the File Maker Pro environmental database. It is anticipated that the implementation of this database system will improve the accuracy of information provided in the quarterly reports to FHWA.

(D2) Section 4(f) Documentation—MOU Section 5.1.1 affirms that Caltrans is subject to the same procedural and substantive requirements that apply to DOT in carrying out the responsibilities assumed under the Pilot Program. The SER Chapter 20, *Section 4(f) and Related Requirements*, sets forth procedures for documenting impacts to

Section 4(f) properties in Caltrans-assigned environmental documents, while the *Forms and Templates* section of the SER contains annotated outlines for such documents, including appropriate language for addressing *de minimis* impacts (49 U.S.C. 303(d); 23 U.S.C. 139(b); 23 CFR 774.17). As was also noted in the fourth FHWA audit of the Pilot Program, project file reviews and interviews with staff during this audit identified inconsistencies in the documentation requirements for carrying out the Section 4(f) provisions. These included:

(a) For a bridge replacement project located within a National Forest, no documentation was provided in the EA document or in the project file regarding the Section 4(f) status of the recreational facilities in the immediate project vicinity or any possible project impacts to those resources;

(b) A project file contained a letter from the official with jurisdiction over the Section 4(f) recreational resource stating the impacts to the resource would be *de minimis*. Neither the EA document nor the project file contained the supporting documentation for that determination, as required under 23 CFR 774.7(b).

(c) The Section 4(f) discussion in the environmental document of another project (for which no NEPA approval had been made at the time of the audit) was unclear as to which type of Section 4(f) documentation and approval was being contemplated. The applicable section of the EA included the discussion of four different types of Section 4(f) approvals:

1. The EA described the project as qualifying for a Nationwide Programmatic Section 4(f) evaluation, but did not reach a conclusion pursuant to the applicable Programmatic.

2. The document then included a discussion similar to what is used in an individual Section 4(f) Evaluation, including impacts to Section 4(f) properties, avoidance alternatives, and measures to minimize harm, ending by stating that no preferred alternative had been identified for the project.

3. The EA also contained a Section 4(f) constructive use discussion, which reached no conclusion.

4. Finally, the project file contained an e-mail stating that although the EA was missing expected language regarding *de minimis* impacts and a concurrence letter from the officials with jurisdiction, the Caltrans Branch Chief would sign the QA/QC sheets "with the assurance that the above items will be completed."

(D3) QA/QC Certification Process—MOU Section 8.2.5 and SER Chapter 38 require Caltrans staff to review each environmental document in accordance with the policy memorandum titled, "Environmental Document Quality Control Program under the NEPA Pilot Program" (July 2, 2007). Incomplete and incorrectly completed QC certification forms continue to be identified. During project file reviews by the audit team, the following instances of incomplete or incorrect QC certification forms since the July 2009 audit were observed:

(a) An EA and Section 4(f) Evaluation was approved contingent on changes that still needed to be made to the document;

(b) One QC certification form was approved by the Quality Control Reviewer, Preparer, and Branch Chief without the technical reviewer's signature due to pending comments;

(c) Five other QC certification forms contained undated review signatures or the signatures were not obtained in the proper sequence in accordance with the Caltrans established QA/QC processes;

(d) Two QC certification forms were missing the signatures of required reviewers. In those cases, a memo was included in the files documenting this oversight. One memo noted that the NEPA document that was approved for the project had been incomplete. No additional explanation was provided; and

(e) Two external QC certification forms contained signatures that were obtained after the internal QC certification form signatures. The SER Chapter 38 process requires the QC external certification form to be completed before the internal certification review can be initiated.

(D4) Maintenance of Project and General Administrative Files—MOU Section 8.2.4 requires Caltrans to maintain project and general administrative files pertaining to its discharge of the responsibilities assumed under the Pilot Program. Caltrans has instituted specific procedures for maintaining project files and has provided training on these procedures. Previous audits identified inconsistencies with the application of these procedures (i.e., missing required documents, missing UFS tabs) and inconsistencies throughout the Districts visited in this audit were also identified. This audit also identified inconsistencies with file maintenance in at least 15 of the approximately 80 project files reviewed. Examples of these include:

(a) Various types of required project documentation were missing from project files. Examples of missing documents included:

- Signed final environmental documents;
- Noise abatement decision report;
- Historic Properties Survey Report;
- Environmental Commitment Records;
- internal and external QC certification forms (some signed but undated);
- Signed copies of the Preliminary Environmental Analysis Report/Preliminary Environmental Scoping forms;
- Section 106 Memorandum of Agreement; and
- Information on the types of Section 4(f) resources and the projects' impacts upon them.

(b) Two instances in which the project files were not available for review; in one case, the file has been improperly disposed, while in the other case, it was uncertain whether the project file had been misplaced or had never been set up.

Response to Comments and Finalization of Report

The FHWA received no comments during the 30-day comment period for the draft audit report. Therefore, the FHWA feels that there is no need to revise the draft audit

report findings and finalizes the audit report with this notice.

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA-2010-0386]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt seventeen individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions are effective January 28, 2011. The exemptions expire on January 28, 2013.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366-4001, fmcsamedical@dot.gov, FMCSA, Room W64-224, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: <http://www.regulations.gov>.

Docket: For access to the docket to read background documents or comments, go to <http://www.regulations.gov> and/or Room W12-140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you

may visit <http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf>.

Background

On December 14, 2010, FMCSA published a notice of receipt of Federal diabetes exemption applications from seventeen individuals and requested comments from the public (75 FR 77947). The public comment period closed on January 13, 2011 and no comments were received.

FMCSA has evaluated the eligibility of the seventeen applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current standard for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that "A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control" (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled "A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century." The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible. The September 3, 2003 (68 FR 52441) **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777) **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These seventeen applicants have had ITDM over a range of 1 to 44 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5 years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes

mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision standard at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the December 14, 2010, **Federal Register** notice and they will not be repeated in this notice.

Discussion of Comment

FMCSA did not receive any comments in this proceeding.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes standard in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants from the diabetes standard in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's