

**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, the Pilot Program was codified at 23 U.S.C. 327; and

Whereas, Section 1313 of the Moving Ahead for Progress in the 21st Century Act (Pub. L. 112-141) (2012) amended Section 327, making the Pilot Program permanent and changing the name to the Program; and

Whereas, Sections 1308 and 1446 of the Fixing America's Surface Transportation (FAST) Act (Pub. 114-94) (2015), amended Section 327; 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 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 CFR 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 CFR 773; and

Whereas, following the FHWA's approval of Caltrans' Pilot Program application, on July 1, 2007, the FHWA and Caltrans entered into an 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, Caltrans has continually participated in the Pilot Program and the permanent Program since July 1, 2007; and

Whereas, the history of Caltrans' participation in the two programs is set forth in detail in the FHWA-Caltrans MOU dated December 23, 2016 (2016 MOU), hereby incorporated by reference; 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 (2009-2010) 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, after 2010 the FHWA has monitored Caltrans' participation in the program in accordance with 23 U.S.C. 327(h); and

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

Whereas, the 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 December 18, 2019, Caltrans notified the FHWA of its intent to renew participation in the Program with respect to highway projects; and

Whereas, pursuant to 23 CFR 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 4, 2020, after coordination between the agencies, the 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 August 25, 2020, for approval to continue the assigned duties and responsibilities for highway projects pursuant to the Program; and

Whereas, on December 8, 2021, and April 14, 2022, FHWA sent letters to Caltrans authorizing an extension of Caltrans' assigned and assumed responsibilities under the 2016 MOU in accordance with 23 CFR 773.115(h) to allow the parties to complete the renewal process for this renewal MOU. The letter sent on April 14, 2022, extended the term of the 2016 MOU to either May 31, 2022, or the effective date of this renewal MOU, whichever is earlier; and

Whereas, on April 19, 2022, the 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 the FHWA, has considered the renewal package, comments received as a result of the *Federal Register* Notice, monitoring 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 773 and 23 U.S.C. 327; and

Whereas, on June 6, 2010, June 7, 2013, May 31, 2016 (as amended on December 30, 2016), and April 18, 2019, the FHWA and Caltrans executed Memoranda of Understanding assigning Caltrans the USDOT Secretary's responsibilities for environmental reviews determining whether certain designated activities qualify for categorical exclusions (CE) pursuant to 23 U.S.C. 326 (hereinafter 326 CE MOU); and

Whereas, on April 18, 2022, the FHWA and Caltrans renewed the 326 CE 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' August 25, 2020, 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 August 25, 2020, 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. Third parties also have the right to file a complaint against Caltrans with the FHWA under Title VI of the Civil Rights Act of 1964 and the FHWA has the authority and jurisdiction to accept, investigate, and make a determination regarding the allegations in the complaint. 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.

1.1.5 The assignment of responsibilities under this MOU is made pursuant to the authority granted to the Secretary under 23 U.S.C. 327. Any provision of this MOU, or any portion of any provision, that is deemed to be illegal, unenforceable, or beyond the scope of the Secretary's authority shall be severed from this MOU, without affecting the validity of the remainder of the MOU. In such event, all other provisions or parts of provisions of this MOU shall remain in full force and effect.

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 NEPA with respect to the highway projects specified under subpart 3.3. This includes statutory provisions, regulations, executive orders, policies, and guidance related to the implementation of NEPA for highway projects such as 23 U.S.C. 139, 40 CFR 1500-1508, DOT Order 5610.1C, and 23 CFR 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 326 CE MOU between the 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 and executive orders related to highway projects:

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 772

Wildlife

- Endangered Species Act of 1973 (ESA), 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
- Bald and Golden Eagle Protection Act, 16 U.S.C. 668-668d
- 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 (NHPA), 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), 23 U.S.C. 133(b)
- FHWA wetland and natural habitat mitigation regulations at 23 CFR 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 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 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
- E.O. 13985 - Advancing Racial Equity and Support for Underserved Communities Through the Federal Government
- E.O. 13990 - Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis

- E.O. 14008 - Tackling the Climate Crisis at Home and Abroad
Other Executive Orders not listed, but related to highway projects

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 CFR 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)). In addition, FHWA remains responsible for implementing other laws, requirements and policies that are not assumed by Caltrans under this MOU, or other MOUs and agreements, with respect to highway projects. This includes, but is not limited to, laws,

requirements and policies related to Interstate access, right-of-way (including advance acquisition of right-of-way), value engineering, design, and other areas related to such projects.

3.2.5 The assignment under this part does not alter the scope and terms of the 326 CE MOU between the 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 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 the 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 for 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 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.
- 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 326 CE 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:
- D. Projects funded by other Federal agencies [or projects without any Federal funding] that also require FHWA approvals and meet the definition of a highway project found at 23 CFR 773.103. 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;
- 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.
- C. Any Federal-aid highway project that may be designed and constructed by the FHWA under a 23 U.S.C. 308 agreement between the FHWA Central Federal Lands Highway Division and Caltrans.

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, legal, 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 The Caltrans Chief Engineer will serve as the Senior Agency Official consistent with 40 CFR 1508.1(dd); this position must be the one that is equivalent to an Assistant Director of the State DOT or higher. Any changes to the title designation must be provided in writing to the FHWA with a justification.

4.2.4 When carrying out the requirements of Section 106 of the NHPA, as amended, Caltrans staff (including consultants) shall comply with 36 CFR 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 (36 CFR Appendix A to Part 61). Caltrans shall ensure that all documentation required under 36 CFR 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 the 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, including, but not limited to, environmental justice. 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 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 5.1.3 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]. 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.

Caltrans has reviewed the following memoranda and understands that by accepting the FHWA's NEPA responsibilities, it also agrees to perform the FHWA's obligations set forth in these memoranda, consistent with the assigned authorities under this MOU:

- 2014 MOA between the U.S. Coast Guard (USCG) and the FHWA to Coordinate and Improve Bridge Planning and Permitting
- 2014 MOU between USCG, the FHWA, the Federal Transit Administration, and the Federal Railroad Administration to Coordinate and Improve Bridge Planning and Permitting

5.1.2 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.

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

5.1.4 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 the 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, formal policy, or guidance established by or applicable to the USDOT Secretary or the 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 highway 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 the 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 the 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 an 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 California 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 the 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 the FHWA's California 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 the FHWA's California Division Office and DOJ within five (5) calendar days of filing a notice of appeal of a court decision. Caltrans shall confer with the FHWA and DOJ regarding the appeal at least forty-five (45) calendar days before filing an appeal brief in the case.

6.2.7 Caltrans's notifications to the FHWA and DOJ in subparts 6.2.3, 6.2.5, and 6.2.6 shall be made by electronic mail to the FHWA_assignment_lit@dot.gov, and NRS DOT.enrd@usdoj.gov, unless otherwise specified by the 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. The 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 the 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)(7) regarding financial penalties.

6.3.2 Caltrans agrees to follow 40 CFR 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 CFR 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 THE 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 Caltrans 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 the 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, emerging national policy issues, and 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 as they would apply if these responsibilities were carried out by the USDOT Secretary, 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. Caltrans agrees to comply with all requests from FHWA related to monitoring under this MOU that FHWA reasonably considers necessary to ensure that Caltrans is adequately carrying out the responsibilities assigned to Caltrans.

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. Further, in the report, Caltrans will provide project names, locations, decisions, and any commitments related to mitigation for all analyses, including environmental justice analysis. The information related to commitments will be summarized in the annual report, with more detailed information provided through a hyperlink to the environmental document, for each project that has environmental commitments.

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, including environmental justice, 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 environmental 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 Except as noted below, Caltrans will retain environmental project records until the end of the third year after the FHWA's final voucher payment for the project is verified. For projects on the State Highway System, final voucher payment is verified when the Certificate of Environmental Compliance (CEC) at Contract Acceptance is signed. For Local Assistance projects, it is verified when the Local Agency Final Inspection Form (FIF) is signed.

A. Environmental Assessments and Environmental Impact Statements

The following shall be retained:

- Signed draft environmental documents (except for DEISs, the retention period shall be a minimum of 8 years, or at least 3 years from when the CEC or FIF is signed, whichever is later)
- Signed final environmental documents, including the following (except for FEISs, the retention period shall be a minimum of 8 years, or at least 3 years from when the CEC or FIF is signed, whichever is later):
 - Section 7 Biological Opinion(s) and letter(s) of concurrence
 - Section 106 MOA
 - Air quality conformity determination
 - Section 4(f) de minimis finding(s) and/or evaluation
 - FONSI or ROD
- Final technical reports, as applicable, including:
 - Hydrology report
 - Location hydraulic analysis
 - Floodplain risk assessment
 - Initial site assessment
 - Preliminary site assessment
 - Air quality report
 - Air quality conformity analysis

- Noise study report (Shall be maintained for a minimum of 4 years and at least 3 years from the CEC or FIF approval as identified above, whichever length of time is longer)
- Noise abatement decision report (Shall be maintained for a minimum of 4 years and at least 3 years from the CEC or FIF approval as identified above, whichever length of time is longer)
- Environmental justice analysis
- Natural environment study
- Biological assessment(s)
- Wetland delineation
- Community impact assessment
- Relocation impact report
- Traffic study
- Visual resources study
- Historic properties survey report including required appendices (Archaeological Survey Report and Historic Resources Evaluation Report)
- Federal environmental permits including those related to:
 - Section 404 of the Clean Water Act
 - Section 10 of the Rivers and Harbors Act
 - Title 14, Division 5.5, Chapter 5, Sec. 13300 et seq (local or state coastal development permits)
- Environmental Commitment Record
- Signed Certificate of Environmental Compliance at Contract Acceptance

B. Categorical Exclusions

The following shall be retained:

- Signed CE/CE Determination form
- Final technical studies, as applicable, identified above
- Environmental permits, as applicable, identified above
- Environmental commitment record
- Signed Certificate of Environmental Compliance at Contract Acceptance

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 CFR 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 Data and Information Requests

8.5.1 Caltrans agrees to provide data and information requested by the FHWA and resource agencies for the preparation of national reports, the Federal Permitting Dashboard, and other purposes that the Secretary reasonably considers necessary to ensure that Caltrans is adequately carrying out the responsibilities assigned to Caltrans and to the extent that the information relates to determinations, findings, and proceedings associated with projects processed under this MOU. Such data and information requests may 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. ESA 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;
- E. Environmental Conflict Resolution reports, requested by the OMB, and the CEQ;
- F. Project status and information for EAs and EISs for use on the searchable website maintained under section 41003(b) of the FAST Act [Fixing America's Surface Transportation Act, 42 U.S.C. 4370m-2(b) and 23 U.S.C. 139(o)] (Federal Permitting Dashboard) to be submitted in accordance with current and any future reporting standard issued by USDOT pursuant to such provisions;
- G. Environmental information for all EAs and EISs subject to this MOU. Such information shall include, but is not limited to all known environmental justice concerns identified during the environmental process;

H. Any such information that may be requested by the FHWA Administrator

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 CE MOU, Caltrans shall rely upon the 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 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, after receiving reasonable notice and an opportunity to take corrective action, 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, including instances where the FHWA receives a complaint under Title VI of the Civil Rights Act of 1964 involving a project that is subject to this MOU and the FHWA accepts the complaint for investigation or determines that the project may have significant negative community impacts ; 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 seek 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. Following its final determination, when FHWA withdraws assignment for any project or projects, FHWA will assume sole responsibility and liability for the decisions and approvals it has re-assumed for the project or projects based on such determination. However, Caltrans will remain responsible for other decisions and approvals for the project or projects, which FHWA has not reassumed responsibility or liability for, such as decisions and approvals beyond the scope of the USDOT Secretary's responsibilities under NEPA and related Federal environmental laws.

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 the 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 the FHWA and the public as provided in subpart 8.2.7.

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 as provided in section 3.2.1 of this MOU.

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.
- iv. Ensure meaningful public engagement, including with environmental justice communities.

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 ten 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 12.2.2 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 non-compliance determination detailing a description of each responsibility in need of corrective action regarding an inadequacy identified.
- B. Caltrans shall have a period of not less than 120 days to take such corrective action as the FHWA determines to be necessary to comply with this MOU.
- C. If, after the notification and the period to take corrective action Caltrans has failed to take satisfactory corrective action as determined by the FHWA, the 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 the 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 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.

12.3.3 The FHWA and Caltrans shall have a plan to transition the responsibilities that Caltrans has assumed back to the 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 the 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, the 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

CFR 773.115.

- A. Caltrans shall notify the 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 the 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 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.

PART 14. IMPLEMENTATION OF NONENVIRONMENTAL LAWS

14.1 Generally

14.1.1 It is recognized and understood that the FHWA remains responsible for implementing other laws, requirements and policies that are not assumed by Caltrans under this MOU, or other MOUs and agreements, with respect to highway projects. This includes, but is not limited to, laws, requirements and policies related to Interstate access, right-of-way (including advance acquisition of right-of-way), value engineering, design, and other areas related to such projects. The FHWA's implementation of such laws, requirements and policies should be consistent with Caltrans' analyses and decisions, if any, that are made pursuant to the responsibilities assumed under this MOU.

14.1.2 Nothing in the MOU prevents or otherwise limits the FHWA's ability to ask Caltrans for information or clarification regarding any NEPA or other environmental decision or analysis made or conducted by Caltrans under this MOU for any highway project.

14.1.3 The FHWA's requests for such information or clarification do not change Caltrans' responsibility and liability for such decisions and analyses under this MOU.

14.1.4 Should FHWA determine that further action is necessary with respect to Caltrans compliance with the responsibilities it has assumed under this MOU, the FHWA may request that Caltrans take appropriate action and will give Caltrans a reasonable period of time to respond. The FHWA may also take action to reassume responsibilities for such project if the FHWA deems appropriate as provided for under Part 9 of this MOU.

14.2 Title VI of the Civil Rights Act of 1964

14.2.1 Although Title VI is not part of NEPA, the public has the right to file a Title VI complaint. The FHWA's responsibilities with respect to such complaints, as well as other issues related to Title VI compliance that have been identified by the FHWA, may require the FHWA to ask Caltrans for information or clarification regarding any NEPA or environmental decision or analysis made or conducted by Caltrans under this MOU for any highway project.

14.2.2 Caltrans agrees to comply with all requests from FHWA related to monitoring under this MOU. Title VI investigations involving highway projects subject to this MOU may result in additional monitoring in accordance with this MOU.

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 1.1.3.



Stephanie Pollack
Deputy Administrator
Federal Highway Administration

Date: 5-27-22



Steven Keck
Acting Director
California Department of Transportation

Date: 5-26-22



Erin Holbrook
Chief Counsel

Date: 5/24/22

For California Department of Transportation only as to the certifications required under subpart 4.1.1 of this MOU and as to form.