

Guidance for Managing Legal Risks in the NEPA Process

This guidance is intended to assist federal and state transportation agencies in managing legal risks in the environmental review process for transportation projects, particularly highway projects, as part of a comprehensive approach to project risk management. The intended audience for this guidance includes Federal Highway Administration (FHWA) and State department of transportation (State DOT) staff, as well as the consultants who work for them in preparing environmental documents under the National Environmental Policy Act (NEPA) and related federal and state laws.

In this guidance, the term “legal risk” includes any risks related to legal requirements, including permitting delays as well as litigation-related delays.

This guidance focuses on two aspects of managing legal risks:

- Early identification and assessment of legal risks
- Effective methods for managing legal risks.

This guidance document is derived from the legal research documented in Section 2 of this report. Section 2 includes a summary of case law involving challenges to environmental reviews for transportation projects, as well as case studies of six projects in which legal risks were effectively managed. The research and this guidance document were prepared under the National Cooperative Highway Research Program (NCHRP), project 20-24(71), and is an extension of a previous effort, *Guide for Managing NEPA-Related and Other Risks in Project Delivery*, published as NCHRP Web-Only Document 183 Volume 1.

Early Identification and Assessment of Legal Risks

The premise of this guidance is that, in most cases, it is possible to identify important legal risks early in the environmental review process - and, if those risks are identified early, the transportation agencies are in a better position to manage those risks.

To assist practitioners in identifying and assessing risks, this guidance includes an annotated checklist. The checklist includes various factors that may indicate a heightened potential for legal risk. Every project is different. Practitioners should therefore use this checklist as a general guide, and not as an exhaustive list of the potential risks that could face a particular project.

The identification and evaluation of risks should be a team effort. It may involve a single risk-assessment meeting, or a longer-term, iterative process in which team members identify and discuss potential risks. Either way, it is helpful to involve multiple team members, because the sharing of information helps to uncover facts that may indicate the presence of legal risks. The involvement of multiple team members, with varying background and experience, reduces the risk of blind spots and the risk of greatly understating or overstating the magnitude of risks.

Methods for Managing Legal Risks

This guidance summarizes a range of strategies that federal and state transportation agencies have used to manage legal risks on complex projects. Many of these strategies may seem obvious, but experience shows that applying these strategies effectively - and in a timely manner - takes considerable forethought and discipline.

By compiling these common strategies in one document, this guidance is intended to give practitioners an easy-to-use menu of risk management options. Of course, not every strategy is appropriate for every project. These strategies can be adapted, as appropriate, to the circumstances of each project.

1. Build a Strong Project Team

- Establish a small core team responsible for managing preparation of the NEPA document and related technical studies. Consider including the FHWA environmental lead, the State DOT project manager, the consultant project manager, and legal counsel.
- Convene regular meetings of the core project team (in person or by phone) and allow time for discussion of difficult/contentious issues related to the NEPA document - e.g., disputes over whether which data to use, whether to change the methodology, how to respond to criticism from an agency or stakeholder.
- Encourage a culture of open discussion, probing questions and even debate within the project team; discourage group-think.
- Engage a technical editor to review all chapters of the NEPA document and relevant technical reports for clarity and readability, especially on issues that may become the subject of litigation.
- Ensure that the project team includes technical experts with strong experience in each of the subject areas that involve potential legal risks.
- Include experienced legal counsel on the project team to assist in assessing legal risks, reviewing NEPA documents, and responding to comments.

2. Take Time to Prepare Before Initiating the NEPA Process

- After the project team is established, take time to prepare for the NEPA process, rather than initiating the process immediately. Don't rush to issue the Notice of Intent just as a way to show progress.
- Preparing for the NEPA process may include activities such as:
 - Develop a written plan that outlines the team's overall approach to the NEPA process, focusing on how NEPA requirements will be integrated with consultation and permitting requirements under other laws.
 - Gather previous studies and assess their role in the NEPA process, including the potential to adopt decisions or analyses from those studies.
 - Assess the adequacy of existing transportation models for use in the NEPA process, and allow time to make any necessary improvements before the NEPA process begins.
 - Assess the adequacy of existing environmental data, including any geographic information systems (GIS) databases. If gaps are found, determine how much time is needed to fill the gaps.
 - Consider opportunities to use programmatic approaches to streamline the NEPA process.
 - Establish working relationships within the project team (including between State DOT and FHWA), including team meeting schedules.
 - Meet with regulatory and resource agencies to brief them on the project, assess their level of interest, and identify any potential concerns.

- Train the project team on issues related to document management, public-records laws, administrative records, and litigation preparation.

3. Conduct a Legal Issue Assessment Early in the NEPA Process

- Convene a team of experts (including legal counsel), early in the NEPA process, to conduct a legal issue assessment and develop a plan for responding to the identified risks.
- Conduct an open-ended discussion of legal risk with the project team; following that discussion, review and complete the “Legal Risk Assessment Checklist” (Attachment 1 to this Guidance).
- Don’t assume that there will be no controversy just because you are not seeing it up-front.
- The legal issue assessment should ask:
 - What legal or regulatory challenges are possible?
 - How likely are they to happen?
 - What can be done in advance to reduce the likelihood?
 - What should be done if and when it did happen?
- Update the legal issue assessment at key milestones during the NEPA process - e.g., after receiving comments on the DEIS.
- Refer to the legal issue assessment when evaluating the legal sufficiency of NEPA documents and in responding to comments on NEPA documents.

4. Actively Engage with All Stakeholders

- Build relationships with key stakeholders early in the process, even before the NEPA process begins - e.g., with a collaborative planning exercise that examines future transportation and land use scenarios.
- Be proactive in including and welcoming those who may oppose the project. It is useful to engage early with potential adversaries to both explore opportunities to avoid a legal challenge and to become aware of the issues likely to arise if there is such a challenge.
- Maintain a consistent two-way flow of information with key stakeholder groups, through formal and informal channels.
- Seek to understand the relationships between non-governmental stakeholders and public agencies.
- Seek to understand underlying issues and concerns regarding the project, not just the specific concerns expressed about the analysis in the NEPA document.
- Use multiple channels to communicate with the public throughout the NEPA process. Do not become overly reliant on a single channel, such as the project website or public meetings.
- Customize the public involvement activities to meet the needs of special populations such as low-income, minority, elderly, and limited-English proficiency.
- Consider creating smaller-group settings - e.g., task forces, advisory committees, etc. - in which individuals from varying perspectives can meet to provide input and/or seek to resolve disputed issues.
- Document meetings with stakeholders and provide participants with drafts of meeting summaries for them to review.

5. Coordinate Early and Often with Resource Agencies

- Establish an interagency group of “principals” who meet on a regular basis to discuss and resolve issues that could not be resolved at the staff level, with or without a mediator.
- Establish an interagency working group to address technical issues related to the NEPA document and project permitting.

- Meet with agencies, after receiving comments on DEIS, to discuss their concerns and how they might be addressed, rather than just responding to their comments in writing in the FEIS.
 - Provide opportunities for resource agencies to review and comment on drafts of technical reports and relevant chapters of the NEPA document while the documents are in production. Take particular care to address comments of cooperating agencies. Establish protocols for sharing documents that are consistent with maintaining confidentiality as well as complying with public-record requirements.
6. Use the Scoping Process Effectively
- Consider potential segmentation risks when determining the project termini, prior to issuing the Notice of Intent to prepare the EIS.
 - Use the scoping process to re-assess the project scope and determine whether expansion (or narrowing) is appropriate. Issues such as project termini and range of alternatives are often a major focus of NEPA litigation.
 - Incorporate avoidance, minimization, mitigation, and enhancement measures into the alternatives from the outset, rather than doing so only in response to specific legal requirements or demands from agencies or stakeholders.
 - Inform agencies and the public of decisions made regarding the scope of analysis and methodology for the NEPA document after scoping comments have been evaluated.
7. Use Collaboration and Dispute-Resolution Techniques
- Consider whether it would be helpful to engage expert assistance from qualified neutrals to keep the collaboration process positive and on track.
 - Be willing to take a step back and re-assess alternatives during the NEPA process when faced with strong public opposition or when presented with new ideas that have the potential to be reasonable alternatives.
 - When faced with an impasse, consider convening a stakeholder task force (or other stakeholder group) to receive input and seek to develop consensus on difficult issues, with or without a mediator.
 - Ensure the team members with appropriate technical expertise present or readily available when meeting with agencies and stakeholders.
 - Consider adding or refining alternatives in response to specific requests from agencies or stakeholders, especially when there is substantial public interest in an alternative.
 - Consider conducting special studies to address specific environmental issues that have become a particular area of interest among agencies or groups.
8. Prepare a Readable, High-Quality NEPA Document
- Ensure that the purpose and need statement is clearly articulated and that each element of the purpose and need is well-supported with relevant data.
 - When developing the purpose and need, think about what measures will be used to evaluate the alternatives' ability to meet the purpose and need.
 - Include citations to relevant data supporting the purpose and need.
 - Use visuals to complement the data, illustrating the purpose and need.
 - Provide an opportunity for public and agency comment on the draft purpose and need statement, and address any comments received.
 - Establish a systematic and objective process for screening alternatives, tailored to the circumstances of the project, and describe the steps in that process (not just the results) in the NEPA document.

- Use the scoping process to generate a wide range of potential alternatives for consideration in the screening process.
- Before screening begins, develop and document the methodology that will be used in the screening process, including screening criteria.
- Ensure that reasons for eliminating alternatives are consistent with the Council on Environmental Quality regulations and guidance.
- If the screening criteria are changed or new data is obtained after screening has occurred, consider whether to “re-screen” alternatives to ensure that previous decisions remain valid.
- Provide an opportunity for public and agency comment on the screening methodology and screening results, and address any comments received.
- Document the methodologies used in the environmental impact analysis, using language that can be understood by non-technical readers. “Show your work.”
- When relying on previous studies, such as planning documents, take care to ensure that the data remains current and that the findings are appropriate for use in the NEPA process.
- Give close attention to issues that are frequently litigated, even if they are not heavily emphasized in comments during the NEPA process.
- Ensure that responses to comments on the NEPA document are well-organized, thorough, and easy to cross-reference to the comments.
- Have the lead agency’s experts prepare thorough technical responses to expert reports submitted by commenters (e.g., on traffic modeling.)
- Use a reader-friendly format for the NEPA document to make it easier for elected officials and the public (and potentially judges and their law clerks) to understand the analysis and conclusions.
- Acknowledge the limitations of quantitative methods that are used to analyze environmental impacts - e.g., the difficulty of quantifying changes that are subjective, such as visual impacts or community cohesion impacts.
- Utilize legal counsel throughout the preparation of the NEPA document to assist in developing a legally sufficient document and a strong administrative record.
- Hold regular meetings with legal counsel during development of the NEPA document to obtain legal advice as decisions are being made, rather than obtaining legal advice only after it is submitted for legal sufficiency review.
- Review the main body of the NEPA document and all technical reports for inconsistencies - both within each document, and between the main body and the technical reports.

9. Anticipate the Need to Prepare an Administrative Record

- Provide training to project team members regarding confidentiality, public-record requests, and administrative records.
- Provide training to project team members regarding legal requirements and case law relevant to issues identified in the risk assessment.
- Establish a protocol for maintaining an organized, up-to-date project file throughout the NEPA process.
- Regularly review the project file to ensure that filing protocols are being followed.
- Begin preparing an administrative record when the NEPA process is approaching completion.
- Seek to have the administrative record completed before the end of the 150-day statute-of-limitations period for challenges to the ROD.

10. Anticipate and Manage Post-NEPA Litigation Risks

- After the completion of the NEPA process, remain alert for developments that could give rise to the need for a reevaluation or supplemental EIS; avoid taking actions that inadvertently create new opportunities for litigation.
- Where necessary, prepare reevaluations or supplemental NEPA documents to address new information or changes in the project.
- Establish an environmental commitments database to track implementation of commitments made in the NEPA document, in order to avoid the delays or other risks that could result if commitments are not implemented.

Legal Risk Assessment Checklist for Transportation Projects

| # | Issue | Indicators of Higher Risk | √ |
|-----------|----------------------|--|--------------------------|
| 1. | The Project | | |
| 1.1 | NEPA Class of Action | <ul style="list-style-type: none"> • The project requires an EIS. • An EA/FONSI is anticipated, but the appropriateness of a FONSI is a close call. | <input type="checkbox"/> |
| 1.2 | Capacity Expansion | <ul style="list-style-type: none"> • The project involves construction on new location. • The project involves a major expansion of capacity on an existing facility. | <input type="checkbox"/> |
| 1.3 | Project History | <ul style="list-style-type: none"> • The project has a lengthy, complex history - e.g., numerous planning studies and/or previous unsuccessful environmental studies. | <input type="checkbox"/> |
| 1.4 | Multi-State | <ul style="list-style-type: none"> • The project is located in two or more States, and thus has two or more States as project sponsors. | <input type="checkbox"/> |
| 1.5 | Multi-Modal | <ul style="list-style-type: none"> • The project requires approval of two or more modal agencies within USDOT. | <input type="checkbox"/> |
| 1.6 | Multi-Agency | <ul style="list-style-type: none"> • The project requires approval from other federal agencies, in addition to USDOT - e.g., U.S. Army Corps of Engineers, U.S. Coast Guard, etc. | <input type="checkbox"/> |
| 1.7 | Study Area | <ul style="list-style-type: none"> • The project involves a very large study area - e.g., a multiple counties or multiple States. | <input type="checkbox"/> |
| 1.8 | Media Attention | <ul style="list-style-type: none"> • The project has attracted a high degree of media attention in the project area. | <input type="checkbox"/> |
| 1.9 | Public Opinion | <ul style="list-style-type: none"> • Public opinion about the project is polarized, with well-defined groups of advocates and opponents. | <input type="checkbox"/> |
| 2. | Funding | | |

| # | Issue | Indicators of Higher Risk | √ |
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| 2.1 | Funding Gap | <ul style="list-style-type: none"> • There is a large gap between available funds and estimated project costs. • There is substantial uncertainty and/or political controversy about how to pay for the project. | <input type="checkbox"/> |
| 2.2 | Tolling | <ul style="list-style-type: none"> • The project involves a proposal to toll an existing non-tolled facility, or to construct a new toll facility. • The project involves tolling and is located in an area where tolling has become controversial. | <input type="checkbox"/> |
| 2.3 | “Major Project” | <ul style="list-style-type: none"> • The project has an estimated cost of \$500 million or more - i.e., a ‘major project’ under 23 USC 106. | <input type="checkbox"/> |
| 3. Purpose and Need | | | |
| 3.1 | Clarity and Consistency | <ul style="list-style-type: none"> • The Purpose and Need is not well-defined at the outset of the NEPA process - e.g., there is only a vague statement of purpose, or there are multiple, conflicting statements of purpose. • The Purpose and Need has been modified several times, before or during the NEPA process. • The project definition (e.g., project termini, major project elements) has changed one or more times during the NEPA process. | <input type="checkbox"/> |
| 3.2 | Data Quality | <ul style="list-style-type: none"> • The data underlying the Purpose and Need is incomplete or outdated at the outset of the NEPA process - e.g., old traffic forecasts. | <input type="checkbox"/> |
| 3.3 | Model Quality | <ul style="list-style-type: none"> • Questions have been raised by agencies or stakeholders regarding the traffic forecasts used to support the Purpose and Need - e.g., claiming that forecasts are overstated. | <input type="checkbox"/> |
| 3.4 | Reliance on Previous Studies | <ul style="list-style-type: none"> • Considerable time has passed since the previous studies were completed. • There is disagreement among agencies about whether those studies can be relied on as the basis for the P&N. | <input type="checkbox"/> |
| 4. Alternatives | | | |
| 4.1 | Mode | <ul style="list-style-type: none"> • Transportation mode has not been resolved in the planning process, prior to initiation of NEPA. | <input type="checkbox"/> |

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| 4.2 | Number | <ul style="list-style-type: none"> The number of potentially reasonable alternatives is very large - e.g., a vast number of potential alignments within a large geographic area. | <input type="checkbox"/> |
| 4.3 | Design Standards | <ul style="list-style-type: none"> There is disagreement regarding the design standards that alternatives must meet - e.g., ability to avoid impacts by modifying design. | <input type="checkbox"/> |
| 4.4 | Reliance on Previous Studies | <ul style="list-style-type: none"> Considerable time has passed since the previous studies were completed. There is disagreement among agencies about whether it is appropriate to rely on those studies as the basis for eliminating alternatives. | <input type="checkbox"/> |
| 5. Project Impacts | | | |
| 5.1 | Community Impacts | <ul style="list-style-type: none"> The project is located in a densely populated area, such as urban neighborhoods. | <input type="checkbox"/> |
| 5.2 | Environmental Justice | <ul style="list-style-type: none"> The project is located in or near areas with large minority and/or low-income populations. Representatives of low-income or minority communities have expressed opposition to or concerns about the project. | <input type="checkbox"/> |
| 5.3 | Historic Properties | <ul style="list-style-type: none"> The project is located in an area with numerous historic properties - e.g., an urban corridor with multiple historic buildings and historic districts. The project is located in an area that will require extensive efforts to identify and evaluate potential historic properties (e.g., a lengthy corridor). The project is located in an area with one or more extremely well-known historic properties - e.g., a famous battlefield. Section 106 consultation is expected to involve a large number of consulting parties. Historic preservation groups have expressed opposition to the project based on its potential impacts on historic properties. | <input type="checkbox"/> |
| 5.4 | Tribal Issues | <ul style="list-style-type: none"> Resources of important to Indian tribes are located in the project area (even if the project is not located on Indian lands). A portion of the project crosses Indian lands, and therefore cannot be built without permission from one or more Indian tribes. Indian tribes are expected to take a strong interest in the project. | <input type="checkbox"/> |

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| 5.5 | Section 4(f) | <ul style="list-style-type: none"> The project is likely to require a 'full' Section 4(f) evaluation because it will use lands from parks, recreation areas, refuges, or historic sites (and the impacts are not 'de minimis'). There is controversy regarding the applicability of Section 4(f) to a property. There is controversy regarding the availability of prudent and feasible alternatives for avoiding the use of Section 4(f) properties. There is controversy regarding the potential for constructive use of Section 4(f) properties. | □ |
| 5.6 | Wetlands & Floodplains | <ul style="list-style-type: none"> The project is likely to require an individual permit under Section 404 of the Clean Water Act for impacts to wetlands or other waters of the U.S. The project involves extensive impacts to sensitive/high-value wetlands complexes or floodplains. Alternatives that avoid or reduce impacts to wetlands are available, but are not considered unacceptable by the project sponsor. Agencies involved in Section 404 permitting have declared that a specific alternative cannot be approved or is highly unlikely to be approved. | □ |
| 5.7 | Endangered Species | <ul style="list-style-type: none"> Federally listed threatened or endangered species are known to be present in the project area. The project area includes designated 'critical habitat' for federally listed species. The project is likely to require formal consultation under Section 7 of the Endangered Species Act. | □ |
| 5.8 | Air Quality Conformity | <ul style="list-style-type: none"> There is uncertainty about whether a conformity determination can be made for the project - i.e., will emissions be too high to meet conformity? There is controversy (or expected controversy) regarding the appropriate methodology for the conformity analysis - e.g., which model to use. The air quality analysis indicates that the project, as proposed, does not conform to air quality plans. | □ |

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| 5.9 | MSATs | <ul style="list-style-type: none"> The project is likely to require a quantitative analysis of mobile source air toxics (MSATs) - e.g., it involves a high volume of diesel truck traffic in close proximity to residential populations. | <input type="checkbox"/> |
| 5.10 | Induced Growth | <ul style="list-style-type: none"> The project has the potential to cause induced growth - e.g., it provides new transportation service on the periphery of a developed area. Stakeholders have publicly raised concerns about the project's potential to cause 'sprawl'. Agencies or stakeholders raise questions about the reliability of the methods used to predict induced growth - e.g., claiming that a different model should have been used. | <input type="checkbox"/> |
| 5.11 | Cumulative Impacts | <ul style="list-style-type: none"> The project area includes sensitive resources that are being affected by multiple projects. There is uncertainty or disagreement about which projects or resources need to be considered in the cumulative impacts analysis. There is uncertainty or disagreement about the methods that should be used for analyzing cumulative impacts - e.g., whether to address them qualitatively or quantitatively. | <input type="checkbox"/> |
| 5.12 | Regulated Resources | <ul style="list-style-type: none"> The project involves impacts on other resources that are subject to specific regulatory protection under Federal or State laws, such as: <ul style="list-style-type: none"> Wild and Scenic Rivers Coastal Zones Wilderness Areas Roadless Areas in National Forests The project involves unusual permitting issues - e.g., approval for a project to cross an international border. The project is subject to new or recently modified statutes or regulations. | <input type="checkbox"/> |

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| 5.13 | Emerging Issues | <ul style="list-style-type: none"> • There is uncertainty or disagreement about whether an environmental issue should be analyzed and/or about what methodology should be used. Potential examples: <ul style="list-style-type: none"> ○ Contribution to climate change through increased greenhouse gas emissions ○ Effects of climate change on the project (e.g., sea level rise) ○ Health effects based on project's potential to affect human behavior ○ Health effects resulting from air pollution | <input type="checkbox"/> |
| 6. Agencies and Stakeholders | | | |
| 6.1 | Local Governments | <ul style="list-style-type: none"> • Local governments and/or local elected officials have expressed opposition to and/or strong concerns about the project. | <input type="checkbox"/> |
| 6.2 | MPOs | <ul style="list-style-type: none"> • The MPO (if applicable) has expressed opposition to and/or strong concerns about including the project in the long-range plan and TIP. | <input type="checkbox"/> |
| 6.3 | Regulatory Agencies | <ul style="list-style-type: none"> • Federal or State regulatory agencies have expressed opposition to and/or strong concerns about the project. | <input type="checkbox"/> |
| 6.4 | Community Groups | <ul style="list-style-type: none"> • Community groups - e.g., homeowners' associations - have expressed opposition to and/or strong concerns about the project. | <input type="checkbox"/> |
| 6.5 | Interest Groups | <ul style="list-style-type: none"> • Interest groups - e.g., environmental or historic preservation groups - have expressed opposition to the project or strong concerns about the project. • New stakeholders emerge and raise new issues and concerns late in the NEPA process. | <input type="checkbox"/> |
| 6.6 | Legal Counsel | <ul style="list-style-type: none"> • Stakeholders have retained legal counsel to assist in preparing comments in the NEPA process for the project and/or initiating litigation. | <input type="checkbox"/> |
| 6.7 | Public-Record Requests | <ul style="list-style-type: none"> • Individuals or groups interested in the project have submitted multiple public-record requests (under FOIA or State laws) for documents related to the project. | <input type="checkbox"/> |
| 7. Project Team Capabilities | | | |

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| 7.1 | Experience | <ul style="list-style-type: none"> The project team lacks experience with managing the NEPA process for complex, controversial projects. | <input type="checkbox"/> |
| 7.2 | Support | <ul style="list-style-type: none"> The project lacks high-level support within the government entities responsible for developing and funding the project. | <input type="checkbox"/> |
| 7.3 | Relationships | <ul style="list-style-type: none"> The project sponsor and lead agency do not have strong working relationships with one another. | <input type="checkbox"/> |