

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2010–0046; Notice No. 10–1]

Safety Advisory Notice: Use of Composite Cargo Tanks Manufactured Under DOT Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA).

ACTION: Safety advisory notice.

SUMMARY: This safety advisory is issued to remind all persons who manufacture or use composite cargo tank motor vehicles authorized under DOT special permits of the requirement to conduct

testing to ensure that the material to be transported in the cargo tank is compatible with the materials used in the construction of the cargo tank.

FOR FURTHER INFORMATION CONTACT: Charles Hochman, Senior Advisor (Technology), Pipeline and Hazardous Materials Safety Administration, (202) 366–4545 or Donald Burger, Chief, Special Permits and General Approvals, Pipeline and Hazardous Materials Safety Administration, (202) 366–4535.

SUPPLEMENTARY INFORMATION: The Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) contain specifications for the design and construction of cargo tank motor vehicles in Part 178, Subpart J (see §§ 178.320–178). Currently, the HMR do not contain include a specification for composite cargo tanks, such as fiber

reinforced plastic (FRP) or glass fiber reinforced plastic (GFRP) cargo tanks.

Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*) authorizes the Department of Transportation to issue variances—termed special permits—from the HMR in a way that achieves a safety level at least equal to the safety level required under Federal hazmat law or consistent with the public interest and Federal hazmat law, if a required safety level does not exist. That authority is delegated to the Pipeline and Hazardous Materials Safety Administration (PHMSA).

PHMSA has issued the following special permits (SPs) for the manufacture, marking, sale, and use of FRP or GFRP cargo tank motor vehicles:

SP number	Holder	Status	Expiration date
9166	Comptank Corp.	Expired	12/31/2009
10878	Tankcon FRP	Active	9/30/2010
11565	C.P.F. Dualam	Active	3/31/2010
11903	Comptank Corp.	Active	10/31/2010
12516	Poly-Coat Systems	Active	11/30/2010
14275	Hawk Corp.	Active	12/31/2011
14277	Ascus Technology	Active	11/30/2012
14779	Corrosion Companies	Active	11/30/2011

On December 30, 2009, a glass fiber reinforced plastic composite cargo tank manufactured in accordance with a special permit (DOT–SP 11903) failed catastrophically and released its entire contents onto the highway. PHMSA’s investigation of the accident concluded that the failure resulted from the carriage of a material in the cargo tank that was incompatible with the materials used in the manufacture of the cargo tank. The material in question reacted with and degraded the corrosion barrier and the structural glass matrix of the tank leading to catastrophic failure.

As demonstrated by the by the December 30, 2009 incident, the shipment of a material that is not compatible with the corrosion barrier and structural glass matrix of a composite cargo tank can lead to a catastrophic failure and potentially cause serious injuries, fatalities, and property and environmental damage. All of the special permits identified above contain the following requirement:

The compatibility of the commodities and the (FRP or GFRP) cargo tank must be based on ASTM C 581 “Standard Test Method for Chemical Resistance of Thermosetting Resins Used in Glass Fiber Reinforced Structures”. Test reports must be maintained by the owner or manufacturer for as long as the cargo tank remains in active service.

PHMSA is concerned that owners and manufacturers of composite cargo tanks are not performing the required compatibility testing or maintaining test reports. To prevent another incident similar to the one that occurred on December 20, 2009, this advisory reminds all persons involved in the manufacture and use of composite cargo tank motor vehicles authorized under DOT special permits of the requirement to perform compatibility testing. Failure to perform the required compatibility testing and to maintain the test reports may result in the suspension or termination of the special permit as well as civil or criminal penalties.

Persons who offer for transportation or transport hazardous materials in violation of applicable HMR requirements may be subject to significant civil penalties and criminal fines and imprisonment. The maximum penalties depend on several factors, including the nature and circumstances, extent and gravity, and severity of the consequences of the violation, but can range up to \$100,000 for a civil penalty

and \$500,000 and ten years in jail for a criminal penalty.

Magdy El-Sibaie,
Acting Associate Administrator for Hazardous Materials Safety.

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA–2009–0119]

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 fourth FHWA audit of the California

Department of Transportation (Caltrans) under the pilot program.

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

SUPPLEMENTARY INFORMATION:

Electronic Access

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

Background

Section 6005 of 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 fourth audit report in a **Federal Register** Notice published on December 23, 2009, at 74 FR 68308. The FHWA received no comments. This notice provides the final draft of the fourth 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: February 23, 2010.

Victor M. Mendez,
Administrator.

Surface Transportation Project Delivery Pilot Program Federal Highway Administration Audit of California Department of Transportation July 27-31, 2009

Introduction

Overall Audit Opinion

Based on the information reviewed, it is the Federal Highway Administration (FHWA) audit team's opinion that as of July 31, the California Department of Transportation (Caltrans) has 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 the Caltrans Application for Assumption (Application).

With the completion of FHWA's fourth audit, Caltrans has been operating under the Pilot Program for 2 years. In compliance with the time specifications for the required audits, FHWA has completed the four semiannual audits in the first 2 years of State participation. As required under the Pilot Program, FHWA audits of Caltrans will now be on an annual basis. During the four audits conducted, the audit team has completed on-site audits at 9 of the 12 Caltrans Districts and the remaining Districts were within the scope of the Caltrans Regional Offices that were audited. The audit team continues to identify significant differences across the Districts in terms of the Pilot Program. Example of such differences include: resource availability and allocation; methods of implementation; processes and their improvement; and progress toward meeting all commitments. It is the audit team's opinion that the highly decentralized nature of Caltrans' operations is a major contributing factor to the variation observed. The decentralized nature of the organization necessitates clear, consistent, and ongoing oversight by Caltrans Headquarters over Districts' implementation and operation of the Pilot Program. 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 meet all Pilot Program commitments.

The FHWA commends Caltrans for its implementation of corrective actions in response to previous audit findings. However, these corrective actions and "fixes" have been put into practice on a case-by-case basis. The FHWA recommends that Caltrans develop a departmentwide, holistic corrective action management approach and system that will develop and implement an internal process review to determine needed improvements to existing processes and procedures.

Due to the multiyear timeframes associated with more complex and controversial projects, the full lifecycle of the environmental review aspect of project 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 fully realized within the period of the Pilot Program. Over the past 2 years, the FHWA California Division has continued to execute the FHWA role for 22 project reviews and decisions excluded from the Pilot Program. Caltrans continues to gain experience in understanding the resource requirements and processes necessary to administer its Pilot Program. It is the audit team's opinion that Caltrans needs to continue to refine its approaches and resources to meet all Pilot Program commitments, especially given the likelihood of increasing resource demands associated with exclusively managing ever-more complex and controversial projects under the Pilot Program.

During the on-site audit, Caltrans staff and management continued to express ongoing interest in receiving feedback from the FHWA audit team related to program successes and areas in need of improvement. By addressing all findings in this report, Caltrans will continue to move its program toward full compliance with all assumed responsibilities and meeting all Pilot Program commitments.

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 the audit and make determinations of Caltrans successful participation in having met its commitments under the Pilot Program

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

during the four audits conducted have been further limited by the following:

- Not every District was audited.

Each audit (including this audit) consisted of visits to selected Caltrans Districts.

- Incomplete project files. Project files and associated project documentation have, when reviewed, not always been complete (*i.e.*, a full administrative record was not always available for review by the auditor team). This is especially true for projects where the project or related studies were initiated prior to commencement of the Pilot Program.

- The limited scope of Pilot Program activity to date conducted by Caltrans. Since Caltrans has not been operating under the Pilot Program for the period of time that is generally agreed to be required to complete the full lifecycle of most Environmental Impact Statements (EIS) and other complex projects, FHWA is not yet able to fully determine how Caltrans complies with all the responsibilities assumed in those project situations.

- Insufficient data to determine time savings. Similarly, it is too early in Caltrans' participation in the Pilot Program, and there is not enough data available, for FHWA to be able to report conclusively on time savings being achieved as a result of Caltrans participation in the Pilot Program.

- Lack of ability to view legal comments provided by Caltrans staff attorneys. As in prior audits, Caltrans did not permit access to its attorneys' written comments on assigned environmental documents. The inability to document the existence (not the substance) of such comments has made it difficult for the audit team to determine if the legal sufficiency process is being implemented in an effective—as opposed to a timely—manner. While recognizing Caltrans' expressed concerns about the attorney-client privilege and acknowledging the dialogue that has taken place regarding these concerns and the appropriate documentation of this process, the audit team, mindful of the provisions of 23 CFR 1.5 as well as sections 8.1.6, 8.2.2, and 8.2.4 of the MOU, is considering whether documentation beyond the timeline provided by Caltrans Legal Division's Legal Information Computer System database and individual findings of legal sufficiency is necessary for FHWA to evaluate fully Caltrans' compliance with these requirements.

- Distinction between the two Categorical Exclusion (CE) assumption processes. Since the assumption by Caltrans of the Safe, Accountable, Flexible, Efficient Transportation Equity

Act: A Legacy for Users (SAFETEA—LU, Pub. L. 109–59) 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. Since the quarterly reports continue to contain errors, it is difficult to have confidence that all National Environmental Policy Act (NEPA) documents have been reported and thus can be part of the FHWA audit plans.

Background

The SAFETEA—LU Section 6005(a) established the Pilot Program, codified at title 23, United States Code, section 327. The Pilot Program allows the Secretary of Transportation (Secretary) to assign, and the State to assume, the Secretary's responsibilities under 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 that is 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. The FHWA solicited comments on the fourth audit report in a **Federal Register** Notice

published December 22, 2009, at 74 FR 68308. The FHWA received no comments during the comment period. This notice provides the final draft of the fourth FHWA audit report for Caltrans under the pilot program.

Caltrans published its Application under the Pilot Program on March 14, 2007, and made it available for public comment for 30 days. After considering public comments, Caltrans submitted its Application to FHWA on May 21, 2007, and FHWA, after soliciting the views of Federal agencies, reviewed and approved the Application. Then on June 29, 2007, Caltrans and FHWA entered into an MOU that established the assignments to and assumptions of responsibility to Caltrans, which became effective July 1, 2007. Under the MOU, Caltrans assumed the majority of FHWA's responsibilities under NEPA, as well as FHWA's responsibilities under other Federal environmental laws for most highway projects in California. Caltrans' participation in the Pilot Program is effective through August 2011 (23 U.S.C 327(i)(1)).

Scope of the Audit

This is the fourth FHWA audit of the Caltrans Pilot Program. The on-site portion of the audit was conducted in California from July 27 through July 31, 2009. 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 administering a successful Pilot Program.

The audit primarily focused on the continued review of compliance with assumed responsibilities.

Prior to the on-site audit, FHWA conducted telephone interviews with Federal resource agency staff at the U.S. Army Corps of Engineers (USACE), the U.S. Fish and Wildlife Service (USFWS), the National Park Service, the National Oceanic and Atmospheric Administration and the Environmental Protection Agency regional office in California. The on-site audit included visits to the Caltrans Offices in District 5 (San Luis Obispo), District 7 (Los Angeles), District 11 (San Diego), and District 12 (Irvine). Additionally, Caltrans legal staff was interviewed in Sacramento and USACE office in Irvine was visited.

This report documents findings within the scope of the audit as of the completion date of the on-site audit on July 31, 2009.

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

The FHWA team for the fourth 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
- USFWS.

During the onsite audit, FHWA interviewed 80 staff from the Caltrans four District offices, Caltrans legal staff, and the USACE. The audit team interviewed a cross-section of staff including top senior managers, senior

environmental planners, generalists, associate planners, and technical experts. The audit team also reviewed project files and records for over 45 projects managed under the Pilot Program.

The FHWA acknowledges that Caltrans identified specific issues during its fourth self-assessment performed under the Pilot Program (required by MOU section 8.2.6), and has established processes to address most 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.

Status of Findings Since Last Audit

As part of the fourth audit, FHWA evaluated the corrective actions implemented by Caltrans in response to the audit findings in the third audit report.

Most of the compliant findings in the third audit report involved specific processes and procedures of the North and Central Region offices. As these offices were not visited during this fourth audit, we cannot report on the continuance of their compliance.

The FHWA reviewed the current status of "Deficient" and "Needs Improvement" audit findings identified during the third FHWA audit in January 2009.

"Deficient" audit findings status:

1. *Quarterly Reports*—The quarterly reports Caltrans provides to FHWA under section 8.2.7 of the MOU continue to include an inaccurate listing of all approvals and decisions under the Pilot Program. This continued area of deficiency was also reported by Caltrans in their fourth self assessment.

2. *Performance Measure*—"Monitor relationships with Federal and State resource agencies"—Caltrans reported in its fourth self-assessment that a survey was conducted in early 2009 with those Federal and State resource agencies that it works with on Pilot Program projects.

3. *Delegation of Signature Authority*—This issue has been rectified through issuance of clarifying direction to staff.

4. *Assignment of Section 6002 Responsibility under the Pilot Program*—Caltrans has revised its *Standard Environmental Reference* (SER) to correct and clarify the template letters for inviting cooperating and

participating agencies to participate in an EIS project, as per section 6002 of SAFETEA—LU.

"Needs Improvement" audit findings:

1. *Quality Assurance/Quality Control (QA/QC) Certification Process*—Ongoing improvement was observed in the completion of the QC certification forms. Nevertheless incorrect and incomplete QC certification forms were still identified.

2. *Self Assessment and Process Reviews*—As per the suggestion of this finding, the Caltrans fourth self assessment included review of ongoing projects as well as completed projects.

3. *Air Quality Conformity Determinations*—The project files reviewed during the fourth audit contained the necessary FHWA air quality conformity determination documentation, where applicable.

4. *Project Files/Uniform File System (UFS)*—Some project files reviewed during this audit met the requirements of Section 8.2.4 of the MOU and SER Chapter 38 while other files reviewed did not meet these requirements.

5. *Commitment of Resources*—Inconsistencies continued to be observed with regard to charging time spent on pilot program activities to the official Pilot Program code (6DELE).

6. *Training on Air Quality Conformity*—Caltrans reported in its fourth self assessment that Air Quality training has been offered and is to be provided in the upcoming training plan.

7. *Assignments under the Pilot Program*—Caltrans staff interviewed indicated a better understanding of the SAFETEA—LU Section 6002 (23 U.S.C. 139) environmental review process requirements than indicated in the third audit.

8. *Performance Measure*—"Monitor relationships with the general public"—The fourth Caltrans self assessment reported a new process for monitoring this performance measure had been implemented. Monitoring of how the relationships are evolving is now being conducted.

9. *Documentation of Class of Action Determination*—For projects initiated under the Pilot Program, project files for class of action determination reviewed during the fourth audit, contained this documentation.

10. *Local Assistance Training Plan*—This finding was not revisited as to its status during the fourth audit.

Effective Practices

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

1. One Caltrans District training coordinator implemented a system to

capture and track which employees in that district completed online training courses by creating and assigning a unique billing code for time spent taking such courses. This training coordinator then manually input this information into an employee's training plans.

2. In some Districts, electronic files are set up and organized to mirror the UFS headings.

3. In one Caltrans District, new environmental staff are required to attend an internal 23-day "boot camp" that introduces them to the processes, procedures, and related information needed for their position.

4. The use of a memorandum to the file with a complete explanation of the circumstances and details regarding the "down-scoping" of a project from an EIS to an environmental assessment (EA), or from an EA to a CE.

5. Explanatory notes in a project file under one UFS tab stating where the information for that tab is found filed under another tab within the project file.

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 fourth audit report is from the start of the Caltrans Pilot Program (July 1, 2007) through completion of the third onsite audit (July 31, 2009) with the focus of the audit on the most recent 6 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 2009

Compliant

C1) **Legal Sufficiency Timeline**—Caltrans' Legal Division has developed a consistent process to conduct required legal sufficiency reviews by attorneys (per 23 CFR 771.125(b) and 774.7(d)). Based on interviews with staff and information provided during the audit, legal reviews of NEPA and Section 4(f) of the U.S. DOT Act of 1966 (Section 4(f)) documents appear to be conducted within the times allotted by Caltrans internal performance goals.

Needs Improvement

N1) **Inadequate Guidance in the SER**—Section 8.2.5 of the MOU requires "At a minimum, Caltrans' quality control and quality assurance activities will include the review and monitoring of its processes relating to project decisions, environmental analysis, project file documentation, checking for errors and omissions, legal sufficiency reviews, and taking appropriate corrective action as needed." Several instances were identified where the guidance provided in the SER was unclear, misleading, or incomplete. This resulted in documents incorrectly completed and/or processes not implemented correctly. Examples of such instances were:

a.) SER Chapter 38 requires that the SEP sign the Environmental Document Review Checklist once it is completed. Review of project files revealed Environmental Document Review Checklists that were either not signed by a Senior Environmental Planner (SEP) or not signed at all. Additionally, different versions of the checklist were found in various project files, none of which designated which signature line was to be completed by the SEP. These various instances of noncompliance with the SER requirement were observed within individual Districts and also from District to District.

b.) SER Chapter 38 guidance does not distinguish between the "pilot program" citation required to appear in individual Section 4(f) Evaluations prepared for Section 6005 CE projects and those prepared for Section 6004 CE projects. The statement in the SER regarding the project being carried out by Caltrans under its assumption of responsibility pursuant to 23 U.S.C. 327 is only

applicable to Section 4(f) evaluations for Section 6005 CEs under the Pilot Program. The CEs completed by Caltrans under the Section 6004 CE assumption should refer to 23 U.S.C. 326. Through interviews and project file reviews, confusion about this was identified and, at least in some cases, the apparent misunderstanding that the same language is to be used for both Section 6004 and Section 6005 CEs with individual Section 4(f) evaluations.

c.) SER Chapter 33 discusses the process and documentation for conducting NEPA re-evaluations (to comply with 23 CFR 771.129). The chapter, last updated November 10, 2008, does not provide clear direction on how to process a re-evaluation under the Pilot Program. The chapter includes a reference to a joint FHWA/Caltrans guidance on NEPA consultation and re-evaluation, dated June 21, 2007, that states, "When the NEPA Pilot Program (NEPA assumption) begins, the joint guidance and the NEPA/CEQA Revalidation form will be revised as necessary." The FHWA/Caltrans joint guidance has not been revised to take the Pilot Program into consideration. There is a link to a review form that matches the form contained in the joint FHWA/Caltrans guidance and has FHWA removed as having approval authority; however, there is no guidance on the appropriate use of the form.

d.) SER Chapter 25 references FHWA Order 6640.2 *FHWA Actions to Address Environmental Justice in minority and Low-Income Populations*; however, the flowchart and guidance provided in that chapter do not fully reflect the definition of Disproportionately High and Adverse Effect on Minority and Low-Income Populations provided in that Order, nor does it clearly state the need to identify population served and/or affected by race, or national origin, and income level when determining such effects. The SER chapter provides discussion points and some sources for reference material, but does not provide specific guidance to NEPA practitioners for how to integrate a project level review into a NEPA process, to document proposed steps to guard against disproportionately high and adverse effects, or to document meaningful public involvement opportunities and consider the results.

N2) **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. Areas in need of improvement in working with Federal agencies included:

a.) Through interviews with USACE and USFWS staff located in California, instances were identified where there was confusion as to the implementation of the Endangered Species Act (ESA) Section 7 process and how it is related to the USACE permitting process. Verbal comments were made by resource agency staff that when working on local agency projects, the local project sponsors lacked clarity on the information regarding the ESA Section 7 compliance needed for the USACE permitting process. It was also learned that on more than one occasion, local agencies inappropriately acted as lead agency for ESA Section 7 consultation and Section 404 of the Clean Water Act coordination.

b.) The SER Chapter 38, *Consultation and Coordination with Federal Agencies*, requires Caltrans to include the following specific language in consultation documents being transmitted directly to Federal resource agencies:

Caltrans is [transmitting/initiating * * * (describe product or action)] as the NEPA lead agency under the provisions of the *Memorandum of Understanding (MOU) between the Federal Highway Administration and the California Department of Transportation Concerning the State of California's Participation in the Surface Transportation Project Delivery Pilot Program*, which became effective on July 1, 2007. The MOU was signed pursuant to Section 6005 of the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) which allows the Secretary of Transportation to assign, and the State of California to assume, responsibility for FHWA's responsibilities under other Federal environmental laws. As this project is covered by the Pilot Program MOU, FHWA has assigned and Caltrans has assumed FHWA responsibility for environmental review, consultation, and coordination on this project. Please direct all future correspondence on this project to Caltrans.

A letter in a project file from Caltrans to USFWS requesting initiation of formal ESA Section 7 consultation did not include the required language regarding the responsibilities assumed by Caltrans.

N3) *Section 4(f) Documentation*—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. Through project file reviews and interviews with Caltrans staff, inconsistencies were identified with the *documentation* required in carrying out the Section 4(f) provisions. These included:

a.) For one project, no documentation was provided in the EA or in the project

file to support the assertion that “[t]emporary uses do not normally constitute ‘use’ under Section 4(f) policy.” The FHWA regulation regarding “temporary occupancies of land,” 23 CFR 774.13(d), states in pertinent part that there must be documented agreement with the official with jurisdiction over the Section 4(f) resource that the requisite conditions have been met. 23 CFR 774.13(d)(5).

b.) Two project files that together contained inadequate documentation of three potential Section 4(f) resources were identified. Documentation did not fully support statements that these resources were not, in fact, Section 4(f) resources. In one case, the official with jurisdiction even disputed the statement in the environmental document that the subject property was not a Section 4(f) resource and provided information to support a Section 4(f) resource identification. In another document, there was an implied *de minimis* effect by the use of the term; however, no supporting documentation was provided, nor was there any evidence of public involvement or coordination with the officials with jurisdiction over the Section 4(f) resource, as required by 49 U.S.C. 303(d) and 23 CFR 774.7(b).

c.) In four project files reviewed during the audit, documentation did not reflect that the current Section 4(f) regulations are being adhered to in all NEPA processes. In these four projects, references were made to the prior FHWA regulations at 23 CFR 771.135 rather than to the updated regulations at 23 CFR Part 774.

N4) *Circulation of a Draft Section 4(f) Evaluation*—Project file reviews and interviews with Caltrans staff identified confusion as to the requirements for the circulation of the Section 4(f) Evaluation to the Department of the Interior (DOI) for review. In one instance, Caltrans staff contacted the FHWA Division Office to determine circulation requirements and documentation indicates that the Section 4(f) Evaluation was sent to FHWA for forwarding to DOI.

N5) *Section 4(f) Implementation*—MOU Section 5.1.1 requires Caltrans to be subject to the same procedural and substantive requirements that apply to the DOT when carrying out the responsibilities it has assumed. Through project file reviews and interviews of Caltrans staff, several inconsistencies with the *implementation and general understanding* required in carrying out the Section 4(f) provisions were identified. These include:

a.) Text in an EA that cited the Section 4(f) “policy” should have referred to the Section 4(f) “regulations.”

The correct citation for this Section 4(f) Evaluation should have been the FHWA regulations, 23 CFR Part 774.

b.) Review of a final Environmental Assessment/Finding of No Significant Impact (EA/FONSI) and project files revealed a lack of understanding regarding the applicability of FHWA's Nationwide Programmatic Section 4(f) evaluation for the rehabilitation or replacement of historic bridges. Under the Programmatic, all five criteria of applicability set forth in this programmatic must be met and the explanation for meeting the criteria must be included in the document and the project file (<http://www.environment.fhwa.dot.gov/projdev/4fbridge.asp>). In addition, the draft EA for this project reached a Section 4(f) conclusion prior to executing the Section 106 MOU with the State Historic Preservation Office.

N6) *Legal Division Staff*—Caltrans' Legal Division consists of four largely autonomous offices² serving different regions of the State. The MOU section 4.2.2 requires Caltrans “to obtain adequate* * * staff capability” including “without limitation* * * [d]emonstrating, in a consistent manner, the capacity to perform Caltrans' assumed responsibilities under this MOU and applicable Federal laws.” As noted in a previous audit report, Caltrans maintains a staff of attorneys in each of the four offices trained to support the Pilot Program, and tracks the training each of these attorneys receives related to environmental law. The audit team notes that many of the attorneys assigned to the Pilot Program have a great deal of general legal experience; however, over the life of the Pilot it has become apparent that the four legal offices vary widely when it comes to attorneys with significant experience in Federal environmental law. During this audit, it became clear that this inconsistency increased following the retirement of a highly experienced attorney near the end of 2008. This retirement has resulted in two of Caltrans' legal offices—each of which serves some of Caltrans' largest and busiest Districts—having on staff no attorneys with substantial experience in Federal environmental law. It is the audit team's understanding that legal sufficiency reviews are conducted independently within these autonomous offices, increasing the potential that legal sufficiency reviews may be applied in an inconsistent manner across the State.

² The four offices are located in Sacramento, San Francisco, Los Angeles, and San Diego.

N7) *Training*—Section 4.2.2 of the MOU requires Caltrans to maintain adequate organizational and staff capacity to effectively carry out the responsibilities it has assumed under Section 3 of the MOU. The following inconsistencies were noted during interviews:

a.) Interviews and personnel training record reviews identified two tools used by Caltrans to determine the capacity of Caltrans staff to carry out Pilot Program responsibilities including a Learning Management System (LMS) and Individual Development Plans (IDPs). The audit team observed that these tools, and possibly others, are used in varying ways and with varying success across Districts to (1) identify training needs or gaps in areas of expertise and (2) plan and track the training each employee receives. Given this variation and use of these tools and approaches, it is unclear how District leadership ensures that all Caltrans employees have the capacity to carry out assigned responsibilities assumed under the Pilot Program and how this information can be collected.

b.) Interviews reflected a lack of knowledge in two areas. As is detailed in other portions of this audit report, several instances of inadequate staff capacity for determining compliance process requirements related to the Section 4(f) and ESA Section 7 processes were observed during this audit. This is an example of a needed competency that does not appear to be being met and/or being tracked. As was also noted earlier in this report, there is varying understanding of the re-evaluation process and requires additional training for staff to be competent in the understanding of this process.

c.) As the demand for and use of online training courses increases, there is currently no consistent method for Caltrans to track which employees have completed online training courses and to incorporate this information into the LMS and into the employee IDPs. In order to ensure that Caltrans employees implementing NEPA duties have the knowledge and skills to assume the responsibilities under Section 3 of the MOU, Caltrans should begin to track this information and also determine which online training courses should be prerequisites for performing certain NEPA assumption activities.

N8) *Maintenance of Project and General Administrative Files*—Section 8.2.4 of the MOU 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. Inconsistencies in the application of these procedures, reported in previous audit findings, were also identified in this audit. Inconsistencies in 12 of the 47 project files reviewed during the audit, including:

a.) Required project documentation was missing from several project files. Examples of missing documentation included: a Biological Opinion; ESA Section 7 concurrence documentation; internal and external communications related to the project; letters from the District Local Agency Engineer to the local agency transmitting the Preliminary Environmental Study form with the list of the required technical studies for the project; and noise abatement decision report.

b.) Some required file documentation missing from project files was eventually located elsewhere in the District Office. Examples of items missing from the project file, but brought to auditors upon request, included cooperating agencies' letters, FHWA project level air quality conformity determinations, Caltrans' noise abatement decision reports, a project's Section 106 MOA, and evidence of the circulation of Section 4(f) documents to the DOI. Required documentation could not be located during the audit.

c.) The required documentation according to 23 CFR 771.111(h)(2)(vi), which states that the State must provide "transcript of each public hearing and a certification that a required hearing or hearing opportunity was offered" could not be located during the audit. In two instances, the public hearing transcript was not found nor was any certification (or other documentation) that a hearing had been held.

d.) In several instances, project files were missing required UFS tabs (though they contained pertinent documentation) and some sections contained no information or explanation as to why the tabs were missing or tab sections were empty.

N9) *Varying Oversight/Analysis of Commitment of Resources* — Section 4.2.2 of the MOU requires that "Caltrans will maintain adequate organizational and staff capability, including competent and qualified consultants where necessary or desirable, to effectively carry out the responsibilities it has assumed under part 3 of this MOU. This includes, without limitation:

○ Using appropriate environmental technical and managerial expertise;

○ Devoting adequate staff resources; and

○ Demonstrating, in a consistent manner, the capacity to perform Caltrans' assumed responsibilities under this MOU and applicable Federal laws."

Previous audits have tried to determine how Caltrans monitors its resources to implement the Pilot Program, but based on audit interviews, were unable to identify a uniform process. Through interviews and material reviewed during this audit, it was determined that the existing system used by Caltrans to track resources showed inconsistent use of billing codes and in one case identified an error not previously found by Caltrans. During the interviews with Caltrans environmental personnel, inconsistencies continued to be identified in the reporting and use of these Pilot Program codes. These inconsistencies include:

(a) Lack of familiarity with the activities eligible to be billed to the Pilot Program,

(b) Lack of supervisory direction as to what activities should be billed to the Pilot Program;

(c) Failure to report all times eligible for billing under the appropriate codes for both Capital and Local Assistance programs (codes 6DELE and 6LADELE, respectively);

(d) Varying degrees of oversight, or no oversight of the billing codes for the Pilot Program performed in the Districts.

Deficient

D1) *Quality Control Quality (QA/QC) Assurance*—Under the Pilot Program, and as reflected in the language cited on each environmental document assigned to Caltrans per MOU Section 3.2.5, NEPA documentation should reflect that FHWA has no role in the environmental review and decisionmaking process for assigned projects. Through project file and document reviews, three instances were observed where in a document or in the project file, there were references to FHWA being involved in the decisionmaking process.

D2) *QA/QC Certification Process*—Section 8.2.5 of the MOU 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. Five of the seven identified instances occurred in 2008. Examples of these are:

a) Four instances in which review signatures on QA/QC forms were not

obtained the proper sequence in accordance with the Caltrans established QA/QC processes;

b) Three project files where QA/QC forms were either incomplete or missing.

D3) Quarterly Reporting—MOU

Section 8.2.7 requires Caltrans to submit a report to FHWA each quarter for the first 2 years of Pilot program listing all approvals and decisions Caltrans makes with respect to responsibilities assumed under the MOU. Quarterly reports submitted by Caltrans for the first eight quarters of Pilot program participation were reviewed for this audit. Each of the first seven quarterly reports has been revised; some reports have been revised multiple times. In summary, for the first seven quarterly reports, a total of 63 new projects were added in report revisions and 29 projects initially reported were subsequently deleted. The reporting issues spanned across the majority of districts reporting projects, and seven districts submitted revisions to four or more quarterly reports. Inaccurate project reporting has been a consistent issue affecting the quarterly report process and has been identified in previous FHWA audit reports. Among the errors discovered were reporting errors related to incorrectly characterizing projects (e.g., CEs under Section 6004 and Section 6005), and omissions associated with untimely reporting of project approvals and decisions by district staff (i.e., a subsequent quarterly report included a project that was approved in the previous quarter). The approach used by each district to collect project information for the quarterly reports is highly variable and is one key contributor to continued reporting inaccuracies.

The current Caltrans approach to developing the quarterly reports continues to be deficient. The accuracy of the reports on project approvals and decisions affects FHWA oversight of the Pilot Program. For example, if Caltrans does not report to FHWA a project being administered under the Pilot Program, the project may not be included in the audit process. Additionally, now that the FHWA onsite audit process will move to an annual basis (semi-annual audits were required during the first 2 years of the Pilot Program), the project approval and decision reporting takes on increased significance as less in-field auditing will occur.

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 THE TREASURY

Office of Foreign Assets Control

Additional Designations of Individuals and Entities Pursuant to Section 804(b) of the Foreign Narcotics Kingpin Designation Act ("Kingpin Act"), 21 U.S.C. 1903(b)

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control ("OFAC") is publishing the names of seven individuals and one entity whose property and interests in property have been blocked pursuant to the Foreign Narcotics Kingpin Designation Act ("Kingpin Act") (21 U.S.C. 1901-1908, 8 U.S.C. 1182).

DATES: The designation by the Director of OFAC of seven individuals and one entity identified in this notice, pursuant to section 805(b) of the Foreign Narcotics Kingpin Designation Act ("Kingpin Act"), 21 U.S.C. 1904(b), is effective on February 25, 2010.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW. (Treasury Annex), Washington, DC 20220, Tel.: 202/622-2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available on OFAC's Web site (<http://www.treas.gov/ofac>) or via facsimile through a 24-hour fax-on-demand service, tel.: 202/622-0077.

Background

The Kingpin Act became law on December 3, 1999. The Kingpin Act establishes a program targeting the activities of significant foreign narcotics traffickers and their organizations on a worldwide basis. It provides a statutory framework for the President to impose sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their

businesses and agents access to the U.S. financial system and to the benefits of trade and transactions involving U.S. companies and individuals.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury consults with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security when designating and blocking the property and interests in property, subject to U.S. jurisdiction, of persons who are found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; or (3) playing a significant role in international narcotics trafficking.

On February 25, 2010 the Director of OFAC designated seven individuals and one entity whose property and interests in property are blocked pursuant to section 805(b) of the Foreign Narcotics Kingpin Designation Act.

The list of additional designees is as follows:

Individuals

1. MENDEZ VARGAS, Jose de Jesus (a.k.a. CHAMULA; a.k.a. CHANGO; a.k.a. CHANGO MENDEZ; a.k.a. CHUY; a.k.a. CHUY MENDEZ; a.k.a. EL CHANGO; a.k.a. MENDEZ VARGAS, Jesus; a.k.a. MENDEZ, Jesus), Tazumbos, Jalisco, Mexico; Calle Dr. Lose Luis Mora Col Morelos, Apatzingan, Michoacan, Mexico; Calle Carlos Salazar Col Buenos Aires, Apatzingan, Michoacan, Mexico; Toluca, Mexico, Mexico; Calle Acatitla 122, Col. Ferrocarril, Apatzingan, Mexico; Potrero Grande de C de Paracuaro, Apatzingan, Mexico; c/o Club Abaro, Ave Vicente Villada, Mexico City, Municipio de Mexico City, D.F., Mexico; DOB 28 Feb 1974; alt. DOB 18 Sep 1989; alt. DOB 6 Aug 1973; POB El Coloma, Michoacan; alt. POB Eduardo Neri, Guerrero; alt. POB Acapulco de Juarez, Guerrero; nationality Mexico; C.U.R.P. MEVJ890918HGRNRS09 (Mexico) (individual) [SDNTK]

2. MORENO GONZALEZ, Nazario (a.k.a. CASTREJÓN PEÑA, Víctor