

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

THIS MEMORANDUM OF UNDERSTANDING (MOU), entered into by and between the FEDERAL HIGHWAY ADMINISTRATION (FHWA), an administration in the UNITED STATES DEPARTMENT OF TRANSPORTATION (USDOT), and the STATE OF ALASKA, acting by and through its ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES (DOT&PF), hereby provides as follows:

WITNESSETH

Whereas, Section 327 of Title 23 of the United States Code (U.S.C.) establishes the Surface Transportation Project Delivery Program (Program) that allows the Secretary of the United States Department of Transportation (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. (NEPA), and all or part of the USDOT Secretary's responsibilities for environmental review, consultation, or other actions required by Federal environmental law with respect to highway, public transportation, railroad, and multimodal projects within the state; 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 1, 2016, prior to submittal of its application to FHWA, DOT&PF published notice of, and solicited public comment on, its draft application to participate in the Program as required by 23 U.S.C. 327(b)(3), and addressed the comments received as appropriate; and

Whereas, Alaska Statute 44.42.300 authorizes DOT&PF to participate in the Program; and

Whereas, on July 12, 2016, the State of Alaska acting by and through DOT&PF, submitted an application to FHWA with respect to highway projects in the State of Alaska; and

Whereas, on **DATE TBD**, FHWA published a notice in the *Federal Register* providing an opportunity for comment on its preliminary decision to approve DOT&PF's application and solicited the views of other appropriate Federal agencies concerning DOT&PF's application as required by 23 U.S.C. 327(b)(5); and

Whereas, the USDOT Secretary, acting by and through FHWA pursuant to 49 CFR 1.85(a)(3), has determined that DOT&PF's application meets the requirements of 23 U.S.C. 327 with respect to the Federal environmental laws and highway projects identified in this MOU.

Now, therefore, FHWA and DOT&PF agree as follows:

PART 1. PURPOSE OF MEMORANDUM OF UNDERSTANDING

1.1 Purpose

- 1.1.1 This MOU officially approves DOT&PF's application to participate in the Program and is the written agreement required by 23 U.S.C. 327(a)(2)(A) and (c) under which the USDOT Secretary may assign, and DOT&PF may assume, the responsibilities of the USDOT Secretary for Federal environmental laws with respect to one or more highway projects within the State of Alaska.
- 1.1.2 FHWA's decision to execute this MOU is based upon the information, representations, and commitments contained in DOT&PF's May 31, 2016, application. As such, this MOU incorporates the application. To the extent there is any conflict between this MOU and the application, this MOU shall control.
- 1.1.3 This MOU shall be effective 5 days after signature of the final MOU (Effective Date).
- 1.1.4 On the Effective Date, the MOU between DOT&PF and FHWA dated September 18, 2015, concerning the State Assumption of Responsibility for Categorical Exclusions under 23 U.S.C. 326 will terminate, and be supplanted by this MOU. The Programmatic Agreements between DOT&PF and FHWA dated April 13, 2012, concerning the processing of categorical exclusions [PCE Agreements pursuant to 23 CFR 771.117(g)] will be suspended for the duration of the MOU. The PCE Agreements may be reinstated after the termination of this MOU if FHWA determines that the PCE Agreements continue to be valid pursuant to applicable statutory and regulatory authorities in effect at the time of MOU termination.
- 1.1.5 Pursuant to 23 U.S.C. 327(c)(3)(B) and 327(c)(3)(C), and subpart 4.3 of this MOU, third parties may challenge DOT&PF's action 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 Alaska, 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 of this MOU, FHWA assigns, and DOT&PF 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 Federal-aid highway projects such as 23 U.S.C. 139, 40 C.F.R. parts 1500—1508, USDOT Order 5610.1C, and 23 C.F.R. 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 memoranda corresponding to any Categorical Exclusion (CE) determination it makes, DOT&PF shall insert the following language in a way that is conspicuous to the reader:

The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been,

carried out by DOT&PF pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated [INSERT DATE], and executed by FHWA and DOT&PF.

- 3.1.3 The DOT&PF 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.

3.2 Assignments and Assumptions of Responsibilities to Comply with Federal Environmental Laws Other Than NEPA

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

Air Quality

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

Alaska Specific

- Alaska National Interest Lands Conservation Act (ANILCA), Public Law 96-487, except any responsibilities under 16 U.S.C. 410hh(4)(d)

Executive Orders (E.O.) Relating to Highway Projects

- E.O. 11593, Protection and Enhancement of the Cultural Environment
- E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 CFR parts 650.113 and 650.115)
- E.O. 11990, Protection of Wetlands
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13007, Indian Sacred Sites
- E.O. 13112, Invasive Species, as amended by E.O. 13751, Safeguarding the Nation from the Impacts of Invasive Species
- E.O. 13175, Consultation and Coordination with Indian Tribal Governments

FHWA-Specific

- Efficient Project Reviews for Environmental Decision Making, 23 U.S.C. 139
- Environmental Impact and Related Procedures, 23 C.F.R. part 771
- 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

Hazardous Materials Management

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601—9675
- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901—6992k
- Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. 9671—9675

Historic and Cultural Resources

- Archeological and Historic Preservation Act of 1974, as amended, 54 U.S.C. 312501—312508
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470(aa)—(mm)
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001—3013; 18 U.S.C. 1170
- Preservation of Historical and Archaeological Data, 54 U.S.C. 312501—312508
- Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. 306108.

Land

- Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C. 319

Noise

- Compliance with the noise regulations in 23 C.F.R. part 772
- Noise Control Act of 1972, 42 U.S.C. 4901—4918

Parklands and Other Special Land Uses

- Land and Water Conservation Fund (LWCF) Act, 54 U.S.C. 200302—200310
- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. 138, 49 U.S.C. 303 and implementing regulations at 23 C.F.R. part 774

Social and Economic Impacts

- American Indian Religious Freedom Act, 42 U.S.C. 19961
- Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201—4209

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. 1251-1387

- o Section 319, 33 U.S.C. 1329
- o Section 401 , 33 U.S.C. 1341
- o Section 404, 33 U.S.C. 1344
- Emergency Wetlands Resources Act, 16 U.S.C. 3901 and 3921
- FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777
- Flood Disaster Protection Act, 42 U.S.C. 4001—4130
- Mitigation of Impacts to Wetlands and Natural Habitat, 23 CFR part 777
- Rivers and Harbors Act of 1899, 33 U.S.C. 403
- Safe Drinking Water Act (SDWA), 42 U.S.C. 300f—300j-26
- Wetlands Mitigation, 23 U.S.C. 119(g) and 133(b)(11)
- Wild and Scenic Rivers Act, 16 U.S.C. 1271—1287

Wildlife

- Anadromous Fish Conservation Act, 16 U.S.C. 757a—757f
 - Bald and Golden Eagle Protection Act, as amended, 16 U.S.C. 668—668c
 - Fish and Wildlife Coordination Act, 16 U.S.C. 661—667d
 - Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801—1891d
 - Marine Mammal Protection Act, 16 U.S.C. 1361—1423h
 - Migratory Bird Treaty Act, 16 U.S.C. 703—712
 - Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1536
- 3.2.2 Any FHWA environmental review responsibility not explicitly listed above and assumed by DOT&PF shall remain the responsibility of FHWA unless the responsibility is added by written agreement of the parties through the amendment process established in Part 14 of this MOU and pursuant to 23 C.F.R. 773.113(b). This provision shall not be interpreted to abrogate DOT&PF's responsibilities to comply with the requirements of any Federal environmental laws that apply directly to DOT&PF independent of 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 DOT&PF under this MOU. The FHWA remains responsible for 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 below. A notice from DOT&PF 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 C.F.R. 800.16(m), and is related to NEPA or another Federal law for which DOT&PF has assumed responsibilities under this MOU, and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by DOT&PF, then 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 of this MOU concerning FHWA initiated withdrawal of an assigned project or part of an assigned project will apply.

This MOU is not intended to abrogate, or prevent future entry into an agreement among DOT&PF, FHWA, and a tribe under which the tribe agrees to allow DOT&PF to consult for highway projects in Alaska. However, such agreements are administrative in nature and do not relieve FHWA of its legal responsibility for government-to-government consultation.

- 3.2.4 Nothing in this MOU shall be construed to permit DOT&PF's assumption of the USDOT Secretary's responsibilities for conformity determinations required by Section 176 of the Clean Air Act (42 U.S.C. 7506) or any responsibility under 23 U.S.C. 134 or 135, or under 49 U.S.C. 5303 or 5304.
- 3.2.5 On the cover page of each biological evaluation or assessment, historic properties or cultural resources report, Section 4(f) evaluation, or other analyses prepared under the authority granted by this MOU, DOT&PF shall insert the following language in a way that is conspicuous to the reader or include 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 DOT&PF pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated [INSERT DATE] and executed by FHWA and DOT&PF.

- 3.2.6 The DOT&PF shall disclose to the public and agencies, as part of agency outreach and public involvement procedures, the disclosure in subpart 3.2.5 of this MOU.
- 3.2.7 The DOT&PF will continue to adhere to the original terms of a Biological Opinion (BO) issued by the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) or both prior to the Effective Date of this MOU, so long as the original BO terms are not amended or revised. Any revisions or amendments to a BO made after the Effective Date of this MOU would be DOT&PF's responsibility. The DOT&PF agrees to assume FHWA's environmental review role and responsibilities as identified in existing interagency agreements among DOT&PF, USFWS, NMFS, and FHWA, and/or negotiate new agreements with USFWS and NMFS, if needed. The DOT&PF agrees to assume FHWA's Endangered Species Act Section 7 responsibilities of consultations (formal and informal) ongoing as of the Effective Date of this MOU.
- 3.2.8 The DOT&PF 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 FHWA and obtaining FHWA's approval of such determination.

3.3 Highway Projects

- 3.3.1 Except as provided in subpart 3.3.2 of this MOU or otherwise specified in this subpart, the assignments and assumptions of the USDOT Secretary's responsibilities under subparts 3.1 and 3.2 of this MOU shall apply to the environmental review, consultation, or any other action pertaining to the environmental review or approval of the following classes of highway projects located within the State of Alaska. 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. The DOT&PF shall conduct any reevaluation required by 23 CFR 771.129 for projects for which construction is not completed prior to the date of this MOU, in accordance with the provisions of this MOU. Prior to approving any CE determination, FONSI,

final EIS, or final EIS/ROD, DOT&PF 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), as applicable.

- A. All Class I, or EIS projects, that are funded by FHWA or require FHWA approvals.
- B. All Class II, or CE projects, that are funded by FHWA or require FHWA approvals.
- C. All Class III, or EA projects, that are funded by FHWA or require FHWA approvals.
- D. The DOT&PF will not assume the NEPA responsibilities of other Federal agencies. However, DOT&PF may use or adopt another Federal agency's NEPA analysis or documents consistent with 40 C.F.R. parts 1500—1508, current law, 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:

- A. Any Federal Lands Highway projects authorized under 23 U.S.C. 202, 203, and 204, unless such projects will be designed and constructed by DOT&PF.
- B. Any project that crosses or is adjacent to international boundaries. For purposes of this MOU, 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. Programs and projects advanced by direct recipients of Federal-aid Highway Program funds other than DOT&PF, including but not limited to:
 - 1. Recreational Trails program;
 - 2. TIGER Discretionary grants;
 - 3. Direct recipient tribal projects; and
 - 4. Shakwak program.
- D. Privately-funded or other agency funded projects requiring NEPA review as part of Interstate access approvals, unless such projects will be designed and constructed by DOT&PF.
- E. NEPA review for private requests for changes in controlled access, unless such projects will be designed and constructed by DOT&PF.
- F. This assignment does not include the environmental review associated with the development and approval of a CE, EA, FONSI, Draft EIS, FEIS, or ROD for the following projects:
 - 1. 67698 & 67877 / 0922005 & 0922008 Gravina Access;
 - 2. 71100 / 000S131 Juneau Access Improvements; and
 - 3. 53014 / 0212015 Sterling Highway: MP 45-60.

The DOT&PF 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).

3.4 Limitations

- 3.4.1 As provided at 23 U.S.C. 327(e), DOT&PF shall be solely responsible and solely liable for carrying out, in lieu of and without further approval by FHWA, all of the responsibilities it has assumed under 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 DOT&PF under subpart 3.3.1 of this MOU remains the responsibility of the USDOT Secretary.

PART 4. CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

4.1 Certifications

- 4.1.1 The DOT&PF hereby makes the following certifications:
- A. The DOT&PF has the legal authority to accept all the assumptions of responsibility identified in this MOU;
 - B. The DOT&PF has the legal authority to take all actions necessary to carry out all of the responsibilities it has assumed under this MOU;
 - C. The DOT&PF has the legal authority to execute this MOU;
 - D. The State of Alaska has laws in effect that are comparable to the Freedom of Information Act (FOIA) at 5 U.S.C. 552, and those laws are found in the Alaska Public Records Act at Alaska Statutes Title 40, Chapter 25; and
 - E. The Alaska Public Records Act provides that any decision regarding the public availability of a document under that Act is reviewable by an Alaska court of competent jurisdiction.

4.2 State Commitment of Resources

- 4.2.1 As required by 23 U.S.C. 327(c)(3)(D), DOT&PF will maintain the financial resources necessary to carry out the responsibilities it is assuming. The DOT&PF asserts, and FHWA agrees, that the summary of financial resources contained in DOT&PF's application, dated July 12, 2016, appears to be adequate for this purpose. Should FHWA determine, after consultation with DOT&PF, that DOT&PF's financial resources are inadequate to carry out the USDOT Secretary's responsibilities, DOT&PF will take appropriate action to obtain the additional financial resources needed to carry out these responsibilities. If DOT&PF is unable to obtain the necessary additional financial resources, DOT&PF shall inform FHWA, and this MOU will be amended to assign only the responsibilities that are commensurate with DOT&PF's financial resources.
- 4.2.2 Similarly, DOT&PF has and 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 DOT&PF's assumed responsibilities under this MOU and applicable Federal laws.

Should FHWA determine, after consultation with DOT&PF, that DOT&PF's organizational and staff capability is inadequate to carry out the USDOT Secretary's responsibilities, DOT&PF will take appropriate action to obtain adequate organizational and staff capability to carry out these responsibilities. If DOT&PF is unable to obtain adequate organizational and staff capability, DOT&PF shall inform FHWA, and the MOU will be amended to assign only the responsibilities that are commensurate with DOT&PF's available organizational and staff capability. Should DOT&PF

choose to meet these requirements, in whole or in part, with consultant services, including outside counsel, DOT&PF shall maintain on its staff an adequate number of trained and qualified personnel, including counsel provided by the Alaska Department of Law, 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, DOT&PF staff (including consultants) shall comply with 36 C.F.R. 800.2(a)(1). All actions that involve identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation (including 36 C.F.R. 800.11) 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 the Interior's Professional Qualifications Standards (36 C.F.R. part 61, Appendix A). The DOT&PF 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 required under 23 U.S.C. 327(c)(3)(B), and authorized by Alaska Statute 44.23.020(g), DOT&PF hereby expressly consents, on behalf of the State of Alaska, to accept the jurisdiction of the Federal courts in cases that involve the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary assumed by DOT&PF under Part 3 of this MOU. The 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 DOT&PF pursuant to an assumption of responsibility under this MOU. The DOT&PF understands and agrees that, in accordance with 23 U.S.C. 327, the United States district court shall have exclusive jurisdiction over any civil action against the State of Alaska alleging a failure to carry out any responsibility assumed under this MOU, which constitutes a limited waiver of the State of Alaska's immunity under the Eleventh Amendment to the U.S. Constitution.

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, DOT&PF 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, guidance, and policy issued by CEQ, Office of Management and Budget (OMB), USDOT, or 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 of this MOU, interagency agreements, and other similar documents that relate to the environmental review process, e.g., 2015 Red Book - Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects. Official USDOT and FHWA guidance and policies relating to environmental review are posted on FHWA's website, contained in FHWA Environmental Guidebook or published in the *Federal Register*, or sent to DOT&PF electronically or in hard copy.
- A. The DOT&PF 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.
- B. The USDOT Secretary's authorities under 23 U.S.C. 144(h) are not assigned under this MOU.

5.1.2 The FHWA will use its best efforts to ensure that any new or revised Federal policy or guidance, which are final and applicable to FHWA's responsibilities under NEPA and other laws that are assumed by DOT&PF under this MOU, are communicated to DOT&PF within 10 business days of issuance. Delivery may be accomplished by e-mail, web posting (with e-mail or mail to DOT&PF notifying of web posting), mail, or publication in the *Federal Register* (with e-mail or mail to DOT&PF notifying of publication). If communicated to DOT&PF by e-mail or mail, such material will be sent to DOT&PF's Environmental Program Manager and the following address: NEPA@alaska.gov. When FHWA is considering changes to the Program or changes that may or will impact DOT&PF's assumed responsibilities or resources, FHWA shall seek input from DOT&PF. In the event a new or revised FHWA policy or guidance is not made available to DOT&PF as described in this subpart, and if DOT&PF had no knowledge of such policy or guidance, then a failure by DOT&PF to comply with such Federal policy or guidance will not be a basis for termination of this MOU or a negative audit finding under this MOU.

5.1.3 The DOT&PF will coordinate with Federal resource agencies concerning applicable laws, formal guidance, and policies that such other Federal agencies are responsible for administering with respect to DOT&PF's highway projects and the assumption of responsibilities under this MOU.

Within six (6) months of the Effective Date of this MOU, DOT&PF will work with FHWA and the resource agencies to modify existing interagency agreements. Such actions may include:

- A. Obtaining written consent to the continuation of an interagency agreement in its existing form, but with the substitution of DOT&PF for FHWA; or
- B. Amending an interagency agreement as needed so that the interagency agreement continues but that DOT&PF assumes FHWA's responsibilities.

If an affected agency does not agree to modify an interagency agreement then, to the extent permitted by applicable law and regulation, DOT&PF will carry out the assumed environmental review, consultation, or other related activity in accordance with applicable laws and regulations but without the benefit of the provisions of the interagency agreement.

5.1.4 The DOT&PF may enter into an interagency agreement with a Federal, state, tribal, or local agency regarding appropriate processes and procedures to carry out the project-specific responsibilities assumed under this MOU. Although FHWA is not required to be a signatory, such an interagency agreement must conform with all provisions of this MOU, especially subpart 5.2.1.

5.1.5 Upon termination of this MOU, DOT&PF and FHWA shall contact the Federal resource agency to determine whether any interagency agreement should be amended or reinstated as appropriate.

5.2 Rulemaking

5.2.1 As provided under 23 U.S.C. 327(f), nothing in this MOU allows DOT&PF to assume any rulemaking authority of the USDOT Secretary. Additionally, DOT&PF may not establish policy and guidance on behalf of the USDOT Secretary or FHWA for highway projects covered in this MOU. The DOT&PF's 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 FHWA.

5.2.2 Nothing in this MOU prevents DOT&PF from commenting on any *Federal Register* notice for any matter, including Notices of Proposed Rulemaking and other public notices.

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, DOT&PF shall be deemed to be acting as FHWA with respect to the environmental review, consultation, and other related actions required under those responsibilities.

5.4 Other Federal Agencies

- 5.4.1 As provided under 23 U.S.C. 327(a)(2)(E), nothing in this MOU preempts or interferes with any power, jurisdiction, responsibility, or authority of any Federal agency other than USDOT (including FHWA), under applicable statutes 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), DOT&PF will be solely liable and solely responsible for carrying out the responsibilities assumed under this MOU, in lieu of and without further approval of the USDOT Secretary. The FHWA and USDOT will have no responsibility or liability for the performance of the responsibilities assumed by DOT&PF, including any decision or approval made by DOT&PF while participating in the Program.

6.2 Litigation

- 6.2.1 Nothing in this MOU affects the United States Department of Justice's (USDOJ) 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, DOT&PF will coordinate with FHWA and any USDOJ or Federal agency attorneys in the defense of that action.
- 6.2.2 The DOT&PF shall defend all claims brought in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, DOT&PF will provide qualified and competent legal counsel, including outside counsel if necessary. The DOT&PF will 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 DOT&PF's counsel. The DOT&PF will 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, subject to appropriation by the Alaska legislature and subject to allocation of responsibility between DOT&PF and any co-defendant Federal agency.
- 6.2.3 The DOT&PF will notify the FHWA's Alaska Division Office and DOJ's Assistant Attorney General for the Environment and Natural Resources Division, within seven (7) calendar days of DOT&PF's receipt of service of process of any complaint, concerning its discharge of any responsibility assumed under this MOU. The DOT&PF's notification to the FHWA and USDOJ shall be made prior to its response to the complaint. In addition, DOT&PF shall notify the FHWA's Alaska Division Office within seven (7) calendar days of receipt of any notice of intent to sue concerning its discharge of any responsibility assumed under this MOU.
- 6.2.4 The DOT&PF will provide the FHWA's Alaska Division Office and USDOJ copies of any motions, pleadings, briefs, and other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. The DOT&PF will provide such copies to the FHWA and USDOJ 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 DOT&PF, within seven (7) calendar days of the date of filing.
- 6.2.5 The DOT&PF will notify the FHWA's Alaska Division Office and USDOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and USDOJ 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. The DOT&PF will not execute any settlement agreement until: (1) FHWA and USDOJ have provided comments on the proposed settlement; (2) indicated that they will not provide comments on the proposed settlement; or (3) the review period has expired, whichever occurs first.

- 6.2.6 Within seven (7) calendar days of receipt by DOT&PF, DOT&PF will provide notice to FHWA's Division Office and USDOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities DOT&PF has assumed under this MOU. The DOT&PF shall notify FHWA's Alaska Division Office and USDOJ within five (5) days of filing a notice of appeal of a court decision. The DOT&PF shall confer with FHWA and USDOJ regarding the appeal at least forty-five (45) days before filing its initial brief on the merits of the appeal.
- 6.2.7 The DOT&PF's notifications to FHWA and USDOJ in subparts 6.2.3, 6.2.4, 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 USDOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in subpart 6.2.4, DOT&PF 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 USDOJ's comments under subpart 6.2.5 and 6.2.6 shall be made by electronic mail to NEPA@alaska.gov unless otherwise specified by DOT&PF. In the event that regular mail is determined necessary, mail should be sent by overnight mail service to:

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

For FHWA: Division Administrator, Federal Highway Administration – Alaska Division, P.O. Box 21648, 709 West 9th Street, Room 851, Juneau, AK 99802-1648.

For DOT&PF: Statewide Environmental Program Manager, Alaska Department of Transportation and Public Facilities, 3132 Channel Drive, PO Box 112500, Juneau, AK, 99811-2500.

6.3 Conflict Resolution

- 6.3.1 In discharging any of the USDOT Secretary's responsibilities under this MOU, DOT&PF agrees to comply with any applicable requirements of USDOT and FHWA statute, regulation, guidance, or policy regarding conflict resolution. This includes compliance with 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 The DOT&PF agrees to follow 40 CFR part 1504 in the event of pre-decision referrals to CEQ for Federal actions determined to be environmentally unsatisfactory. The DOT&PF also agrees to coordinate and work with CEQ on matters brought to CEQ with regards to the environmental review responsibilities for Federal highway projects DOT&PF has assumed under this MOU.

PART 7. INVOLVEMENT WITH OTHER AGENCIES

7.1 Coordination

- 7.1.1 The DOT&PF agrees to seek early and appropriate coordination with all applicable Federal, State, and local agencies in carrying out any of the responsibilities for highway projects assumed under this MOU.

7.2 Processes and Procedures

- 7.2.1 The DOT&PF will ensure that it has appropriate processes and procedures in place that provide for proactive and timely consultation, coordination, and communication with applicable Federal agencies in order to carry out the responsibilities assumed under this MOU, including the submission of all EISs together with comments and responses to the Environmental Protection Agency (EPA) as required by 40 CFR 1506.9 and for EPA's review as required by section 309 of the Clean Air Act, 42 U.S.C. 7609. These processes and procedures shall be formally documented. Documentation may be a formally executed interagency agreement or other format as appropriate.

PART 8. INVOLVEMENT WITH FHWA

8.1 Generally

- 8.1.1 In discharging any of the USDOT Secretary's and FHWA's responsibilities under this MOU, DOT&PF and FHWA agree to work cooperatively to resolve substantive issues regarding the implementation or interpretation of this MOU.
- 8.1.2 Except as specifically provided otherwise in this MOU, FHWA will not provide project-level assistance to DOT&PF in carrying out the responsibilities it has assumed under this MOU. Project-level assistance includes advice, consultation, or review of draft documents. However, project-level assistance does not include: process or Program-level assistance as described in subpart 8.1.5 of this MOU, including discussions concerning issues addressed in prior projects, interpretations of applicable law contained in Title 23 U.S.C. or Title 49 U.S.C., interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance.
- 8.1.3 The FHWA will not intervene, broker, act as intermediary, or otherwise be involved in any issue involving DOT&PF's consultation or coordination with other Federal resource agencies with respect to DOT&PF's discharge of any of the responsibilities assumed under this MOU for any particular highway project. However, FHWA may attend meetings between DOT&PF and other Federal agencies. Further, FHWA may submit comments to DOT&PF and the other Federal agency in the following extraordinary circumstances:
- A. FHWA reasonably believes that DOT&PF is not in compliance with this MOU;
 - B. FHWA determines that an issue between DOT&PF and the other Federal agency concerns an emerging national policy issue under consideration by the USDOT; or
 - C. upon request by DOT&PF Environmental Program Manager, DOT&PF Commissioner, DOT&PF Deputy Commissioner, or DOT&PF Chief Engineer, or the Federal agency, with agreement by the FHWA.

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

- 8.1.4 Other Federal agencies may raise concerns regarding compliance with this MOU by DOT&PF and may communicate these concerns to FHWA. The FHWA will review the concerns and any information provided to FHWA by such other Federal agency. If FHWA determines the concern has merit, FHWA shall inform the DOT&PF Environmental Program Manager. The DOT&PF will review the concerns and any information provided to FHWA, and work with the other Federal agency to resolve the concern. If the concern remains unresolved, FHWA will notify DOT&PF and will work with both DOT&PF and the other Federal agency to resolve the issue and, if necessary, take appropriate action to ensure compliance with this MOU.
- 8.1.5 At DOT&PF's request, FHWA may assist DOT&PF 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 DOT&PF's consultation, coordination, and communication with other Federal agencies.

- 8.1.6 Communications between DOT&PF and FHWA regarding the administration of the responsibilities assigned and assumed under this MOU, and other process and Program-level communications described in subparts 8.1.2 and 8.1.5 of this MOU, are normally considered intra-agency communications for the purpose of deliberative process privileges under the Freedom of Information Act and the Alaska Public Records Act. The DOT&PF and FHWA shall promptly notify each other of requests for public records regarding the administration of the Program in Alaska.
- 8.1.7 For active projects where DOT&PF is assuming responsibilities from FHWA under this MOU, FHWA shall allow DOT&PF access to its project files and arrange for copies to be provided upon request by DOT&PF.
- 8.1.8 The DOT&PF's 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 FHWA will provide necessary and appropriate monitoring and oversight of DOT&PF's compliance with this MOU. The FHWA's monitoring and oversight activities in years one through four of this MOU's term will primarily consist of an annual audit as provided at 23 U.S.C. 327(g) and Part 11 of this MOU, and evaluating attainment of the performance measures listed in Part 10 of this MOU. After the fourth year of DOT&PF's participation in the Program, FHWA will monitor DOT&PF's compliance with the MOU including the provision by DOT&PF of financial resources to carry out the MOU. The FHWA's monitoring and oversight may also include submitting requests for information to DOT&PF and other relevant Federal agencies, verifying DOT&PF's financial and personnel resources dedicated to carrying out the responsibilities assumed, and reviewing documents and other information.
- 8.2.2 Pursuant to 23 U.S.C. 327(c)(4), DOT&PF is responsible for providing FHWA any information FHWA reasonably considers necessary to ensure that DOT&PF is adequately carrying out the responsibilities assigned. When requesting information subject to section 327(c)(4), FHWA will provide the request to DOT&PF in writing, and the request will identify with reasonable specificity the information required. FHWA will also indicate in the request a deadline for the information to be provided. DOT&PF will, in good faith, work to ensure the information requested is provided by the deadline. DOT&PF's response to an information request under this paragraph will include, where appropriate, making relevant employees and consultants available at their work location (including in-person meeting, teleconference, videoconference or other electronic means as may be available).
- 8.2.3 The DOT&PF shall make project files and general administrative files pertaining to the discharge of the responsibilities it has assumed under this MOU reasonably available for inspection by FHWA at the files' locations upon reasonable notice, which is not less than five business days. These files shall include, but are not limited to, letters and comments received from governmental agencies, the public, and others with respect to DOT&PF's discharge of the responsibilities assumed under this MOU. The DOT&PF will maintain privileged communications in separate files and, at the request of FHWA, will provide those communications to FHWA's counsel for the purposes of FHWA's review and monitoring of the Program and to preserve DOT&PF's privileges in those communications.
- 8.2.4 In carrying out the responsibilities assumed under this MOU, DOT&PF agrees to carry out regular quality control and quality assurance (QA/QC) reviews to ensure that the assumed responsibilities are being conducted in accordance with applicable law and this MOU. At a minimum, DOT&PF's QA/QC process will include the review and monitoring of its processes

and performance relating to project decisions, completion of environmental analysis, project file documentation, checking for errors and omissions, and legal sufficiency reviews, and taking appropriate corrective action as needed. Within three (3) months of the Effective Date of this MOU, DOT&PF shall finalize a QA/QC process that satisfies the requirements in this subpart. In developing and implementing the QA/QC process, DOT&PF shall consult with the FHWA Alaska Division Office. DOT&PF agrees cooperate with FHWA to consider recommendations FHWA may have made with respect to its QA/QC process.

- 8.2.5 The DOT&PF shall perform annual self-assessments of its QA/QC process and performance to determine if its process is working as intended. If any process areas are identified as needing improvement, DOT&PF will take appropriate and timely corrective actions to address such areas. At least one month prior to the date of a scheduled FHWA audit DOT&PF will transmit a summary of its most recent self-assessment to FHWA Alaska Division Office. The summary will include a description of the scope of the self-assessment conducted and the areas reviewed, a description of the process followed in conducting the self-assessment, a list of the areas identified as needing improvement, any corrective actions that have been or will be implemented and a statement from DOT&PF's Environmental Program Manager concerning whether the processes are ensuring that the responsibilities DOT&PF has assumed under this MOU are being carried out in accordance with this MOU and all applicable Federal laws and policies, and a summary of DOT&PF's progress toward attaining the performance measures listed in Part 10 of this MOU.
- 8.2.6 Upon the Effective Date of this MOU, DOT&PF will maintain a list of NEPA approvals and decisions (CE, EA, FONSI, DEIS, FEIS, FEIS/ROD, ROD) and Section 4(f) approvals it makes under this MOU. The DOT&PF will provide an updated list to FHWA every six (6) months.

8.3 Records Retention

8.3.1 DOT&PF will retain project files, and files pertaining to the discharge of its responsibilities under this MOU, in accordance with the DOT&PF Statewide Design and Engineering Services Division, State of Alaska Records Retention and Disposition Schedule, which meets or exceeds requirements established in FHWA Records Disposition Manual (Field Offices) Chapter 4, FHWA Order No. 1324.1 B, issued July 29, 2013 or in accordance with any subsequent order that supersedes or replaces Order No. 1324.1 B. In accordance with DOT&PF Records Retention and Disposition Schedule 25-539.2, records will be retained for six (6) fiscal years after the completion of the project, reporting requirement or other applicable activity. Capital project files of historical significance (NEPA decision documents including CE, EA and EIS) will be retained permanently.

To the extent that FHWA's Records Disposition Manual is amended to provide for a longer retention period, DOT&PF will meet such requirement.

DOT&PF will permanently store records for Significant Transportation Projects as they are defined in FHWA Order No. 1324.1B.

- 8.3.2 For the following record types DOT&PF will ensure that the following retention periods are maintained in the following manner:
- A. **FHWA-DOT&PF Environment Correspondence Files:** Correspondence between FHWA and DOT&PF relative to the interpretation, administration, and execution of this MOU and the environmental aspects of the Federal-aid Highway Program, as established in 8.1.2 and 8.1.5, shall be maintained by DOT&PF for a period of six (6) years after the resolution of the particular issue or after the guidance has been superseded. After six (6) years DOT&PF may follow the State records disposition process for these records.

- B. **National Environmental Policy Act (NEPA) and Related Documents:** For a period of 8 years after approval of the final construction voucher DOT&PF shall maintain Final NEPA Documents (Draft EISs, Final EISs, Supplemental EISs, RODs, EAs, FONSI, CE documentation and determinations), Supporting Materials (documentation supporting the Sec. 139 environmental review process [i.e., coordination plans that include project schedules, evidence for opportunities for public/agency input in purpose and need, alternatives] , scoping, public and agency comments; meeting minutes; NOI, Public Involvement Plans, public meeting summaries, public hearing certifications and transcripts, mitigation reports/tracking, technical reports; correspondence; studies and reports; references; errata sheets; and reevaluation documents); NEPA Reference Documents (written statements and supporting documents needed for reference); and official documents and correspondence related to reviews under other environmental requirements (e.g., ESA, CWA, Section 4(f), Section 106). After 8 years DOT&PF may follow the State records disposition process for these records except that DOT&PF will permanently store the above referenced records for Significant Transportation Projects as they are defined in Order No. 1224.1B.

Drafts and working copies of paper or electronic documents should be kept until the final version of a document is completed. For long or complex documents, several earlier drafts and the current draft may be retained to ensure document integrity until the final draft is approved. Then, previous revisions may be erased or destroyed and only the final text and the requisite back-up copies will be kept as identified above.

- C. **Environmental Impact Statements - Other Agencies:** Files containing reviews and comments furnished by DOT&PF to other Federal agencies following reviews of an EIS for which another Federal agency is the lead agency shall be maintained by DOT&PF for a period of 5 years. After 5 years, DOT&PF may destroy these files when no longer needed.
- D. **Noise Barriers:** DOT&PF agrees to maintain the necessary information to comply with 23 CFR 772.13(f) regarding noise abatement measures reporting. DOT&PF shall maintain this information for a period of 4 years after the end of the Federal fiscal year in which the project file is closed.

8.3.3 In the case of a conflict between FHWA Records Disposition Manual, FHWA Order 1324.1B, DOT&PF Records Management Policy, and Retention and Disposal Schedule the more stringent retention requirements shall control.

8.3.4 Nothing contained in this MOU is intended to relieve DOT&PF of its recordkeeping responsibilities under 2 C.F.R. 200.333-200.337 (Record Retention and Access) or other applicable laws.

8.4 Federal Register

8.4.1 For any documents that are required 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(j)(2), DOT&PF shall transmit such document to FHWA's Alaska Division Office, with a request for publication in the *Federal Register* on behalf of DOT&PF. The FHWA's Alaska Division Office will submit such document to the *Federal Register* within five (5) calendar days of receipt of DOT&PF's request for publication in the *Federal Register*. If requested, DOT&PF shall reimburse FHWA for costs associated with publishing such documents in the *Federal Register* (excluding FHWA's overhead).

8.5 Participation in Resource Agency Reports

- 8.5.1 DOT&PF agrees to provide data and information requested by FHWA 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 of and duration to complete all NEPA classes of action (EIS, EA, CE);
 - B. Archeology Reports requested by the National Park Service (NPS);
 - C. Endangered Species Act Expenditure Reports requested by the USFWS and NMFS;
 - D. Project schedules and other project information for nationwide infrastructure transparency initiatives
 - E. 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 U.S. DOT pursuant to such provisions;
 - F. NEPA Litigation Reports requested by CEQ; and
 - G. Environmental Conflict Resolution reports requested by the Office of Management and Budget and 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 Clean Air Act and its implementing regulations, FHWA's Alaska Division Office will document the project level conformity determination within a reasonable timeframe. The FHWA's Alaska Division Office will restrict its review to only that data, analyses, applicable comments and responses, and other relevant documentation that enable FHWA to make the project-level conformity determination.

8.7 Certification of NEPA Compliance

- 8.7.1 For projects funded by FHWA, DOT&PF shall ensure that a certification is included with each NEPA approval specifying that DOT&PF has fully carried out all responsibilities assumed under this MOU in accordance with this MOU and all applicable Federal laws, regulations, Executive Orders, and policies. DOT&PF shall ensure that this certification is made prior to the execution of any future Federal-aid approval or action. The DOT&PF shall include the certification in its request for authority to proceed to final design, right-of-way acquisition, or construction. The DOT&PF agrees to provide FHWA access to NEPA approvals and certifications.

8.8 Enforcement

- 8.8.1 Should FHWA determine that DOT&PF is not in compliance with this MOU, then FHWA shall take appropriate action to ensure DOT&PF's compliance, including appropriate remedies provided at 23 C.F.R. 1.36 for violations of or failure to comply with Federal law or regulations at 23 C.F.R. with respect to a project, withdrawing assignment of any responsibilities that have

been assumed as provided in Part 9 of this MOU, or terminating DOT&PF's participation in the Program as provided in Part 13 of this MOU.

PART 9. WITHDRAWAL OF ASSIGNED RESPONSIBILITIES

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 DOT&PF under this MOU for any highway project or highway projects upon FHWA's determination that:
- A. With respect to such project or projects, DOT&PF is not in compliance with a material term of this MOU or applicable Federal laws or policies, and DOT&PF has not taken sufficient corrective action to the satisfaction of FHWA;
 - B. The highway project or highway projects involve significant or unique national policy interests for which DOT&PF's assumption of the USDOT Secretary's responsibilities would be inappropriate; or
 - C. DOT&PF cannot satisfactorily resolve an issue or concern raised in 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, FHWA will informally notify DOT&PF of FHWA's determination. After informally notifying DOT&PF of its determination, FHWA will provide DOT&PF written notice of its determination including the reasons for its determination. Upon receipt of this notice, DOT&PF may submit any comments that would resolve the compliance concern or objections to FHWA within 30 calendar days, unless FHWA agrees to an extended period of time. Upon receipt of DOT&PF's comments or objections, FHWA will make a final determination within 30 calendar days, unless extended by FHWA for cause, and notify DOT&PF of its decision. In making its determination, FHWA will consider DOT&PF's comments or objections, the effect the withdrawal of assignment will have on the Program, the 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 DOT&PF has assumed for any highway project when the preferred alternative that is identified in the CEs, EA, or FEIS is a highway project or part of a program that is specifically excluded in subpart 3.3.2. In such case, subpart 9.1.2 of this MOU shall not apply.

9.2 DOT&PF-Initiated Withdrawal of Assignment of Projects

- 9.2.1 The DOT&PF may, at any time, provide FHWA with notice of its intent to withdraw a highway project assumed under this MOU.
- 9.2.2 Upon DOT&PF's decision to request FHWA withdraw the assignment of the USDOT Secretary's responsibilities under subpart 9.2.1, DOT&PF shall informally notify FHWA of its desire for FHWA to withdraw assignment of its responsibilities. After informally notifying FHWA of its desire, DOT&PF will provide FHWA written notice of its desire, including the reasons for wanting FHWA to withdraw assignment of the responsibilities. Upon receipt of this notice, FHWA will have 30 calendar days, unless extended by FHWA for cause, to determine whether it will withdraw assignment of the responsibilities requested. In making its determination, FHWA will consider the reasons DOT&PF desires 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 FHWA and DOT&PF have determined it is desirable to mutually establish a set of performance measures to consider DOT&PF's administration of the responsibilities assumed under this MOU.
- 10.1.2 The DOT&PF's attainment of the performance measures indicated in this part of the MOU will be considered by FHWA during audits, as required by 23 U.S.C. 327(g).
- 10.1.3 The DOT&PF shall collect and maintain all necessary and appropriate data related to the attainment of performance measures. In collecting this data, DOT&PF shall monitor its progress toward meeting the performance measures and include its progress in the self-assessment summary described in subpart 8.2.5 of this MOU.

10.2 Performance Measures

- 10.2.1 The performance measures applicable to DOT&PF in carrying out the responsibilities it has assumed under this MOU are as follows:

- A. Compliance with NEPA, FHWA NEPA regulations, and other Federal environmental statutes and regulations:

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

- B. QA/QC 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; this shall include the legal sufficiency reviews of Notices of Intent and Notices of Final Agency Action as required by law, policy, or guidance;
 - b. Compliance with FHWA's and DOT&PF's 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. Assesses change in communication among DOT&PF, 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 the NEPA process:

- i. Compare time of completion of environmental document 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, Section 106 resolution of adverse effects) before and after assumption of responsibilities under this MOU.

PART 11. AUDITS

11.1 General

11.1.1 As required at 23 U.S.C. 327(g), FHWA will conduct audits of DOT&PF's discharge of the responsibilities it has assumed under this MOU. During the first four (4) years, audits will be the primary mechanism used by FHWA to oversee DOT&PF's compliance with this MOU, ensure compliance with applicable Federal laws and policies, evaluate DOT&PF's progress toward achieving the performance measures identified in Part 10, and collect information needed for the USDOT Secretary's annual report to Congress.

Pursuant to 23 U.S.C. 327(g)(3), each audit carried out under this MOU shall be carried out by an audit team, consisting of members designated by FHWA in consultation with DOT&PF. Such consultation shall include a reasonable opportunity for DOT&PF to review and provide comments on the proposed members of the audit team.

11.1.2 Pursuant to 23 U.S.C. 327(c)(4), DOT&PF is responsible for providing FHWA any information FHWA reasonably considers necessary to ensure that DOT&PF is adequately carrying out the responsibilities assigned. The DOT&PF will make documents and records available for review by FHWA in conducting audits and shall provide FHWA with copies of any such documents and records as may be requested by FHWA pursuant to the process identified in subpart 8.2.3. In general, all documents and records will be made available to FHWA at their normal place of repository. However, DOT&PF will work with FHWA to provide documents through e-mail, CD-ROM, mail, or facsimile to the extent it does not create an undue burden.

11.1.3 The DOT&PF agrees to cooperate with FHWA in conducting audits, including providing access to all necessary information, making all employees available to answer questions (including consultants hired for the purpose of carrying out the USDOT Secretary's responsibilities), and providing all requested information (including making employees available) to FHWA in a timely manner. Employees will be made available either in-person at their normal place of business or by telephone, at the discretion of FHWA.

11.1.4 The DOT&PF and FHWA Alaska Division Office will each designate an audit coordinator who will be responsible for coordinating audit schedules, requests for information, and arranging audit meetings.

11.1.5 Such FHWA audits will include, but not be limited to, consideration of DOT&PF's technical competency and organizational capacity, adequacy of the financial resources committed by DOT&PF to administer the responsibilities assumed, quality control and quality assurance process, attainment of performance measures, compliance with this MOU's requirements, and compliance with applicable Federal laws and policies in administering the responsibilities assumed.

11.2 Scheduling

11.2.1 As provided at 23 U.S.C. 327(g), FHWA will conduct an annual audit during each of the first (4) four years after the Effective Date. After the fourth year of DOT&PF's participation in the Program, FHWA will monitor DOT&PF's compliance with the MOU, including the provision by

DOT&PF of financial resources to carry out the MOU, but will not conduct additional audits under this Part. In the event the frequency of the audits is modified by amendments to 23 U.S.C. 327(g), the frequency established by the statutory amendments will control and apply to this subpart.

- 11.2.2 For each annual audit, the designated audit coordinators for FHWA and DOT&PF will work to establish a general audit schedule within 180 days of the Effective Date or anniversary date of this MOU. The general audit schedule will include the dates that FHWA will conduct the audit. To the maximum extent practicable, the general audit schedule will identify all employees (including consultants) and documents and other records that DOT&PF will make available, as requested by FHWA in support of the audit. With respect to documents and other records, FHWA agrees to be as specific as possible, although a general description of the types of documents will be acceptable. The general schedule will include the time period for completing an annual audit from initiation to completion (including public comment and responses to those comments), which shall not exceed 180 calendar days, unless modified by amendments to 23 U.S.C. 327(g).
- 11.2.3 The DOT&PF's audit coordinator shall make reasonable efforts to ensure all identified employees (including consultants) are available to FHWA during the specified dates on the general audit schedule. The DOT&PF will also ensure necessary documents and records are made reasonably available to FHWA as needed during the general audit schedule.
- 11.2.4 After the general audit schedule is established, the audit coordinators shall work to establish specific audit schedules at least two (2) weeks prior to the scheduled audit. The specific audit schedule shall include the dates, times, and place for which FHWA will talk to DOT&PF's employees (including consultants) and review of documents and records.
- 11.2.5 To the maximum extent practicable, the specific audit schedule will identify all employees (including consultants) and documents and other records that DOT&PF will make available to FHWA during the audit. Should FHWA determine that it needs access to an employee, document or other record that is not identified in the specific audit schedule, DOT&PF will make reasonable efforts to produce such employee, document or other record on the specified dates.

11.3 Other Agency Involvement

- 11.3.1 The FHWA may invite other Federal or state agencies as deemed appropriate to assist FHWA in conducting an audit under this MOU by sitting in on interviews, reviewing documents obtained by FHWA, and making recommendations to FHWA. The FHWA's audit coordinator will advise DOT&PF's audit coordinator of FHWA's intent to include other Federal or state agencies and the proposed role of such agencies in the audit team. If FHWA invites another Federal or state agency to participate in the audit team, the agency will be placed on the general and specific audit schedules. The DOT&PF will have a reasonable opportunity to review and comment on any proposed additional member of the audit team.

11.4 Audit Report and Findings

- 11.4.1 Upon completing each audit, FHWA will transmit to DOT&PF a draft of the audit report and allow DOT&PF a period of 14 calendar days within which to submit written comments to FHWA. The FHWA will grant any reasonable request by DOT&PF to extend its deadline to respond in writing to a draft audit report not to exceed a total review period of 30 days. The FHWA will review the comments provided by DOT&PF and revise the draft audit report as may be appropriate. The DOT&PF and FHWA may also meet and discuss the draft report and DOT&PF's comments. If DOT&PF anticipates an additional meeting will be beneficial, DOT&PF will notify FHWA audit coordinator prior to providing its written comments so that such meeting may be timely scheduled. The FHWA will then prepare the draft audit report for public comment.

- 11.4.2 As required by 23 U.S.C. 327(g)(2), FHWA will make the draft audit report available for public comment. In carrying out this requirement, FHWA will, after receipt and incorporation of DOT&PF comments as provided in subpart 11.4.1, publish the audit report in the *Federal Register* and allow a comment period of 30 calendar days. The FHWA will then address and respond to the public comments by incorporating the comments and response into the final audit report. The final audit report will be published in the *Federal Register* not later than 60 calendar days after the comment period closes.

PART 12. TRAINING

- 12.1 The FHWA will provide DOT&PF with training, to the extent that FHWA and DOT&PF deem necessary, in all appropriate areas with respect to the environmental responsibilities that DOT&PF has assumed. Such training may be provided to DOT&PF by either FHWA, another Federal agency or other parties, as may be appropriate.
- 12.2 The DOT&PF will continue to implement training necessary to meet its environmental obligations. Within three (3) months of the Effective Date of this MOU and annually thereafter, DOT&PF and FHWA, in consultation with other Federal agencies as deemed appropriate, will assess DOT&PF's need for training and develop a training plan. The training plan will be updated by DOT&PF and FHWA, in consultation with other Federal agencies as appropriate, annually during the term of this MOU. The DOT&PF will be solely responsible for the final development and implementation of its training plan.

PART 13. TERM, TERMINATION AND RENEWAL

13.1 Term

- 13.1.1 This MOU has a term of five (5) years from the Effective Date.

13.2 Termination by FHWA

- 13.2.1 As provided by 23 U.S.C. 327(j)(1), FHWA may terminate DOT&PF's 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 of this MOU. Termination may be based on DOT&PF's failure to adequately carry out its responsibilities under this MOU including, but not limited to:
- A. persistent neglect of, or noncompliance with Federal laws, regulations, and policies;
 - B. failure to address deficiencies identified during the audit or monitoring process;
 - C. failure to secure or maintain adequate personnel and/or financial resources to carry out the responsibilities assumed;
 - D. substantial non-compliance with this MOU; or
 - E. persistent failure to adequately consult, coordinate, or account for the concerns of appropriate Federal, state, tribal, and local agencies with oversight, consulting, or coordination responsibilities under Federal environmental laws and regulations.
- 13.2.2 If FHWA determines that DOT&PF is not adequately carrying out the responsibilities assigned to DOT&PF, then:
- A. provide DOT&PF written notification of its non-compliance determination detailing a description of each responsibility in need of corrective action regarding an inadequacy identified; and

- B. provide DOT&PF a period of not less than 120 days to take such corrective action as the FHWA determines is necessary to comply with this MOU.

13.2.3 If DOT&PF, after notification and the 120 day period, fails to take satisfactory corrective action, as determined by FHWA, FHWA shall provide notice to DOT&PF of its determination of termination. Any responsibilities identified to be terminated in the notice that have been assumed by DOT&PF under this MOU shall transfer to FHWA.

13.3 Termination by DOT&PF

13.3.1 The DOT&PF may terminate its participation in the Program, in whole or in part, at any time by providing FHWA notice of its intent at least 90 calendar days prior to the date that DOT&PF seeks to terminate and subject to such terms and conditions as FHWA may provide. In that event, FHWA and DOT&PF may develop a plan to transition the responsibilities that DOT&PF has assumed back to FHWA so as to minimize disruption to projects, minimize confusion to the public, and minimize burdens to other affected Federal, State, and local agencies.

13.3.2 Any termination of assignment agreed to under a transition plan shall not be subject to the procedures or limitations provided for in Part 9 of this MOU and shall be valid as agreed to in the transition plan.

13.4 Validity of DOT&PF Actions

13.4.1 Any environmental approvals made by DOT&PF pursuant to the responsibilities DOT&PF has assumed under this MOU shall remain valid after termination of DOT&PF's participation in the Program or withdrawal of assignment by FHWA. The DOT&PF shall remain solely liable and solely responsible for any environmental approvals it makes pursuant to any of the responsibilities it has assumed while participating in the Program.

13.5 Renewal

13.5.1 This MOU is renewable in accordance with 23 U.S.C. 327(c)(6) and implementing regulations, in effect at the time of the renewal. The DOT&PF and FHWA agree to initiate the renewal process at least 12 months prior to the expiration of this MOU.

PART 14. AMENDMENTS

14.1 Generally

14.1.1 All parts of this MOU may be amended at any time upon mutual agreement by both FHWA and DOT&PF, pursuant to 23 CFR 773.113(b).

14.2 Additional Projects, Classes of Projects and Environmental Review Responsibilities

14.2.1 The FHWA may assign, and DOT&PF 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.

14.2.2 If DOT&PF decides to request amendment of this MOU to add or withdraw responsibility for projects or classes of projects, or environmental review responsibilities beyond those identified in Part 3 of this MOU, such request shall be treated as an amendment to DOT&PF's original application that was submitted to FHWA pursuant to 23 U.S.C. 327(b) and 23 C.F.R. 773.113(b). In developing the application supplement, DOT&PF shall identify the projects,

classes of projects, and environmental review responsibilities it wishes to assume or withdraw and make any appropriate adjustments to the information contained in DOT&PF's original application, including verification of personnel and financial resources.

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.

STATE OF ALASKA

Marc A. Luiken
Commissioner
Department of Transportation and Public Facilities

Dated: _____

Jahna Lindemuth
Attorney General
Department of Law

Dated: _____

FEDERAL HIGHWAY ADMINISTRATION

Brandye L. Hendrickson
Acting Administrator
Federal Highway Administration

Dated: _____