

**MEMORANDUM OF UNDERSTANDING BETWEEN THE FEDERAL
HIGHWAY ADMINISTRATION AND THE CALIFORNIA DEPARTMENT OF
TRANSPORTATION CONCERNING THE STATE OF CALIFORNIA'S
PARTICIPATION IN THE SURFACE TRANSPORTATION PROJECT
DELIVERY PROGRAM PURSUANT TO 23 U.S.C. 327**

THIS MEMORANDUM OF UNDERSTANDING (hereinafter "MOU"), made and entered into by and between the FEDERAL HIGHWAY ADMINISTRATION (hereinafter "FHWA"), an administration in the UNITED STATES DEPARTMENT OF TRANSPORTATION (hereinafter "USDOT"), and the CALIFORNIA DEPARTMENT OF TRANSPORTATION (hereinafter "Caltrans"), a department of the State of California, hereby provides as follows:

WITNESSETH:

Whereas, Section 327 of Title 23 of the U.S. Code (U.S.C.) establishes the Surface Transportation Project Delivery Program (hereafter "Program") that allows the Secretary of the United States Department of Transportation (hereafter "USDOT Secretary") to assign and States to assume the USDOT Secretary's responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321, et seq.) (hereafter "NEPA"), and all or part of the USDOT Secretary's responsibilities for environmental review, consultation, or other actions required under any Federal environmental law with respect to highway public transportation, railroad, and multimodal projects within the State; and

Whereas, the Program was initially established as a pilot called the Surface Transportation Project Delivery Pilot Program (hereafter "Pilot Program") by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59 [Aug. 10, 2005]) (hereinafter "SAFETEA-LU") with a termination date that was six years after the date of enactment of SAFETEA-LU; and

Whereas, 23 U.S.C. 327(b)(2) requires a State to submit an application in order to participate in the Program; and

Whereas, on May 18, 2007, Caltrans submitted its application to the FHWA for participation in the Surface Transportation Project Delivery Pilot Program (hereafter "Pilot Program"); and

Whereas, the FHWA solicited the views of other appropriate Federal agencies concerning Caltrans' application as required by 23 U.S.C. 327(b)(5); and

Whereas, the USDOT Secretary, acting by and through the FHWA pursuant to 49 C.F.R. 1.85(a)(3), approved Caltrans' Pilot Program application, finding that Caltrans met all of the requirements of 23 U.S.C. 327 and 23 C.F.R. Part 773; and

Whereas, following the FHWA's approval of Caltrans' Pilot Program application, on July 1, 2007, the FHWA and Caltrans entered into a Memorandum of Understanding

(hereinafter “Original MOU”) under which Caltrans assumed and carried out the assigned duties and responsibilities of the USDOT Secretary under NEPA and other Federal environmental laws under the auspices of the Pilot Program; and

Whereas, Section 13.1.1 of the Original MOU established an August 10, 2011, termination date, which was six years after the enactment of SAFETEA-LU; and

Whereas, Section 2203(c) of the Continuing Appropriations and Surface Transportation Extensions Act of 2011 (Pub. L. 111-322 [Dec. 22, 2010]) extended the Pilot Program’s termination date to August 10, 2012, which was seven years after the enactment of SAFETEA-LU; and

Whereas, on August 10, 2011, the FHWA and Caltrans entered into Amendment 1 to the Original MOU (hereinafter “Amended MOU”); and

Whereas, Section 5D of the Amended MOU provided that should Congress enact legislation extending the termination date of the Pilot Program, the August 10, 2012, termination date would automatically be replaced with the appropriate termination date of the Pilot Program as specified in Federal law; and

Whereas, Section 7 of the Amended MOU provided that as soon as practicable following the potential reauthorization of SAFETEA-LU by Congress, the FHWA and Caltrans shall review the Original MOU, the Amended MOU, and other applicable MOU amendments, to determine if any further changes were required or desirable as a result of changes in legislation; and

Whereas, Section 101(e) of the Temporary Surface Transportation Extension Act of 2012 (Pub. L. 112-140 [June 29, 2012]) extended the duration of the Pilot Program until September 30, 2012; and

Whereas, the FHWA conducted audits as required by SAFETEA-LU semiannually during the first two-year period (2007, 2008) and annually during the next two-year period (2009 and 2010) of the State’s participation in the Program; and

Whereas, the FHWA has made the audit reports available to the public for comment through publication of notices in the *Federal Register*; and

Whereas, Caltrans has also conducted self-assessments and quarterly reports on its performance on the Program; and

Whereas, FHWA’s audit reports and Caltrans’s self-assessments are publicly available for inspection at http://www.dot.ca.gov/hq/env/nepa/html/documents_reports.htm; and

Whereas, on July 6, 2012, President Obama signed into law the Moving Ahead for Progress in the 21st Century Act (Pub. L. 112-141) (hereafter, “MAP-21”), which became effective on October 1, 2012; and

Whereas, Section 1313 of MAP-21 amended 23 U.S.C. 327, making the Pilot Program permanent; and

Whereas, MAP-21 amended 23 U.S.C. 327(b)(2) to require the USDOT Secretary to amend, as appropriate, the Program's application regulations; and

Whereas, on September 25, 2012, the FHWA and Caltrans entered into a Memorandum of Understanding allowing Caltrans to continue to participate in the Program under the terms of the Original MOU and Amended MOU by extending the term of Caltrans' participation to eighteen months from the effective date of the final Program application regulations (April 16, 2016); and

Whereas, on September 16, 2014, FHWA issued final Program application regulations implementing the changes from MAP-21 and these regulations became effective October 16, 2014; and

Whereas, on February 27, 2015, Caltrans notified FHWA of its intent to renew participation in the Program with respect to highway projects, and the State of California's legislature has enacted laws to allow the State to participate in the Program; and

Whereas, pursuant to 23 C.F.R. 773.115(b), Caltrans coordinated with the FHWA to determine if significant changes have occurred or new assignment responsibilities would be sought that would warrant a statewide notice and comment opportunity prior to the State's submission of the renewal package; and

Whereas, on June 16, 2015, after coordination between the agencies, FHWA determined that a statewide notice and comment opportunity was unnecessary prior to the State's submission of the renewal package; and

Whereas, pursuant to 23 U.S.C. 773.115(d), Caltrans submitted a renewal package to the FHWA on June 17, 2015 for approval to continue the assigned duties and responsibilities for highway projects pursuant to the Program; and

Whereas, on December 4, 2015, President Obama signed into law Pub. L. 114-94, the Fixing America's Surface Transportation (FAST) Act, with a retroactive effective date of October 1, 2015; and

Whereas, on November 16, 2016, FHWA published a *Federal Register* Notice and provided an opportunity for comment on Caltrans's renewal request and solicited the views of the public and other Federal agencies concerning Caltrans' renewal request as required by 23 CFR 773.115(f); and

Whereas, the USDOT Secretary, acting by and through FHWA, has considered the renewal package, comments received as a result of the *Federal Register* Notice, auditing reports, and the State's overall performance in the Program as required by 23 CFR

773.115(g) and has determined that Caltrans' renewal package meets all the requirements of 23 CFR part 773 and 23 USC 327; and

Whereas, on June 6, 2010, the FHWA and Caltrans executed a Memorandum of Understanding assigning Caltrans the USDOT Secretary's responsibilities for environmental reviews of highway projects that qualify for categorical exclusions (CE) pursuant to 23 U.S.C. 326 (hereinafter sec. 326 CE MOU); and

Whereas, on April 1, 2016, FHWA extended the terms of the NEPA assignment MOU, under the authority of 23 C.F.R. 773.115(h), from the expiration date of April 16, 2016, to December 31, 2016, to allow additional time for negotiation of the terms of the renewal MOU and to be consistent with the changes of the FAST Act; and

Whereas, on May 31, 2016, the FHWA and Caltrans renewed the sec. 326 CE MOU and Caltrans intends to maintain this MOU.

Now, therefore, the FHWA and Caltrans agree as follows:

PART 1. PURPOSE OF MEMORANDUM OF UNDERSTANDING

1.1 Purpose

1.1.1 This MOU officially approves Caltrans' request to renew participation in the Program and is the written agreement required pursuant to 23 U.S.C. 327(a)(2)(A) and (c) under which the USDOT Secretary may assign, and Caltrans may assume, the responsibilities of the USDOT Secretary for Federal environmental laws with respect to one or more highway projects within the State of California.

1.1.2 The FHWA's decision to execute this MOU is based upon the information, representations, and commitments contained in Caltrans' June 17, 2015, renewal package, the auditing and monitoring reports, consideration of comments received during the comment period, and the State's overall performance in the Program since July 1, 2007. This MOU incorporates by reference the June 17, 2015, renewal package. However, this MOU shall control to the extent there is any conflict between this MOU and the June 17, 2015, renewal package.

1.1.3 This MOU shall be effective upon the date of final execution by both parties (hereinafter the "Effective Date").

1.1.4 Pursuant to 23 U.S.C. 327(d), and subpart 4.3 of this MOU, third parties may challenge Caltrans' actions in carrying out environmental review responsibilities assigned under this MOU. Otherwise, this MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the State of California, its departments, agencies, or entities, its officers, employees, or agents. This MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party

against the United States, its departments, agencies, or entities, its officers, employees, or agents.

PART 2. [RESERVED]

PART 3. ASSIGNMENTS AND ASSUMPTIONS OF RESPONSIBILITY

3.1 Assignments and Assumptions of NEPA Responsibilities

3.1.1 Pursuant to 23 U.S.C. 327(a)(2)(A), on the Effective Date, the FHWA assigns, and Caltrans assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the USDOT Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq. with respect to the highway projects specified under subpart 3.3. This includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for highway projects such as 23 U.S.C. 139, 40 CFR parts 1500–1508, DOT Order 5610.1C, and 23 CFR Part 771 as applicable.

3.1.2 On the cover page of each environmental assessment (EA), finding of no significant impact (FONSI), environmental impact statement (EIS), and record of decision (ROD) prepared under the authority granted by this MOU, and for any 23 U.S.C. 327 CE determination it makes, Caltrans shall insert the following language in a way that is conspicuous to the reader or include it in a CE project record:

“The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by Caltrans pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated _____, and executed by FHWA and Caltrans.”

3.1.3 Caltrans shall disclose to the public and agencies, as part of agency outreach and public involvement procedures, including any notice of intent or scoping meeting notice, the disclosure in subpart 3.1.2 above.

3.1.4 The assignment under this part does not alter the scope and terms of the sec. 326 CE MOU between FHWA and Caltrans.

3.2 Assignments and Assumptions of Federal Environmental Laws Other Than NEPA

3.2.1 Pursuant to 23 U.S.C. 327(a)(2)(B), on the Effective Date, the FHWA assigns and Caltrans assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the USDOT Secretary's responsibilities for environmental review, reevaluation, consultation, or other action pertaining to the review or approval of highway projects specified under subpart 3.3 required under the following Federal environmental laws:

Air Quality

- Clean Air Act, 42 U.S.C. 7401-7671q, with the exception of any conformity determinations

Noise

- Noise Control Act of 1972, 42 U.S.C. 4901-4918
- FHWA noise regulations at 23 CFR Part 772

Wildlife

- Endangered Species Act of 1973, 16 U.S.C. 1531-1544
- Marine Mammal Protection Act, 16 U.S.C. 1361-1423h
- Anadromous Fish Conservation Act, 16 U.S.C. 757a-757f
- Fish and Wildlife Coordination Act, 16 U.S.C. 661-667d
- Migratory Bird Treaty Act, 16 U.S.C. 703-712
- Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801-1891d

Historic and Cultural Resources

- National Historic Preservation Act of 1966, as amended, 54 U.S.C. 300101 et seq.
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm
- Archeological and Historic Preservation Act, 54 U.S.C. 312501-312508
- Native American Grave Protection and Repatriation Act, 25 U.S.C. 3001-3013; 18 U.S.C. 1170

Social and Economic Impacts

- American Indian Religious Freedom Act, 42 U.S.C. 1996
- Farmland Protection Policy Act, 7 U.S.C. 4201-4209

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. 1251-1387: (Sections 319, 401, and 404)
- Coastal Barrier Resources Act, 16 U.S.C. 3501-3510
- Coastal Zone Management Act, 16 U.S.C. 1451-1466
- Safe Drinking Water Act, 42 U.S.C. 300f—300j-26
- Rivers and Harbors Act of 1899, 33 U.S.C. 403
- Wild and Scenic Rivers Act, 16 U.S.C. 1271-1287
- Emergency Wetlands Resources Act, 16 U.S.C. 3901 and 3921
- Wetlands Mitigation 23 U.S.C. 119(g), 133(b)(14)
- FHWA wetland and natural habitat mitigation regulations at 23 CFR part 777
- Flood Disaster Protection Act, 42 U.S.C. 4001-4130

Parklands and Other Special Land Uses

- Section 4(f), 23 U.S.C. 138 and 49 U.S.C. 303
- FHWA/FTA Section 4(f) Regulations at 23 CFR Part 774
- Land and Water Conservation Fund, 54 U.S.C. 200302-200310

Hazardous Materials

- Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601-9675
- Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9671-9675
- Resource Conservation and Recovery Act, 42 U.S.C. 6901-6992k

Executive Orders Relating to Highway Projects

- E.O. 11990 - Protection of Wetlands
- E.O. 11988 - Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 CFR sections 650.113 and 650.115)
- E.O. 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13112 - Invasive Species

FHWA-Specific

- Planning and Environmental Linkages, 23 U.S.C. 168, with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135.
- Programmatic Mitigation Plans, 23 U.S.C. 169 with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135

3.2.2 Any FHWA environmental review responsibility not explicitly listed above and assumed by Caltrans shall remain the responsibility of the FHWA unless the responsibility is added by written agreement of the parties through the amendment process established in Part 13 and pursuant to 23 CFR 773.113(b). This provision shall not be interpreted to abrogate Caltrans' responsibilities to comply with the requirements of any Federal environmental law that apply directly to Caltrans independent of the FHWA's involvement (through Federal assistance or approval).

3.2.3 The USDOT Secretary's responsibilities for government-to-government consultation with Indian tribes, as defined in 36 C.F.R. 800.16(m), are not assigned to or assumed by Caltrans under this MOU. The FHWA remains responsible for all government-to-government consultation, including initiation of government-to-government consultation consistent with Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, unless otherwise agreed as described in this Part. A notice from Caltrans to an Indian tribe advising the tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 CFR 800.16(m),

and is related to NEPA or another Federal environmental law for which Caltrans has assumed responsibilities under this MOU, and either the Indian tribe or the FHWA determines that the issue or concern will not be satisfactorily resolved by Caltrans, then the FHWA may withdraw the assignment of all or part of the responsibilities for processing the project. In this case, the provisions of subpart 9.1 concerning the FHWA initiated withdrawal of assignment shall apply. This MOU is not intended to abrogate, or prevent future entry into, any agreement among Caltrans, the FHWA, and a tribe under which the tribe agrees to permit Caltrans to administer government-to-government consultation activities for the FHWA. However, such agreements are administrative in nature and do not relieve the FHWA of its legal responsibility for government-to-government consultation.

3.2.4 Nothing in this MOU shall be construed to permit Caltrans' assumption of the USDOT Secretary's responsibilities for conformity determinations required under section 176 of the Clean Air Act (42 U.S.C. 7506) or any responsibility under 23 U.S.C. 134 and 135, or under 49 U.S.C. 5303 or 5304 (23 U.S.C. 327(a)(2)(B)(iv)(II)).

3.2.5 The assignment under this part does not alter the scope and terms of the sec. 326 CE MOU between FHWA and Caltrans. Caltrans will engage in all environmental reviews authorized under the terms of that MOU if it elects to process the highway projects under the sec. 326 CE MOU.

3.2.6 On the cover page of each biological assessment, historic properties or cultural resources report, Section 4(f) evaluation, or other analyses prepared under the authority granted by this MOU, Caltrans shall insert the following language in a way that is conspicuous to the reader:

"The environmental review, consultation, and any other actions required by applicable Federal laws for this project are being, or have been, carried out by Caltrans pursuant to 23 U.S.C. 327 and the Memorandum of Understanding dated _____ and executed by FHWA and Caltrans."

3.2.7 Caltrans shall disclose to the public and agencies, as part of agency outreach and public involvement procedures, the disclosure in stipulation 3.2.6 above.

3.2.8 Caltrans will continue to adhere to the original terms of Biological Opinions (BOs) coordinated between the FHWA, Caltrans, and either the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) or both USFWS and NMFS prior to the Pilot Program so long as the original BO terms are not amended or revised. Any revisions or amendments to a BO made under assumption of FHWA's environmental responsibilities would be Caltrans' responsibility. Caltrans agrees to assume the FHWA's environmental review role and responsibilities as identified in existing interagency agreements among Caltrans, USFWS, NMFS, and the FHWA. Caltrans agrees to continue to assume the FHWA's ESA Section 7 responsibilities of consultations (formal and informal).

3.2.9 Caltrans will not make any determination that an action constitutes a constructive use of a publicly owned park, public recreation area, wildlife refuge, waterfowl refuge, or historic site under 49 U.S.C. 303/23 U.S.C. 138 (Section 4(f)) without first consulting with the FHWA and obtaining the FHWA's approval of such determination.

3.3 Highway Projects

3.3.1 Except as provided by subpart 3.3.2 below or otherwise specified in this subpart, the assignments and assumptions of the USDOT Secretary's responsibilities under subparts 3.1 and 3.2 above shall apply with respect to the environmental review, consultation, or other action pertaining to the review or approval of the following classes of highway projects located within the State of California. The definition of "highway project" is found at 23 CFR 773.103, and for purposes of this MOU, "highway project" includes eligible preventative maintenance activities. Prior to approving any CE determination under this MOU, FONSI, final EIS, or final EIS/ROD, the State of California shall ensure and document that for any proposed project the design concept, scope, and funding are consistent with the current Transportation Improvement Plan (TIP), Regional Transportation Plan (RTP), or Metropolitan Transportation Plan (MTP).

- A. Projects requiring an EIS, both on the state highway system (SHS) and Local Assistance projects off the SHS that are funded by the FHWA or require FHWA approvals. This assignment does not include the environmental review associated with the development and approval of the Draft EIS, Final EIS, and ROD for the following projects:

- i. District 1: Eureka/Arcata Corridor Improvement

Caltrans will be responsible for any additional environmental review of this project after the expiration of the statute of limitations for this project in accordance with 23 U.S.C. 139(l).

- B. Projects qualifying for CEs, both on the SHS and Local Assistance projects off the SHS that are funded by the FHWA or require FHWA approvals, and that do not qualify for assignment of responsibilities pursuant to the June 7, 2013 23 USC 326 MOU.
- C. Projects requiring EAs, both on the SHS and Local Assistance projects off the SHS that are funded by the FHWA or require FHWA approvals with the exception of the following projects:
 - i. District 5: Highway 1 Congestion Management–Santa Cruz HOV Lanes
 - ii. District 9: Inyo–395 Olancho to Cartago 4 Lane

Caltrans will be responsible for any additional environmental review of these projects after the expiration of the statute of limitations for these projects in accordance with 23 U.S.C. 139(l).

- D. Projects funded by other Federal agencies [or projects without any Federal funding] that also require FHWA approvals. For these projects, Caltrans would not assume the NEPA responsibilities of other Federal agencies. However, Caltrans may use or adopt other Federal agencies' NEPA analyses consistent with 40 CFR parts 1500–1508, and USDOT and FHWA regulations, policies, and guidance.

3.3.2 The following are specifically excluded from the list in subpart 3.3.1 of highway projects and classes of highway projects:

- A. Any highway projects authorized under 23 U.S.C. 202, 203, and 204 unless such projects will be designed and constructed by Caltrans; and
- B. Any project that crosses State boundaries and any project that crosses or is adjacent to international boundaries. For purposes of this agreement a project is considered “adjacent to international boundaries” if it requires the issuance of a new or the modification of an existing Presidential Permit by the U.S. Department of State.

3.4 Limitations

3.4.1 As provided at 23 U.S.C. 327(e), Caltrans shall be solely responsible and solely liable for carrying out all of the responsibilities it has assumed under part 3 of this MOU.

3.4.2 As provided at 23 U.S.C. 327(a)(2)(D), any highway project or responsibility of the USDOT Secretary that is not explicitly assumed by Caltrans under subpart 3.3.1 in this MOU remains the responsibility of the USDOT Secretary.

PART 4. CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

4.1 Certifications

4.1.1 Caltrans hereby makes the following certifications:

- A. Caltrans has the legal authority to accept all the assumptions of responsibility identified in part 3 of this MOU;
- B. Caltrans has the legal authority to take all actions necessary to carry out all of the responsibilities it has assumed under this MOU;
- C. Caltrans has the legal authority to execute this MOU;
- D. The State of California currently has laws and regulations in effect that are comparable to 5 U.S.C. 552, which are located at California Government Code § 6250, et seq.; and
- E. With respect to the public availability of any document under California Government Code § 6250, et seq., any decision regarding its release or

public availability may be legally challenged or reviewed in the courts of the State of California.

4.2 State Commitment of Resources

4.2.1 As provided at 23 U.S.C. 327(c)(3)(D), Caltrans will maintain the financial resources necessary to carry out the responsibilities it is assuming. Caltrans believes, and the FHWA agrees, that the financial resources contained in the renewal package appear to be adequate for this purpose. Should the FHWA determine, after consultation with Caltrans, that Caltrans' financial resources are inadequate to carry out the USDOT Secretary's responsibilities, Caltrans will take appropriate action to obtain the additional financial resources needed to carry out these responsibilities. If Caltrans is unable to obtain the necessary additional financial resources, Caltrans shall inform the FHWA, and this MOU will be amended to assign only the responsibilities that are commensurate with Caltrans' financial resources.

4.2.2 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 this MOU. This includes, without limitation:

- A. Using appropriate environmental technical and managerial expertise;
- B. Devoting adequate staff resources; and
- C. Demonstrating, in a consistent manner, the capacity to perform Caltrans' assumed responsibilities under this MOU and applicable Federal laws.

Should the FHWA determine, after consultation with Caltrans, that Caltrans' organizational and staff capability is inadequate to carry out the USDOT Secretary's responsibilities, Caltrans will take appropriate action to obtain adequate organizational and staff capability to carry out these responsibilities. If Caltrans is unable to obtain adequate organizational and staff capability, Caltrans shall inform the FHWA and the MOU will be amended to assign only the responsibilities that are commensurate with Caltrans' available organizational and staff capability. Should Caltrans choose to meet these requirements, in whole or in part, with consultant services, including outside counsel, Caltrans shall maintain on its staff an adequate number of trained and qualified personnel, including counsel, to oversee the consulting work.

4.2.3 When carrying out the requirements of Section 106 of the National Historic Preservation Act (NHPA), as amended, Caltrans staff (including consultants) shall comply with 36 C.F.R. 800.2(a)(1). All actions that involve the identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meet the Secretary of Interior's Professional Qualifications Standards (published at 48 FR 44738-44739, Sept. 29, 1983). Caltrans shall ensure that all documentation required under 36 C.F.R. 800.11 is reviewed and approved by a staff member or consultant who meets the Professional Qualifications Standards.

4.3 Federal Court Jurisdiction

4.3.1 As provided at 23 U.S.C. 327(c)(3)(B), the State of California hereby consents to, and accepts, the exclusive jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibilities of the USDOT Secretary assumed by Caltrans under this MOU. This consent to Federal court jurisdiction shall remain valid after termination of this MOU, or FHWA's withdrawal of assignment of the USDOT Secretary's responsibilities, for any decision or approval made by Caltrans pursuant to an assumption of responsibility under this MOU. The State of California understands and agrees that this acceptance constitutes a waiver of the State's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of addressing matters arising out of this MOU and carrying out the USDOT Secretary's responsibilities that have been assumed under this MOU.

PART 5. APPLICABILITY OF FEDERAL LAW

5.1 Procedural and Substantive Requirements

5.1.1 As provided at 23 U.S.C. 327(a)(2)(C), in assuming the USDOT Secretary's responsibilities under this MOU, Caltrans shall be subject to the same procedural and substantive requirements that apply to the USDOT Secretary in carrying out these responsibilities. Such procedural and substantive requirements include, but are not limited to, Federal statutes and regulations, Executive Orders issued by the President of the United States, USDOT Orders, Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500 -1508), FHWA Orders, official guidance and policy issued by the CEQ, Office of Management and Budget (OMB), USDOT, or the FHWA (e.g. Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects), and any applicable Federal court decisions, and, subject to subpart 5.1.4 below, interagency agreements such as programmatic agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process [e.g., the 2015 Red Book – Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects, etc.].

Caltrans has reviewed the 2014 MOA between the US Coast Guard (USCG) and FHWA and understands that by accepting FHWA's NEPA responsibilities, it also agrees to perform FHWA's obligations set forth in the MOU between the USDOT and the USCG and the MOA between FHWA and the USCG.

5.1.2 Official USDOT and FHWA formal guidance and policies relating to environmental review matters are posted on the FHWA's website, contained in the FHWA *Environmental Guidebook*, published in the *Federal Register*, or sent to Caltrans electronically or in hard copy.

5.1.3 After the Effective Date of this MOU, the FHWA will use its best efforts to ensure that any new or revised Federal policies and guidance that are final and applicable to the FHWA's responsibilities under NEPA and other environmental laws and that are assumed by Caltrans under this MOU are communicated to Caltrans within ten (10) calendar days of issuance. Delivery may be accomplished by e-mail, Web posting (with email or mail to Caltrans notifying of Web posting), mail, or publication in the *Federal Register* (with email or mail notifying Caltrans of publication). If communicated to Caltrans by e-mail or mail, such material will be sent to the Chief of Caltrans' Division of Environmental Analysis. In the event that a new or revised FHWA policy or guidance is not made available to Caltrans as described in the preceding sentence, and if Caltrans had no actual knowledge of such policy or guidance, then a failure by Caltrans to comply with such Federal policy or guidance will not be a basis for termination under this MOU.

5.1.4 Caltrans will work with all other appropriate Federal agencies concerning the laws, guidance, and policies that such other Federal agencies are responsible for administering.

5.1.5 Upon termination of this MOU, the FHWA and Caltrans shall contact the relevant third party to any interagency agreement and determine whether the interagency agreement should be amended or reinstated as in effect on the termination date of this MOU.

5.2 Rulemaking

5.2.1 As provided at 23 U.S.C. 327(f), nothing in this MOU permits Caltrans to assume any rulemaking authority of the USDOT Secretary. Additionally, Caltrans may not establish policy and guidance on behalf of the USDOT Secretary or FHWA for highway projects covered in this MOU. Caltrans authority to establish State regulations, policy, and guidance concerning the State environmental review of State highway projects shall not supersede applicable Federal environmental review regulations, policy, or guidance established by or applicable to the USDOT Secretary or FHWA.

5.3 Effect of Assumption

5.3.1 For purposes of carrying out the responsibilities assumed under this MOU, and subject to the limitations contained in 23 U.S.C. 327 and this MOU, Caltrans shall be deemed to be acting as the FHWA with respect to the environmental review, consultation, and other actions required under those responsibilities.

5.4 Other Federal Agencies

5.4.1 As provided at 23 U.S.C. 327(a)(2)(E), nothing in this MOU preempts or interferes with any power, jurisdiction, responsibility, or authority of an agency, other than the USDOT (including the FHWA), under applicable law and regulations with respect to a project.

PART 6. LITIGATION

6.1 Responsibility and Liability

6.1.1 As provided in 23 U.S.C. 327(e), Caltrans shall be solely responsible and solely liable for carrying out all of the USDOT Secretary's responsibilities it has assumed under this MOU. The FHWA and USDOT shall have no responsibility or liability for the performance of the responsibilities assumed by Caltrans, including any decision or approval made by Caltrans while participating in the Program.

6.2 Litigation

6.2.1 Nothing in this MOU affects the United States Department of Justice's (hereinafter "DOJ") authority to litigate claims, including the authority to approve a settlement on behalf of the United States if either FHWA or another agency of the United States is named in such litigation, or if the United States intervenes pursuant to 23 U.S.C. 327(d)(3). In the event FHWA or any other Federal agency is named in litigation related to matters under this MOU, or the United States intervenes in the litigation, Caltrans agrees to coordinate with DOJ in the defense of that action.

6.2.2 Caltrans shall defend all claims brought in connection with the discharge of any responsibility assumed under this MOU. In the event of litigation, Caltrans shall provide qualified and competent legal counsel, including outside counsel if necessary. Caltrans shall provide the defense at its own expense, subject to 23 U.S.C. 327(a)(2)(G) concerning Federal-aid participation in attorney's fees for outside counsel hired by Caltrans. Caltrans shall be responsible for opposing party's attorney's fees and court costs if a court awards those costs to an opposing party, or in the event those costs are part of a settlement agreement.

6.2.3 Caltrans will notify the FHWA's California Division Office and DOJ's Assistant Attorney General for the Environment and Natural Resources Division, within seven (7) calendar days of Caltrans Legal Division's receipt of service of process of any complaint, concerning its discharge of any responsibility assumed under part 3 of this MOU. Caltrans' notification to the FHWA and USDOJ shall be made prior to its response to the complaint. In addition, Caltrans shall notify the FHWA's California Division Office within seven (7) calendar days of receipt of any notice of intent to sue concerning its discharge of any responsibility assumed under part 3 of this MOU.

6.2.4 Caltrans will provide the FHWA's California Division Office and DOJ copies of any motions, pleadings, briefs, and other such documents filed in any case concerning its discharge of any responsibility assumed under part 3 of this MOU. Caltrans will provide such copies to the FHWA and DOJ within seven (7) calendar days of receipt of service of any document or, in the case of any documents filed by or on behalf of Caltrans, within seven (7) calendar days of the date of filing.

6.2.5 Caltrans will notify the FHWA's Division Office and DOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and DOJ with a reasonable amount of time of at least ten (10) calendar days, to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. Caltrans will not execute any settlement agreement until FHWA and DOJ have provided comments on the proposed settlement, indicated that they will not provide comments on the proposed settlement, or the review period has expired, whichever occurs first.

6.2.6 Within seven (7) calendar days of receipt by Caltrans, Caltrans will provide notice to FHWA's Division Office and DOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities Caltrans has assumed under this MOU. Caltrans shall notify FHWA's Division Office and DOJ within five (5) days of filing a notice of appeal of a court decision. Caltrans shall confer with FHWA and DOJ regarding the appeal at least forty-five (45) days before filing an appeal brief in the case.

6.2.7 Caltrans's notifications to FHWA and DOJ in subparts 6.2.3, 6.2.5, and 6.2.6 shall be made by electronic mail to *FHWA_assignment_lit@dot.gov*, and *NRSDOT.enrd@usdoj.gov*, unless otherwise specified by FHWA and DOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in subpart 6.2.4, Caltrans may opt to either send the materials to the email addresses identified above, send hardcopies to the mail address below, or add to the distribution list in the court's electronic filing system (e.g., PACER) the following two email addresses: *FHWA_assignment_lit@dot.gov* and *efile_nrs.enrd@usdoj.gov*. FHWA and DOJ's comments under subpart 6.2.5 and 6.2.6 shall be made by electronic mail to Caltrans Chief Counsel, unless otherwise specified by Caltrans. In the event that regular mail is determined necessary, mail should be sent by overnight mail service to:

For DOJ: Assistant Attorney General for the Environment and Natural Resources Division at 950 Pennsylvania Avenue, NW, Room 2143, Washington, DC, 20530.

For FHWA: Division Administrator for the FHWA California Division, 650 Capitol Mall, Ste. 4-100, Sacramento, CA 95814-4708.

6.3 Conflict Resolution

6.3.1 In discharging any of the USDOT Secretary's responsibilities under this MOU, Caltrans agrees to comply with any applicable requirements of USDOT and FHWA statute, regulation, guidance or policy regarding conflict resolution. This includes the USDOT Secretary's responsibilities for issue resolution under 23 U.S.C. 139(h), with the exception of the USDOT Secretary's responsibilities under 23 U.S.C. 139(h)(6) regarding financial penalties.

6.3.2 Caltrans agrees to follow 40 CFR part 1504 in the event of pre-decision referrals to CEQ for Federal actions determined to be environmentally unsatisfactory. Caltrans also agrees to coordinate and work with CEQ on matters brought to CEQ with regards the environmental review responsibilities for highway projects Caltrans has assumed.

PART 7. INVOLVEMENT WITH OTHER AGENCIES

7.1 Coordination

7.1.1 Caltrans agrees to seek early coordination with all appropriate Federal, State, and local agencies in carrying out any of the responsibilities and highway projects assumed under this MOU.

7.2 Processes and Procedures

7.2.1 Caltrans will ensure that it has appropriate processes and procedures in place that provide for proactive and timely consultation, coordination, and communication with all appropriate Federal agencies in order to carry out any of the responsibilities assumed under this MOU, including the submission of all environmental impact statements together with comments and responses to the Environmental Protection Agency (EPA) as required at 40 C.F.R. 1506.9 and for EPA's review as required by section 309 of the Clean Air Act. These processes and procedures shall be formally documented. Such formal documentation may be in the form of a formal executed interagency agreement or in other such form as appropriate.

PART 8. INVOLVEMENT WITH FHWA

8.1 Generally

8.1.1 Except as specifically provided otherwise in this MOU, the FHWA will not provide any project-level assistance to Caltrans in carrying out any of the responsibilities it has assumed under this MOU. Project-level assistance shall include any advice, consultation, or document review with respect to the discharge of such responsibility for a particular highway project. However, project-level assistance does not include process or program level assistance as provided in subpart 8.1.4, discussions concerning issues addressed in prior projects, interpretations of any applicable law contained in titles 23 or 49 of the United States Code, interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance.

8.1.2 The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving Caltrans' consultation or coordination with another Federal agency with respect to Caltrans' discharge of any of the responsibilities it has assumed under this MOU for any particular highway project. However, the FHWA may attend meetings between Caltrans and other Federal agencies and submit comments to Caltrans and the other Federal agency in the following extraordinary circumstances:

- A. The FHWA reasonably believes that Caltrans is not in compliance with this MOU;
- B. The FHWA determines that an issue between Caltrans and the other Federal agency concerns emerging national policy issues under development by the USDOT; or
- C. Upon request by either Caltrans or the other Federal agency and agreement by the FHWA.

The FHWA will notify both Caltrans and the relevant Federal agency prior to attending any meetings between Caltrans and such other Federal agency.

8.1.3 Other Federal agencies may raise program- or policy-level concerns regarding the compliance by Caltrans with this MOU and may communicate these concerns to the FHWA. The FHWA will review the program- or policy-level concerns and any other information provided to FHWA by such other Federal agency. If, after such review, the FHWA and such other Federal agency still have concerns regarding Caltrans' compliance, the FHWA will notify Caltrans in a timely manner of the potential compliance issue and will work with both Caltrans and the relevant Federal agency to resolve the issue and, if necessary, take appropriate action to ensure compliance with this MOU.

8.1.4 At Caltrans' request, the FHWA may assist Caltrans in evaluating its environmental program and developing or modifying any of its processes or procedures to carry out the responsibilities it has assumed under this MOU, including, but not limited to, those processes and procedures concerning Caltrans' consultation, coordination, and communication with other Federal agencies.

8.1.5 Caltrans' obligations and responsibilities under 23 CFR 1.5 are not altered in any way by executing this MOU.

8.2 MOU Monitoring and Oversight

8.2.1 Pursuant to 23 U.S.C. 327(h), the FHWA shall monitor Caltrans' performance in order to ensure Caltrans' compliance with the MOU and all applicable Federal laws and policies, and to evaluate whether Caltrans is meeting the performance measures listed in Part 10 of the MOU. The FHWA's monitoring program will consist of monitoring reviews, which will be coordinated with Caltrans and take into account Caltrans' self-monitoring and the FHWA California Division's annual risk assessments.

8.2.2 In order to minimize the impact of the monitoring reviews on Caltrans' day-to-day project delivery workload, the FHWA and Caltrans will coordinate when scheduling joint monitoring reviews. Normally, the FHWA expects to complete two monitoring reviews during the term of the MOU, although the FHWA may conduct additional reviews if deemed necessary. Caltrans and the FHWA California Division Office will

each designate a point of contact, who will be responsible for coordinating monitoring review schedules, requests for information and organizing meetings.

8.2.3 In order to evaluate whether Caltrans is meeting the performance measures listed in Part 10 of this MOU, Caltrans shall make available for inspection by the FHWA any project files, general administrative files, and letters or comments received from governmental agencies and the public which pertain to Caltrans' discharge of the responsibilities it has assumed under this MOU. Caltrans will work with the FHWA to provide documents electronically to the extent it does not create an undue burden. Caltrans environmental staff will be available for interviews as part of the monitoring reviews.

8.2.4 Pursuant to 23 U.S.C. 327(c)(4), Caltrans is responsible for providing to the FHWA any information the FHWA reasonably considers necessary to ensure that Caltrans is adequately carrying out the responsibilities assigned. At the request of the FHWA, Caltrans will (within five business days or a mutually agreeable time frame), provide the FHWA with any information the FHWA considers necessary to ensure that Caltrans is adequately carrying out the responsibilities assigned to Caltrans.

8.2.5 Annually from the Effective Date of this MOU, Caltrans shall provide a report to the FHWA California Division Office listing any approvals and decisions Caltrans has made with respect to the responsibilities Caltrans has assumed under part 3 of this MOU.

8.2.6 In carrying out the responsibilities assumed under Part 3 of this MOU, Caltrans agrees to carry out regular quality assurance and quality control (QA/QC) activities to ensure the assumed responsibilities are being conducted in accordance with applicable laws and this MOU. At a minimum, Caltrans' QA/QC 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.

8.2.7 Caltrans shall perform annual monitoring of its QA/QC process to determine whether the process is working as intended, to identify any areas needing improvements in the process, and to take any corrective actions necessary to address the areas needing improvement. Caltrans shall transmit a report on the results of this self-monitoring to the FHWA California Division office and make the report available for public inspection.

8.2.8 Monitoring review reports, be they prepared by the FHWA or Caltrans, shall include a description of the scope of the monitoring reviews, the compliance areas reviewed, a description of the monitoring process, a list of areas identified as needing improvement. The FHWA reports shall identify findings that require corrective actions and the Caltrans reports shall discuss corrective actions that have been or will be implemented.

8.2.9 Prior to making any monitoring review report available to the public, the FHWA will transmit to Caltrans a draft of the report and allow Caltrans at least 14 calendar days to respond in writing. The FHWA will grant any reasonable request by Caltrans to extend this response period up to a total of 30 calendar days. The FHWA will review the comments and revise the draft monitoring report, as appropriate.

8.2.10 Caltrans agrees to post all monitoring reports on the Caltrans Division of Environmental Analysis website in order to make them available to the public.

8.3 Record Retention

8.3.1 Caltrans will retain project files and general administrative files pertaining to its discharge of the responsibilities it has assumed under this MOU in accordance with 2 CFR 200.333 and the provisions below.

8.3.2 In addition to the period of time specified in subpart 8.3.1, 2 CFR 200.333(b), Caltrans will ensure that the following retention periods are maintained for each specified type of record:

- A. **Environmental Correspondence Files:** Environmental correspondence files include correspondence between the FHWA and Caltrans relative to the interpretation, administration, and execution of environmental aspects of the Federal-aid Highway Program. Environmental correspondence files shall be maintained by Caltrans for a period of three years after the resolution of the particular issue for which the file is created. After three years, Caltrans shall transmit environmental correspondence files to the FHWA to be stored at the Federal Records Center.
- B. **Environmental Impact Statements and/or Section 4(f) Statements-FHWA:** Files containing reviews and approval of EIS's and Section 4(f) statements for which Caltrans, in assuming the FHWA's responsibilities, is the lead agency shall be maintained by Caltrans for a period of eight years after approval of the final statement. After eight years, Caltrans shall transmit its EIS and/or section 4(f) files to the FHWA.
- C. **Environmental Impact Statements-Other Agencies:** Files containing reviews and comments furnished by Caltrans to other Federal agencies following reviews of an EIS for which another Federal agency is the lead agency shall be maintained by Caltrans for a period of five years. After five years, Caltrans may destroy these files when no longer needed.
- D. **Fish and Wildlife Coordination:** Files containing correspondence with the fish and wildlife resource agencies early in project development may be destroyed by Caltrans after three years.
- E. **Noise Barriers:** To comply with 23 CFR 772.13(f) regarding noise abatement measures reporting, files containing correspondence, publications, presentations, installation reports for wall barriers, and design of different types of wall barriers by private industry shall be

maintained by Caltrans for a period of four years after the end of the Federal fiscal year in which the particular file is closed.

8.3.3 Nothing contained in the MOU is intended to relieve Caltrans of its recordkeeping responsibilities under 2 CFR 200.333 or other applicable laws or regulations.

8.4 Federal Register

8.4.1 For any documents to be published in the *Federal Register*, such as the Notice of Intent under 23 C.F.R. 771.123(a) and Notice of Final Agency Action under 23 U.S.C. 139(l), Caltrans shall transmit such document to the FHWA's California Division Office, and the FHWA will cause such document to be published in the *Federal Register* on behalf of Caltrans and will submit such document to the *Federal Register* within five calendar days of receipt of such document from Caltrans. To the extent that the operating procedures of the Government Printing Office and the *Federal Register* permit, Caltrans will take over the procedures described above from the FHWA California Division Office.

8.5 Participation in Resource Agency Reports

8.5.1 Caltrans agrees to provide data and information requested by the FHWA Office of Project Development and Environmental Review and resource agencies for the preparation of national reports to the extent that the information relates to determinations, findings, and proceedings associated with projects processed under this MOU. Such reports include but are not limited to:

- A. Information on the completion and time for completion of NEPA environmental documentation of all types (EIS, EA, CE);
- B. Archeology Reports requested by the National Park Service;
- C. Endangered Species Act Expenditure Reports requested by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service;
- D. NEPA Litigation Reports requested by the CEQ; and
- E. Environmental Conflict Resolution reports, requested by the Office of Management and Budget, and the CEQ.

8.6 Conformity Determinations

8.6.1 Pursuant to 23 U.S.C. 327(a)(2)(B)(iv)(II), for any project requiring a project-level conformity determination under the Federal Clean Air Act and its implementing regulations, the FHWA's California Division Office will document the project level conformity determination by transmitting a letter to Caltrans to be included in the Final

EIS or EA. The FHWA's California Division Office will restrict its review to only that data, analyses, applicable comments and responses, and other relevant documentation that enable the FHWA to make the project level conformity determination. For CE projects that have not been assumed pursuant to the 326 MOU, Caltrans shall rely upon FHWA for the project level conformity determinations. Caltrans shall rely upon a documented FHWA project-level conformity determination prior to approval of the CE by Caltrans.

8.7 Certification of NEPA Compliance

8.7.1 For projects funded by the FHWA, prior to the execution of any Federal-aid project agreement for a physical construction contract, a design-build contract, or a contract for final design services, the Director of Caltrans will submit a certification for each individual project to the FHWA California Division Office specifying that Caltrans has fully carried out all responsibilities assumed under this MOU in accordance with this MOU and applicable Federal laws, regulations, and policies. The Director of Caltrans may delegate the certification required under this subpart to other qualified and duly authorized Caltrans personnel.

8.8 Enforcement

8.8.1 Should the FHWA determine that Caltrans is not in compliance with this MOU, then the FHWA shall take appropriate action to ensure Caltrans' compliance, including appropriate remedies provided at 23 CFR 1.36 for violations of or failure to comply with Federal law or the regulations in 23 CFR Part 771 with respect to a project, withdrawing assignment of any responsibilities that have been assumed as provided in part 9 of this MOU, or terminating Caltrans' participation in the Program as provided in part 12 of this MOU.

PART 9. WITHDRAWAL OF RESPONSIBILITIES OF ASSIGNED PROJECTS

9.1 FHWA-Initiated Withdrawal of Assigned Projects

9.1.1 The FHWA may, at any time, withdraw the assignment of all or part of the USDOT Secretary's responsibilities that have been assumed by Caltrans under this MOU for any highway project or highway projects upon the FHWA's determination that:

- A. With respect to that particular highway project or those particular highway projects, Caltrans is not in compliance with a material item of this MOU or applicable Federal laws or policies; and Caltrans has not taken sufficient corrective action to the satisfaction of the FHWA;
- B. The highway project or highway projects involve significant or unique national policy interests for which Caltrans' assumption of the Secretary's responsibilities would be inappropriate; or
- C. Caltrans cannot satisfactorily resolve an issue or concern raised in a government-to-government consultation process, as provided in subpart 3.2.3.

9.1.2 Upon the FHWA's determination to withdraw assignment of the USDOT Secretary's responsibilities under subpart 9.1.1, the FHWA will notify Caltrans of the FHWA's determination. After notifying Caltrans of its determination, the FHWA will provide Caltrans written notice of its determination including the reasons for its determination. Upon receipt of this notice, Caltrans may submit any comments or objections to the FHWA within 30 calendar days, unless an extended period of time is agreed to by the FHWA. Upon receipt of Caltrans' comments or objections, the FHWA will make a final determination within 30 calendar days, unless extended by the FHWA for cause, and notify Caltrans of its decision. In making its determination, the FHWA will consider Caltrans' comments or objections, the effect the withdrawal of assignment will have on the Program, amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.

9.1.3 The FHWA shall withdraw assignment of the responsibilities Caltrans has assumed for any highway project when the preferred alternative that is identified in the environmental assessment or final environmental impact statement is a highway project that is specifically excluded in subpart 3.3.2. In such case, subpart 9.1.2 shall not apply.

9.2 Caltrans-Initiated Withdrawal of Assignment of Projects

9.2.1 Caltrans may, at any time, request the FHWA to withdraw all or part of the USDOT Secretary's responsibilities it has assumed under this MOU for any existing or future highway project or highway projects.

9.2.2 Upon Caltrans' decision to request the FHWA withdraw the assignment of the USDOT Secretary's responsibilities under subpart 9.2.1; Caltrans shall informally notify the FHWA of its desire for the FHWA to withdraw assignment of its responsibilities. After informally notifying the FHWA of its desire, Caltrans will provide the FHWA written notice of its desire, including the reasons for wanting the FHWA to withdraw assignment of the responsibilities. Upon receipt of this notice, the FHWA will have 30 calendar days, unless extended by the FHWA for cause, to determine whether it will withdraw assignment of the responsibilities requested. In making its determination, the FHWA will consider the reasons Caltrans desires the FHWA to withdraw assignment of the responsibilities, the effect the withdrawal of assignment will have on the Program, amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.

PART 10. PERFORMANCE MEASURES

10.1 General

10.1.1 Both the FHWA and Caltrans have determined that it is desirable to mutually establish a set of performance measures that the FHWA can take into account in its

evaluation of Caltrans' administration of the responsibilities it has assumed under this MOU.

10.1.2 Caltrans attainment of the performance measures indicated in this Part 10 will be considered through FHWA monitoring, which is required for FHWA to comply with 23 U.S.C. 327.

10.1.3 Caltrans shall collect and maintain all necessary and appropriate data related to the attainment of the performance measures. In collecting this data, Caltrans shall monitor its progress toward meeting the performance measures and include its progress in the monitoring report provided under subpart 8.2.5 of this MOU. Caltrans shall make the monitoring report available to FHWA and the public as provided in subpart 8.2.5.

10.2 Performance Measures

10.2.1 The performance measures applicable to Caltrans in carrying the responsibilities it has assumed under part 3 of this MOU are as follows:

A. Compliance with NEPA and other Federal laws and regulations:

- i. Maintain documented compliance with procedures and processes set forth in the MOU for the environmental responsibilities assumed under the Program.
- ii. Maintain documented compliance with requirements of all Federal statutes and regulations being assumed (Section 106 of the NHPA, Section 7 of the ESA, etc.).

B. Quality Control and Assurance for NEPA decisions:

- i. Maintain and apply internal quality control and assurance measures and processes, including a record of:
 - a. Legal sufficiency determinations made by counsel;
 - b. Compliance with FHWA and Caltrans environmental document content standards and procedures, including those related to QA/QC; and
 - c. Completeness and adequacy of documentation of project records for projects done under the Program.

C. Relationships with agencies and the general public:

- i. Assess change in communication among Caltrans, Federal and state resource agencies, and the public resulting from assumption of responsibilities under this MOU.
- ii. Maintain effective responsiveness to substantive comments received from the public, agencies and interest groups on NEPA documents and environmental concerns.

- iii. Maintain effective NEPA conflict resolution processes whenever appropriate.

D. Increased efficiency and timeliness in completion of NEPA process:

- i. Compare time of completion for NEPA approvals before and after assumption of responsibilities under this MOU.
- ii. Compare time to completion for key interagency consultation formerly requiring FHWA participation (e.g., Section 7 biological opinions) before and after assumption of responsibilities under this MOU.

PART 11. TRAINING

11.1 Training

11.1.1 The FHWA will provide Caltrans available training, to the extent the FHWA and Caltrans deem necessary, with respect to the environmental responsibilities that Caltrans has assumed. Such training may be provided by either the FHWA or another Federal agency or other parties as may be appropriate. Caltrans agrees to have all appropriate employees (including consultants hired for the purpose of carrying out the USDOT Secretary's responsibilities) attend such training.

11.1.2 A training plan will be updated annually by Caltrans and the FHWA during the term of this MOU. While Caltrans and the FHWA may take other agencies' recommendations into account in determining training needs, Caltrans and the FHWA will jointly determine the training required under this MOU.

PART 12. TERM, TERMINATION AND RENEWAL

12.1 Term

12.1.1 This MOU has a term of five years from the Effective Date.

12.2 Termination by the FHWA

12.2.1 As provided at 23 U.S.C. 327(j)(1), the FHWA may terminate Caltrans' participation in the Program, in whole or in part, at any time subject to the procedural requirements in 23 U.S.C. 327 and subpart 13.2.2 below. Failure to adequately carry out the responsibilities of the Program may include, but not be limited to:

- A. Persistent neglect of, or noncompliance with, any Federal laws, regulations, and policies;
- B. Failure to cooperate with the FHWA in conducting any oversight or monitoring activity;

- C. Failure to secure or maintain adequate personnel and financial resources to carry out the responsibilities assumed;
- D. Substantial noncompliance with this MOU; or
- E. Persistent failure to adequately consult, coordinate, and/or take the concerns of other relevant Federal and state agencies into account in carrying out the responsibilities assumed.

12.2.2 If the FHWA determines that Caltrans is not adequately carrying out the responsibilities assigned to Caltrans, then:

- A. The FHWA shall provide to Caltrans a written notification of its determination.
- B. Caltrans shall have a period of not less than 120 days to take such corrective action as FHWA determines to be necessary to comply with this MOU.
 - i. On the request of the Governor, FHWA shall provide a detailed description of each responsibility in need of corrective action.
- C. If, after the notification and the period to take corrective action Caltrans has failed to take satisfactory corrective action as determined by FHWA, FHWA shall provide Caltrans with a notice of termination. Any responsibilities identified to be terminated in the notice that have been assumed by Caltrans pursuant to this MOU shall transfer to the FHWA.

12.3 Termination by Caltrans

12.3.1 Caltrans may terminate its participation in the Program, in whole or in part, at any time by providing to FHWA a notice at least 90 calendar days prior to the date that Caltrans seeks to terminate its participation in this Program, and subject to such terms and conditions, as the FHWA may provide.

12.3.2 California's consent to Federal court jurisdiction and waiver of sovereign immunity currently sunsets on January 1, 2017. Affirmative action by the State of California will be necessary to extend the State's consent and waiver. If California does not consent to Federal court jurisdiction and waive sovereign immunity, then Caltrans' participation in the Program will be suspended on January 1, 2017 for a period of up to 90 calendar days. If adequate certification (as required by 23 CFR 773.109(a)(6) and 773.115(c)(2)) is not provided within this time period, then this MOU and California's participation in the Program shall be terminated

- A. During the period of suspension, Caltrans will not make any NEPA decisions or implement any of the environmental review responsibilities assigned under Part 3 of this MOU.

B. If the necessary actions are taken to authorize a new consent to Federal court jurisdiction and waiver of sovereign immunity during the period of suspension, then California's participation in the Program will resume on the day the FHWA acknowledges receipt of adequate certification provided by Caltrans as required by 23 CFR 773.109(a)(6) and 773.115(c)(2).

12.3.3 The California State Legislature may, at any time, terminate Caltrans participation in the Program by withdrawing the State's consent to Federal court jurisdiction and waiver of sovereign immunity or taking any other legislative action withdrawing authority to Caltrans to participate in the Program.

12.3.4 The FHWA and Caltrans shall have a plan to transition the responsibilities that Caltrans has assumed back to FHWA in the event that Caltrans' participation in the program is terminated. This plan shall be developed to minimize disruption to projects, confusion to the public, and burdens on other affected Federal, State, and local agencies. The plan shall be approved by both FHWA and Caltrans.

12.4 Validity of Caltrans' Actions

12.4.1 Any environmental approvals made by Caltrans pursuant to the responsibilities Caltrans has assumed under this MOU shall remain valid after termination of Caltrans' participation in the Program or withdrawal of assignment by the FHWA. As among the USDOT Secretary, FHWA and Caltrans, and in accordance with subpart 4.3.1 and part 6, Caltrans shall remain solely responsible and solely liable for any environmental approvals it makes pursuant to any of the responsibilities it has assumed while participating in the Program.

12.5 Renewal

12.5.1 This MOU is renewable in accordance with 23 U.S.C. 327 and 23 C.F.R. 773.115.

- A. Caltrans shall notify FHWA at least 12 months before the expiration of this MOU of its intent to renew its participation in the Program.
- B. Prior to requesting renewal, Caltrans shall coordinate with FHWA to determine if significant changes have occurred or if new assignment responsibilities are being sought that would warrant a statewide notice and opportunity for public comment prior to Caltrans' submittal of the renewal package.
- C. Caltrans shall meet the requirements in 23 CFR 773.115(c); and
- D. Caltrans shall submit the renewal package no later than 180 days prior to the expiration date of the MOU.

PART 13. AMENDMENTS

13.1 Generally

13.1.1 This MOU may be amended at any time upon mutual agreement by both the FHWA and Caltrans pursuant to 23 CFR 773.113(b).

13.2 Additional Projects, Classes of Projects and Environmental Review Responsibilities

13.2.1 Caltrans may assume responsibility for additional projects and additional environmental review responsibilities beyond those identified in part 3 of this MOU by executing an amendment to this MOU.

13.2.2 Should Caltrans decide to request this MOU be amended to add responsibility for additional projects or classes of projects, or additional environmental review responsibilities beyond those identified in part 3 of this MOU, then such request shall be treated as an amendment to Caltrans' renewal package that was submitted to the FHWA pursuant to 23 U.S.C. 327 and 23 CFR Part 773.115. In developing the amendment, Caltrans shall identify the additional responsibilities and projects it wishes to assume and make any appropriate adjustments to the information contained in Caltrans' renewal package, including the verification of personnel and financial resources. Upon receipt of Caltrans' amendment, the FHWA will consult with, and solicit the views of, other appropriate Federal agencies.

IN WITNESS THEREOF, the parties hereto have caused this MOU to be duly executed in duplicate as of the date of the last signature written below. This MOU is effective on the Effective Date as specified in subpart 1.1.4.



Gregory G. Nadeau
Administrator
Federal Highway Administration

Date: December 23, 2016



Malcolm Dougherty
Director
California Department of Transportation

Date: Dec. 20, 2016



Joanne Scherer
Chief Counsel
California Department of Transportation only as to the certifications required under subpart 4.1.1 of this MOU and as to form.

Date: December 19, 2016