DRAFT

RENEWED MEMORANDUM OF UNDERSTANDING
between
Federal Highway Administration, California Division
and the
California Department of Transportation
State Assumption of Responsibility for Categorical Exclusions

THIS RENEWED MEMORANDUM OF UNDERSTANDING ("MOU"), made and entered into this June, ##, 2013, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION ("FHWA") and the STATE of California, acting by and through its DEPARTMENT OF TRANSPORTATION ("State"), hereby provides as follows:

WITNESSETH:

Whereas, Section 326 of amended Chapter 3 of title 23, United States Code (23 U.S.C. § 326) allows the Secretary of the United States Department of Transportation (USDOT Secretary), to assign, and a State to assume, responsibility for determining whether certain designated activities are included within classes of action that are categorically excluded from requirements for environmental assessments or environmental impact statements pursuant to regulations promulgated by the Council on Environmental Quality under part 1500 of title 40, Code of Federal Regulations (CFR); and

Whereas, if a State assumes such responsibility for making categorical exclusion (CE) determinations under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (NEPA), the USDOT Secretary also may assign and the State may assume all or part of certain Federal responsibilities for environmental review, consultation, or other related actions required; and

Whereas, Section 1312 of the Moving Ahead for Progress in the 21st Century Act (P.L. 112-141) amended 23 U.S.C. 326 to preserve the ability of States assuming responsibility to engage in project delivery methods that are otherwise permissible for highway projects, to terminate their participation in the program at any time by providing the USDOT Secretary with a notice no later than 90 days before such termination, and to allow States assuming responsibility to use funds apportioned to the State under 23 USC 104(b)(2) for reasonable attorney's fees directly attributable to eligible activities associated with the project; and

Whereas, on June 6, 2010, the FHWA and the State executed a MOU assigning responsibilities pursuant to 23 U.S.C. § 326 (original MOU) that expires on June 7, 2013, and pursuant to Section VII of the original MOU the parties are entering into this renewed MOU;

Whereas, on Month, ##, 2013, the FHWA published a notice of the availability of this proposed MOU in the Federal Register and provided a 30-day opportunity for comment; and

Whereas, on Month ##, 2013, the State published the proposed MOU on its website at http://www.dot.ca.gov/hq/env/nepa_pilot/html/categorial_exclusion.htm ; and the proposed MOU can be viewed on the Federal docket (FHWA -2007-27804) at http://www.regulations.gov; and

Whereas, the State and the FHWA have considered the comments received; and

Whereas, the USDOT Secretary, acting by and through the FHWA, has determined that specific designated activities are CEs and that it will assign specific responsibilities with respect to designated CEs to the State in accordance with this MOU; and

Whereas, the State wishes to assume such Federal agency responsibilities in accordance with this MOU and applicable law;

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

STIPULATIONS

I. CATEGORICAL EXCLUSION RESPONSIBILITIES ASSIGNED TO THE STATE BY FHWA

A. For the proposed projects covered by this MOU, the FHWA hereby as signs, and the State hereby assumes, subject to the terms and conditions set forth in 23 U.S.C. § 326 and this MOU, the responsibility for determining whether a proposed Federal-aid action is within a category of action that has been designated as a CE by the USDOT Secretary, as specified in Stipulation I(B), and meets the definition of a CE as provided in 40 CFR § 1508.4 (as in effect on October 1, 2003) and 23 CFR § 771.117(a) and (b). This assignment applies only to projects for which the California Department of Transportation is the direct recipient of Federal-aid Highway Program funding or other funding administered by FHWA, or is the project sponsor or co-sponsor for a project requiring approval by the FHWA-California Division Office (Division Office). This assignment does not apply to responsibilities carried out by other modal administrations of the USDOT or the Office of the Secretary.

B. This assignment pertains <u>only</u> to the designated activities described in this Stipulation I(B). The assignment includes the following:

1. The assignment includes the following:
   a) Activities listed in 23 CFR § 771.117(c);
   b) The example activities listed in 23 CFR § 771.117(d); and
   c) Additional actions listed in Appendix A. The State may determine, pursuant to 23 CFR § 771.117(d), whether individual actions that fall within the categories listed in Appendix A satisfy the criteria for a

CE based on documentation that demonstrates that the specific conditions or criteria for the CEs are satisfied and that significant environmental effects will not occur. The list of designated activities in Appendix A may not be amended except in accordance with Stipulation VIII of this MOU.

2. Any activities added through FHWA rulemaking to those listed in 23 CFR 771.117(c) or example activities listed in 23 CFR 771.117(d) after the date of the execution of this MOU.

C. This MOU transfers to the State all responsibility for processing the CEs designated in Stipulation I(B) of this MOU, including any necessary CE approval actions. The State shall process all proposed projects that are CE candidates (CE projects) and any required reevaluations of CEs under 23 CFR § 771.129 for all CE projects not completed prior to the date of this MOU, in accordance with the provisions of this MOU. With respect to matters covered by and subject to the terms of this MOU, this MOU supersedes any existing programmatic agreement that is solely between the State and the FHWA concerning CEs. Such programmatic agreement remains in effect with respect to matters not covered in this MOU until said programmatic agreement is terminated, or superseded, by subsequent agreement(s) between the State and FHWA or by law. A CE project that is excluded from this MOU, but is within the scope of a programmatic CE agreement between the FHWA and the State, may be processed pursuant to such programmatic agreement so long as that agreement remains in effect and does not conflict with the terms of this MOU.

D. The State, when acting pursuant to 23 U.S.C. § 326 and this MOU, holds assigned authority to make decisions and commitments pertaining to only the individual proposed projects and activities within the scope of § 326 and this MOU. No action by the State shall bind the FHWA to future action of any kind. No determination or agreement made by the State with respect to mitigation or other activities shall constitute a precedent for future determinations, agreements, or actions in the Federal-aid Highway Program unless the FHWA consents, in writing, to such commitment.

II. OTHER FHWA RESPONSIBILITIES ASSIGNED TO THE STATE AND RESPONSIBILITIES RESERVED BY FHWA

A. For proposed projects covered by this MOU, the FHWA hereby assigns, and the State hereby assumes, the FHWA responsibilities for environmental review, consultation, or other related actions required under Federal laws and Executive Orders applicable to CE projects as set forth in Appendix B, attached hereto, which describes the environmental responsibilities assigned to the State by FHWA for proposed projects subject to this MOU. This assignment includes the transfer to the State of the obligation to fulfill the assigned environmental responsibilities

associated with any proposed projects meeting the criteria in Stipulation I(B) that were determined to be CEs prior to the June 7, 2010 MOU, but that have not been completed as of the effective date of this MOU. Such projects are included in the term "proposed projects" in this MOU.

B. The FHWA reserves any responsibility for any environmental review, consultation, or other related action that is not expressly assigned under this MOU (See Stipulation III), including:

1. All government-to-government consultation with Indian tribes as defined in 36 CFR § 800.16(m). Notice from the State 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 the State adequately resolves any project-specific tribal issues or concerns, then the FHWA's role in the environmental process shall be limited to carrying out the government-to-government consultation process. If FHWA determines through consultation with an Indian tribe, or an Indian tribe indicates to the FHWA that the proposed resolution of tribal issues or concerns by the State is not adequate, then Stipulation III(C) applies. This MOU is not intended to abrogate, or prevent future entry into, any written agreement among the State, the FHWA, and an Indian tribe under which the Indian tribe agrees to permit the State 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.
2. In connection with the execution of their respective responsibilities under this MOU, the State and FHWA will ensure that:
   a) The State provides to the FHWA any information necessary for the FHWA to carry out its consultation, evaluation, or decision-making for Stipulation II(B)(1)-(2) activities;
   b) The FHWA provides the State with a written decision and any related information used for Stipulation II(B)(1)-(2) decisions and needed by the State to allow the State to evaluate the proposed project and make its decision whether the proposed project qualifies as a CE.
   c) As part of any request for FHWA authorization for funding or other action, the State will provide to the FHWA evidence that the CE processing and any other environmental responsibilities assigned under this agreement have been completed in accordance with this MOU.

C. The State agrees that its execution of environmental review, reevaluation, consultation, and other related responsibilities for CE projects assigned under this MOU are subject to the same existing and future procedural and substantive requirements as if those responsibilities were carried out by the FHWA. This includes, but is not limited to, the responsibilities of the FHWA under programmatic agreements, memoranda of understanding,

memoranda of agreement, and other similar documents that relate to the environmental review process for CE projects, along with the interagency agreements listed in Appendix C of this MOU. If such interagency agreements are between only the State and the FHWA, then the assignment occurs automatically upon the signing of this MOU for proposed projects covered by this MOU. If the interagency agreement involves signatories other than the FHWA and the State, then the FHWA and the State will work to obtain any necessary consents or amendments. Such actions include:

1. Consulting with the other parties to obtain written consent to the continuation of the interagency agreement in its existing form, but with the substitution through assignment of the State for the FHWA with respect to interagency agreement provisions applicable to CE projects;
2. Negotiating with the other parties to amend the interagency agreement as needed so that the interagency agreement continues but provides that the State assumes the FHWA's responsibilities with respect to the assigned CE projects.
3. If a third party does not agree to the assignment or amendment of the interagency agreement, then to the extent permitted by applicable law and regulation, the State must carry out the assigned 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.

D. The State shall carry out the assigned consultation, review, and coordination activities in a timely and proactive manner. The State shall make all reasonable and good faith efforts to identify and resolve conflicts with Federal agencies, state and local agencies, Indian tribes as defined in 36 CFR § 800.16(m), and the public during the consultation and review process.

III. ACTIONS, CONDITIONS, OR DETERMINATIONS THAT EXCLUDE DESIGNATED ACTIVITIES FROM ASSIGNMENT OF RESPONSIBILITIES

A. Notwithstanding any other provision of this MOU, any activity that does not satisfy the criteria for the CE categories described in Stipulation I(B) is <u>excluded</u> from this assignment. Exclusion also may occur at any time during the environmental process if the State determines that the project fails to meet the CE criteria. The provisions of Stipulation IV(C) apply to such cases.

B. Because the State assumes responsibility for environmental processing of the CEs designated in this MOU, the FHWA no longer will be responsible for conducting the environmental review, consultation, or other related actions assigned under this MOU (see Stipulation XI). However, in

furtherance of its stewardship and oversight responsibilities, the FHWA will evaluate the State's environmental processing of any project if the FHWA has any reason to believe that the State's performance with respect to the project does not satisfy the terms and conditions of this MOU. The scope of the evaluation will be commensurate with the potential problem. If the FHWA subsequently determines that the State's performance does not satisfy the terms and conditions of this MOU, then the FHWA will take action to resolve the problem. Such action may include facilitating the State's compliance with this MOU, or excluding the project from assignment under this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.

C. If a project-related concern or issue is raised in the coordination of project review with an Indian tribe, as defined in 36 CFR § 800.16(m), and either the Indian tribe or FHWA determines that the concern or issue will not be satisfactorily resolved, the State, then the FHWA, shall reassume responsibility for processing that project. The FHWA shall notify the State that the project will be excluded from this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.

IV. STATE PERFORMANCE REQUIREMENTS

A. Compliance with governing laws, regulations and MOU. The State shall make all determinations under this MOU in accordance with 23 CFR § 771.117(a) and (b) and succeeding regulations. All actions by the State in carrying out its responsibilities under this MOU shall comply with, and be consistent with, the coordination provisions of Stipulation II and all applicable Federal laws, regulations, policies, and guidance. The State also shall comply with State and local laws to the extent applicable.

1. Failure to meet the requirements of Stipulation IV(A) is grounds for a decision by the FHWA to terminate this MOU pursuant to Stipulation IX(A) if the FHWA determines, after good-faith consultation with the State, that there is an irreconcilable material conflict between a provision of State law, regulation, policy, or guidance and applicable Federal law, regulation, policy, or guidance, and the FHWA reasonably determines that such conflict is preventing the State from meeting its Stipulation IV(A) obligations. The grounds for such decision may include, but are not limited to, the mere existence of the conflict (i.e., on its face) and/or the effect of the conflict on the State's decision(s) on proposed CE project(s) (i.e., as applied).

2. Official USDOT and FHWA formal guidance and policies relating to environmental review matters are posted online at FHWA's website (currently at http://www.fhwa.dot.gov/hep/legreg.htm), contained in the FHWA *Environmental Guidebook* (currently at http://environment/fhwa/dot/gov/guidebook/index/asp), or sent to

the State electronically or in hard copy.

3. After the effective date of this MOU, the FHWA will use its best efforts to ensure that any new or revised FHWA policies and guidance that are final and applicable to the State's performance under this MOU are communicated to the State within 10 days of issuance. Delivery may be accomplished by e-mail, mail, publication in the *Federal Register* or by means of a publicly available online posting including at the sites noted above. If communicated to the State by e-mail or mail, such material may be sent either to the party specified in this MOU to receive notices, or to the Chief of the California Department of Transportation (Caltrans) Division of Environmental Analysis.
4. In the event that a new or revised FHWA policy or guidance is not made available to the State as described in the preceding paragraph, and if the State had no actual knowledge of such policy or guidance, then a failure by the State to comply with such Federal policy or guidance will not be a basis for termination under this MOU.
5. The State will work with all other appropriate Federal agencies concerning the laws, guidance, and policies relating to any Federal laws that such other agencies administer.
6. In order to minimize the likelihood of a conflict as described in (1) above, after the effective date of this MOU the State will use its best efforts to ensure that any proposed new or revised State laws, regulations, policies, or guidance that are applicable to the State's performance under this MOU are communicated to the FHWA for review and comment before they become final. Delivery may be accomplished by e-mail, mail, or personal delivery. If communicated to the FHWA by e-mail or mail, such material may be sent to the party specified in this MOU to receive notices for the FHWA.

B. <u>Processing proposed projects assigned under this MOU -- State identification, documentation, and review of effects</u>: For projects and other activities assigned under Stipulation I(A)-(B) that the State determines are included in the classes of CE assigned to the State under this MOU, the State shall:

1. Institute a process to identify and review the environmental effects of the proposed project.
2. Carry out a review of proposed CE determinations for CEs, including those designated in 23 CFR § 771.117(c), and consider the environmental analysis and project file documentation, prior to the State's approval of the CE determination. The process shall include, at a minimum, review of the documentation and proposed determination by a competent peer reviewer who is not a preparer of the CE documentation.. The CE decision, for all of the assigned categories, will be approved by the Department's District Environmental Office Chief or Senior Environmental Planner.

3. Carry out the other environmental responsibilities that are assigned under this MOU, as necessary or appropriate for the activity.
4. Document its approval of the determination, specifying the assigned CE that applies to the proposed project and including, at a minimum, the printed name, title, and date of the State official approving the determination. Signature authority for the CE determination form will not be delegated below the Senior Environmental Planner classification.
5. Include the following determination statement when documenting the CE findings:

   "*The State has determined that this project has no significant impacts on the environment as defined by NEPA, and that there are no unusual circumstances as described in 23 CFR 771.117(b). As such, the project is categorically excluded from the requirements to prepare an environmental assessment or environmental impact statement under the National Environmental Policy Act. The State has been assigned, and hereby certifies that it has carried out the responsibility to make this determination pursuant to Chapter 3 of title 23, United States Code, Section 326 and a Memorandum of Understanding dated June ##, 2013, executed between the FWHA and the State.*"
6. Document in the project file the specific categorically excluded activity; the CE findings, including the determination that the project has no significant impact(s) on the environment; that there are no unusual circumstances (23 CFR 771.117(b)); and that all applicable FHWA responsibilities assigned under Stipulations I and II have been completed.

C. <u>Excluded projects: determination and documentation</u>. For proposed projects that are candidates for CE classification but that the State determines should be excluded from processing under this or any other NEPA assignment, the State shall:
   1. Document the exclusion findings in the project file, including the reason for the finding;
   2. Notify the FHWA; and
   3. Work with the FHWA as the responsible party under NEPA to proceed with review and documentation of the project under the appropriate NEPA procedures (including those under a programmatic CE agreement, if applicable).

D. <u>Required State resources, qualifications, expertise, standards, and training.</u>
   1. The State must maintain adequate organizational and staff capability and expertise to effectively carry out the responsibilities assigned to it under this MOU. This includes, without limitation:
      a) Using appropriate technical and managerial expertise to perform the functions required under this MOU and applicable laws, regulations, policy, and guidance;

b) Devoting adequate financial and staff resources to carry out the responsibilities assumed by the State; and

c) Demonstrating, in a consistent manner, the capacity to perform the State's responsibilities under this MOU and applicable Federal law.

2. The State agrees that it shall maintain on its staff or through the use of consultant services all of the environmental and other technical expertise needed to carry out its responsibilities under this MOU and 23 U.S.C. § 326. Without limiting the foregoing, when carrying out the requirements of Section 106 of the National Historic Preservation Act, as amended, the State 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 (published at 48 FR 44738-44739). The State 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.

E. State quality control.

1. The State agrees to carry out regular quality control activities to ensure that its CE determinations are made in accordance with applicable laws and this MOU. The state's policy and environmental procedures manual is located at http://www.dot.ca.gov/ser/vol1/sec4/ch30ce/chap30ce.htm
2. At a minimum, the State shall monitor its processes relating to project determinations, environmental analysis, and project file documentation, and check for errors and omissions. The State shall take corrective action as needed. The State shall document its quality control activities and any corrective actions taken.
3. If the State implements training to meet the capability requirements of this MOU or as a corrective action, the State shall be responsible for the training. The State shall provide notice of the training to the FHWA.
4. Without limiting the foregoing, the State shall follow Caltrans' existing CE quality control procedures in Chapter 30 of Volume 1 of Caltrans' Environmental Handbook available on the on-line Standard Environmental Reference resource (http://www.dot.ca.gov/ser).

F. MOU performance monitoring and quality assurance. The FHWA and the State shall cooperate in monitoring performance under this MOU and each party shall modify its practices as needed to assure quality performance by the State and the FHWA. Monitoring by the FHWA and the State will include consideration of the technical competency and organizational capacity of the State, as well as the State's performance of its CE

processing functions. Performance considerations will include, without limitation, the quality and consistency of the State's project determinations, adequacy and capability of the resources applied by the State, and the quality and consistency of the State's administration of its responsibilities under this MOU. In support of the monitoring efforts:

1. The State shall semiannually submit to the FHWA a list of the CE determinations that the State approved during the previous six months (January 1 through June 30, and July 1 through December.
   31). The State shall deliver the list to the FHWA, or make it available by means of FHWA access to a report in the State's project management system, within 15 business days after the end of each six-month reporting period. The FHWA may reduce the frequency of this reporting requirement, provided that in no event will the reporting frequency be less than once each year. Such reduction in reporting frequency, and any revocation of such reduction by the FHWA, shall not be deemed an amendment under Stipulation VIII.
2. At its discretion, the State shall submit to the FHWA (electronically or in hard copy) a report summarizing its performance under this MOU. The report will identify any areas where improvement is needed and what measures the State is taking to implement those improvements. The report will include actions taken by the State as part of its quality control efforts under Stipulation IV(E). Following submission of the report, the State shall schedule a follow-up meeting with the FHWA at which the parties will discuss the report, the State's performance of this MOU, and the FHWA's monitoring activities.
3. The State shall maintain electronic or paper project records and general administrative records pertaining to the State's administration of its MOU responsibilities for proposed projects processed hereunder. As soon as practicable, the State will establish an electronic records system. The records shall be available for inspection by the FHWA at any time during normal business hours. The State shall provide the FHWA with copies of any documents the FHWA may request. The State shall retain those records, including all letters and comments received from governmental agencies, the public, and others about the performance of activities delegated under this MOU, for a period of no less than three (3) years after completion of project construction. This 3-year retention provision does not relieve the State of its project or program recordkeeping responsibilities under 49 CFR § 18.42 or any other applicable laws, regulations, or policies.
4. The State shall ensure that project records are available to the public consistent with requirements applicable to Federal agencies under 5 U.S.C. § 552 (the Freedom of Information Act, as amended in 2002) and NEPA.

5. The FHWA and the State shall review the State's records and may interview State staff to evaluate the State's performance under this MOU. Such reviews will occur no sooner than the 19th month and no later than the 31st month of the MOU and may be coordinated with the State in its MOU performance review. The primary purposes of the monitoring reviews will be to independently verify the State's compliance with the requirements of this MOU and to document the State's levels of achievement with respect to the performance areas stated in this MOU. The FHWA anticipates that, under normal circumstances, its evaluation of the State's performance will be based on a modified version of a typical FHWA CE process review (to view FHWA guidance on how monitoring should occur visit http://www.fhwa.dot.gov/hep/6004stateassumpt.htm). Modifications to the CE process review will include incorporation of measures specific to the responsibilities assigned to the State pursuant to 23 U.S.C. § 326 and will include performance measurements of quality and time. However, the FHWA reserves the right to determine in its sole discretion the frequency, scope, and procedures used for monitoring activities. The State, by its execution of this MOU, acknowledges that it is familiar with the FHWA CE Process Review procedures and with the expected modifications to the procedures that will be adopted for the purpose of monitoring the State's MOU performance.
6. Nothing in this Stipulation shall prevent the FHWA from undertaking other monitoring actions, including audits, with respect to the State's performance of this MOU. The FHWA, in its sole discretion, may require the State to perform such other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with this MOU, 23 U.S.C. § 326, and other applicable Federal laws and regulations. Such requirement shall not be deemed an amendment under Stipulation VIII.
7. The State agrees to cooperate with the FHWA in all quality assurance activities.

G. State liability. The State agrees that it is solely responsible and solely liable for complying with and carrying out this MOU, for the performance of all assigned responsibilities as provided by applicable law, and for any decisions, actions, or approvals by the State. The FHWA shall have no responsibility or liability for the performance of responsibilities assigned to the State, including without limitation any decision or approval made by the State pursuant to an assignment under 23 U.S.C. § 326. Where the State takes any subsequent substantive action under authority assigned in accordance with 23 U.S.C. § 326, on a proposed project which FHWA determined to be a CE prior to June 7, 2010, the State assumes sole NEPA responsibility and liability for any subsequent substantive action it takes on that project.

H. Litigation. This section assumes that the FHWA will not be named as a party in litigation brought in connection with the State's discharge of its responsibilities under this MOU. If either the FHWA or another agency of the United States is named in such litigation, however, nothing in this MOU affects the authority of the U. S. Department of Justice (DOJ) to litigate such claims, including the authority to approve a settlement, on behalf of the United States.

1. Except as provided in 23 USC 326(f), the State shall defend, at its own expense, all claims brought in connection with its discharge of any responsibility assigned to the State. In the event that FHWA or any other Federal agency is named in litigation related to matters under this MOU, the State agrees to coordinate with DOJ in the defense of that action.
2. The State shall notify the FHWA of any notice of claim the State receives prior to initiation of litigation, which notice is given in connection with the State's acts or omissions pursuant to this MOU. The State shall provide the FHWA with a copy of any such notice of claim within 5 business days after the State's receipt of the notice.
3. In the event of litigation, the State shall provide qualified legal counsel, including outside counsel if necessary. The State will notify the FHWA's Division Office and the U. S. Department of Justice, through its Office of the Assistant Attorney General, Environment and Natural Resources Division, within 5 business days of the receipt of service of process of any complaint concerning its discharge of any responsibility assumed under this MOU. The State's notification to the FHWA and DOJ shall be made prior to its response to the complaint. The State agrees to provide the FHWA's Division Office and DOJ with copies of the complaint and any motions, pleadings, briefs, and other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. The State will deliver such copies to the FHWA and DOJ via express mail or delivery service within 5 business days of the service or receipt of any document or, in the case of any documents filed by or on behalf of the State within 5 business days of the date of filing.
4. The State agrees to consult with FHWA and DOJ prior to filing any dispositive motion in any litigation arising out of or relating to the State's discharge of any responsibility under this MOU. The State agrees to notify FHWA's Division Office and DOJ prior to settling any action or potential action and shall provide FHWA and DOJ at least 30 calendar days to review and comment on the proposed settlement. The State agrees not to enter into any settlement agreement without prior FHWA and DOJ consent. The State's notice will serve as the State's request for FHWA and DOJ consent to the proposed settlement. FHWA and DOJ agree to provide an answer to the request for consent by the end of the review and comment period unless either Federal agency notifies the State that additional time is needed to obtain the appropriate settlement

approval. In cases where FHWA or DOJ notify the State that additional time is needed, the Federal agency will provide an expected timeframe for responding to the State's request.

5. For either litigation or pre-litigation settlement agreements, the lack of FHWA approval of such settlement is grounds for FHWA denial of Federal-aid eligibility for any State claims for reimbursement of costs arising out of or relating to the settlement agreement.
6. The State hereby consents to intervention by the FHWA in any action or proceeding arising out of or relating to the State's discharge of any responsibility assigned to the State under this MOU.
7. If the FHWA re-assumes responsibility for processing a project and makes the final CE determination for the project, then the FHWA shall be responsible for defending that CE determination in the event of a challenge to that determination, including the final CE determination. Nothing in this paragraph shall relieve the State of its liability for acts or omissions prior to the FHWA's re-assumption of responsibility for processing the project.
8. Within 5 business days of receipt by the State, the State will provide notice to FHWA and DOJ of any court decision, judgment, and notice of appeal arising out of or relating to the responsibilities the State has assumed under this MOU. The State agrees not to take an appeal without the consent of DOJ,

I. Federal Register. While this MOU is in effect, if any CE project or program documents are required to be published in the *Federal Register*, such as a Notice of Final Agency Action under 23 U.S.C. § 139(l), the State shall transmit such document to the FHWA's Division Office and the FHWA will publish such document in the *Federal Register* on behalf of the State. The State is responsible for the expenses associated with the publishing of such documents in the *Federal Register*, in accordance with guidance issued by the FHWA.

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

1. Report to Congress on Review of Federal Project and Program Delivery [MAP-21 Sec. 1323(2).
2. Archeology Report requested by the National Park Service,
3. Endangered Species Act Expenditure Reports requested by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service,
4. NEPA Litigation Reports requested by the Council on Environmental Quality,

5. Environmental Conflict Resolution reports requested by the Council on Environmental Quality."

V. STATE CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

A. The State hereby certifies that it has the necessary legal authority and the capacity to:
   1. Accept the assignment under this MOU;
   2. Carry out all of the responsibilities assigned to the State; and
   3. Agree to and perform all terms and conditions of the assignment as contained in this MOU and in 23 U.S.C. § 326.

B. The State consents to and accepts the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary that the State assumes under this MOU pursuant to 23 U.S.C. § 326. The State understands and agrees that this consent constitutes a waiver of the State's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of addressing the compliance, discharge and enforcement of the USDOT Secretary's responsibilities that that State assumes under this MOU pursuant to 23 U.S.C. § 326. This consent to Federal court jurisdiction shall remain valid after termination of this MOU, or re-assumption of the USDOT Secretary's responsibilities by the FHWA, for any act or omission by the State relating to its compliance, discharge, or enforcement of any responsibility under this MOU pursuant to 23 U.S.C. § 326.
   1. A valid, binding, and sufficient waiver of the State's sovereign immunity must be in effect at all times that the State acts under the authority of this MOU. As provided for in the California Streets and Highways Code Section 820.1, the State's present waiver of its immunity under the Eleventh Amendment sunsets on December 31, 2017. Affirmative action by the State Legislature, extending the Eleventh Amendment waiver, will be necessary to avoid the sunset date. If a new or extended waiver covering the remainder of the term of this MOU is not in effect by December 31, 2017, then the State's authority to participate in this MOU will end on January 1, 2017, and this MOU will terminate automatically subject to applicable survival and transitional provisions of this MOU. The provisions of Stipulation X(A)(1)-(3) will not apply.
   2. If no new or extended waiver has been enacted by August 31, 2017, the FHWA and the State shall begin preparations to transition the responsibilities that the State has assumed under this MOU back to the FHWA.

C. In accordance with 23 U.S.C. § 326(e), the State agrees that it shall be deemed to be a Federal agency for the purposes of the Federal law(s) under which the State exercises any responsibilities pursuant to this MOU and 23 U.S.C. § 326.

D. The State may not assign or delegate its rights or responsibilities under this MOU to any other agency, political subdivision, or entity, or to any private individual or entity. Without limiting the foregoing, the State understands and agrees that it must retain the environmental decision-making responsibilities assigned to it under this MOU and may not assign or delegate such decision-making responsibilities to consultants or others.

E. With respect to the public availability of any document or record under the terms of this MOU or the State's open records law, California Government Code §§ 6250 et seq., the State certifies that the laws of the State provide that any decision regarding the release or public availability of a document or record may be legally challenged or reviewed in the courts of the State.

F. The State certifies that the persons signing this MOU are each duly authorized to do so and have the respective legal authority among them to:

1. Waive the State's Eleventh Amendment rights pursuant to the authority in California Streets and Highways Code § 820.1(a-f);
2. Consent to Federal court jurisdiction as specified above;
3. Enter into this MOU on behalf of the State;
4. Make the certifications set forth in this MOU; and
5. Bind the State to the terms and conditions contained in this MOU.

The California Department of Transportation's Chief Counsel, pursuant to California Streets and Highways Code § 138, by signing this MOU certifies that the foregoing is true and that upon execution of this MOU the certifications, terms, and conditions of this MOU will be legally binding and enforceable obligations of the State.

VI. PUBLIC NOTICE AND COMMENT

A. The execution of this MOU and any amendment or renewal requires prior public notice and an opportunity for comment.

B. The State shall publish notice of the availability of this MOU and any proposed amendment or renewal for public review and comment on its website at http://www.dot.ca.gov/hq/env/nepa_pilot/html/categorial_exclusion.htm; and in the Federal docket at http://www.regulations.gov.

C. The FHWA Division Office shall publish in the *Federal Register* a notice of availability of the initial proposed MOU, and any proposed amendment or renewal, for public review and a 30-day comment period. If this MOU, or any amendment or renewal, includes assignment of CE authority in Stipulation I(B)(3), the notice will expressly request comments on any additional types of activities proposed for assignment under Stipulation I(B)(3), and will include a description of the public availability of

supporting documentation for any assignment under Stipulation I(B)(3). The notice also must advise the public about how to learn about FHWA's final decision on the proposed MOU, including how to obtain a copy of any resulting final MOU. The FHWA will establish a docket at http://www.regulations.gov to receive comments.

D. The State and the FHWA shall consider comments provided by the respondents to the public notices before finalizing this MOU or any proposed amendment or renewal agreement. Upon completion of the decision-making process, the FHWA shall publish a notice in the Federal Register that announces the agency's decision and the execution of this MOU. The notice also will inform the public of the availability in the Federal Docket System of a brief summary of the results of the decision-making process and a copy of any final MOU executed by the State and FHWA, whether initial, amended, or renewed. The notice also will advise where the final MOU is available on the State's Web site.

E. The State agrees that at all times that this MOU is in effect, the State will post on its Web site and make available to the public upon request copies of the State's reports of CE determinations under Stipulation IV(F)(1), the State's performance reports under Stipulation IV(F)(2), and FHWA performance monitoring reports pursuant to Stipulation IV(F)(5). The FHWA will arrange for the posting of a similar notice on the FHWA's web site or create a link from the FHWA's web site to the State's web site.

VII. TERM AND RENEWAL

A. This MOU shall have a term of three (3) years, beginning on the date of the last signature, assuming the waiver cited in Section V(B)(1) is extended to cover the three (3) year term or a new waiver is enacted. Otherwise, this MOU will terminate when the waiver expires.

B. This MOU is renewable in writing for additional terms of three (3) years each if the State requests renewal, the FHWA determines that the State has satisfactorily carried out the provisions of this MOU, and the necessary waiver extends to cover any additional three (3) year term(s). In considering any renewal of this MOU, the FHWA will evaluate the effectiveness of this MOU and its overall impact on the environmental review process. The FHWA may decide not to renew this MOU if the FHWA determines that the operation of this MOU has substantial adverse effects on the environmental review process. Such evaluation may include consideration of any effects from the assumption by the State of only some, but less than all, of the FHWA's environmental review, consultation, or other related responsibilities as listed in Stipulation II.

At least eight (8) months prior to the end of the three (3) year term of this MOU, the State and the FHWA shall meet to discuss the results of the

monitoring and consider any amendments to this MOU. This meeting may be combined with a meeting to discuss performance under the monitoring provisions in Stipulation IV(F)(2) of this MOU.

C. If the parties do not renew this MOU, then it shall expire at the end of the term then in effect. The provisions of Stipulation X(A)(4) and X(C)-(E) shall apply.

VIII. AMENDMENTS AND ADMINISTRATIVE MODIFICATIONS

A. Any party to this MOU may request that it be amended or administratively modified to reflect non-substantive changes, whereupon the parties shall consult to consider such an amendment. Public notice and comment is not required for the parties to agree to a technical non-substantive change.

B. If, after the required public notice and comment, the parties agree to amend this MOU, then the FHWA and the State may execute an amendment with new signatures and dates of the signatures. The term of this MOU shall remain unchanged unless otherwise expressly stated in the amended MOU. Any amendment that extends the term of this MOU shall be treated as a renewal, and the FHWA must make the determinations required for a renewal under Stipulation VII.

IX. TERMINATION

A. Entire MOU. The State, FHWA, or the State and FHWA by mutual agreement, may terminate this MOU in its entirety.

1. The FHWA may terminate this MOU without the agreement of the State if the FHWA determines that the State has failed to adequately meet MOU requirements. The procedures in Stipulation X apply.
2. The State may terminate its participation in the program by providing a written notice to FHWA no later than ninety (90) calendar days before the date of termination.

B. Part of MOU. By mutual agreement, the FHWA and the State may terminate the State's responsibilities with respect to particular designated activities under Stipulation I, or with respect to one or more responsibilities assigned under Stipulation II. The FHWA may exercise such partial termination without the agreement of the State if the FHWA determines that the State has failed to adequately meet MOU requirements for the responsibilities in question, but that termination of the entire MOU is not warranted. The procedures in Stipulation X apply.

X. PROCEDURES FOR TERMINATION AND FHWA-INITIATED PROJECT EXCLUSIONS

A. Except as provided in Stipulation X(B) below, the process for termination under Stipulation IX(A)-IX(B), and for exclusion of a project from MOU assignment by the FHWA under Stipulation III(B)-III(C), is as follows:

1. The party wishing to initiate the termination or exclusion shall provide to the other party a written notice of intent. The notice should identify the proposed action and explain the reason(s) for the proposed action.

2. Following the notice, the parties shall have a thirty (30) day period during which the FHWA and the State shall consult on amendments or other actions that would avoid termination or exclusion. By agreement, the parties may extend this consultation period, provided that such extension may not exceed the term of this MOU.
3. Effective Date
   a) Termination shall be effective either thirty (30) days after the date of the state's receipt of a FHWA notice of termination or ninety (90) days after the date of FHWA's receipt of the State's termination notice.
   b) Exclusions of a project from the terms of this MOU shall be effective thirty (30) days following the date of either a post-consultation agreement between the State and FHWA, or the date of the State's receipt of a FHWA notice of final determination of exclusion.
   c) All responsibilities covered by the termination or exclusion shall revert to the FHWA as of the effective date of either the termination or exclusion notice.
4. In the event of termination or exclusion, the State and the FHWA agree to cooperate to make the transfer of responsibilities back to the FHWA effective in as orderly and administratively efficient manner as possible. The State promptly will provide to FHWA any documents, records and other project-related material needed for FHWA to proceed with processing any affected project. Appropriate NEPA procedures, including those under any applicable programmatic CE agreement, shall apply to the subsequent processing of projects.

B. The FHWA, in its sole discretion, may exclude a project from this MOU pursuant to Stipulation III(B)-III(C), or terminate this MOU pursuant to Stipulation IX(A)-IX(B), without the 30-day consultation or final notice periods, if the FHWA determines that:

1. The State is not performing in accordance with this assignment; and
2. Extreme conditions exist that justify immediate exclusion or termination and transfer back to the FHWA of the responsibilities covered by the exclusion or termination.

In such cases, the FHWA shall notify the State in writing of its determination and action, and specify the reasons for the action.

C. The State's liability for its acts and omissions under this MOU, and the provisions of Stipulation V, shall survive this MOU. This survival clause includes, without limitation, the provisions of Stipulations IV(G)-IV(H) relating to liability and litigation.

D. Termination and exclusion actions and any decision not to renew do not require public notice and comment.

E. Termination or other action by the FHWA in accordance with the provisions of this MOU does not limit or otherwise affect the FHWA's ability to seek any other remedy or to take action under other provisions of applicable law, including without limitation any appropriate remedies as provided in 23 C.F.R. § 1.36.

XI. STATE EXECUTION OF ASSIGNED RESPONSIBILITIES WITHOUT FHWA INVOLVEMENT

A. The FHWA will not provide any project-level assistance to the State in carrying out any of the responsibilities assigned under this MOU. "Project-level assistance" includes 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 discussions concerning issues addressed in prior projects, legal interpretations of any applicable law contained in titles 23 or 49 of the United States Code, legal interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance. If a need for project-level assistance is identified as a result of the government-to-government consultation process described in Stipulation II(B)(1), then the FHWA shall reassume responsibility for the project as provided in Stipulation III(C).

B. The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving the State's consultation or coordination with another Federal, State, or local agency with respect to the State's discharge of any of the responsibilities the State has assumed under this MOU for any particular highway project. However, the FHWA holds both monitoring and quality assurance obligations under this MOU and general oversight and stewardship obligations under the Federal-aid Highway Program. In furtherance of those obligations, the FHWA occasionally may elect to attend meetings between the State and other Federal agencies. Prior to attending such meetings, the FHWA will make a reasonable and diligent effort to give the State notice. In rare or extreme circumstances and Based on its observations, the FHWA may submit comments to the State and the other Federal agency if the FHWA determines such comment is necessitated by rare or extreme circumstances including:

1. The FHWA reasonably believes that the State is not in compliance

with this MOU; or

2. The FHWA determines that an issue between the State and the other Federal agency has broad or unique policy implications for the administration of the national Federal-aid Highway Program.

XII. NOTICES

Any notice to either party may be given electronically so long as a paper original of the notice also is delivered to the party. The effective date of the notice shall be the date of delivery of the paper original. Paper notices shall be delivered as follows:

State of California:
Director
Caltrans
1120 N Street, Mail Station 49
Sacramento, CA 95814

Federal Highway Administration:
Division Administrator
Federal Highway Administration, California Division
650 Capitol Mall, Suite 4-100
Sacramento, CA 95814-4708

U.S. Department of Justice:
Office of the Assistant Attorney General
Environment and Natural Resources Division
950 Pennsylvania Avenue, NW
Room 2143
Washington, D.C. 20530

Execution of this MOU and implementation of its terms by the State formally evidence that the parties have reviewed this MOU and determined that it complies with the laws, regulations, and policies applicable to the FHWA and the State. Accordingly, this MOU is approved and is effective upon the date of the last signature below.

FEDERAL HIGHWAY ADMINISTRATION

_____ _____

VINCENT MAMMANO Date
California Division Administrator

STATE OF CALIFORNIA

_____ _____

MALCOLM DOUGHERTY Date
Director
California Department of Transportation

_____ _____

RONALD W. BEALS Date
Chief Counsel
California Department of Transportation

Appendix A
23 CFR § 771.117(d) Determination that the USDOT Secretary Assigns to the State Pursuant to Stipulation I(B)(3)

The following categories can be used by the State under Stipulation I(B)(3) on a project-by project basis for a proposed project located anywhere in the State of California.

1. Construction, modification, or repair of storm water treatment devices (e.g., detention basins, bioswales, media filters, infiltration basins), protection measures such as slope stabilization and other erosion control measures throughout California.

2. Replacement, modification, or repair of culverts or other drainage facilities.

3. Projects undertaken to assure the creation, maintenance, restoration, enhancement, or protection of habitat for fish, plants, or wildlife (e.g., revegetation of disturbed areas with native plant species; stream or river bank revegetation; construction of new, or maintenance of existing fish passage conveyances or structures; restoration or creation of wetlands).

4. Routine repair of facilities due to storm damage, including permanent repair, to return the facility to operational condition that meets current standards of design and public health and safety without expanding capacity (e.g., slide repairs, construction or repair of retaining walls).

5. Routine seismic retrofit of facilities to meet current seismic standards and public health and safety standards without expansion of capacity.

6. Air space leases that are subject to subpart D, part 710, title 23, Code of Federal Regulations.

7. Drilling of test bores/soil sampling to provide information for preliminary design and for environmental analyses and permitting purposes.

Appendix B
List of FHWA Responsibilities Assigned

Air Quality
Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q. *Determinations for project-level conformity if required for the project.*

Noise
Compliance with the noise regulations in 23 CFR Part 772

Wildlife
Section 7 of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544, 1536

Marine Mammal Protection Act, 16 U.S.C. § 1361

Anadromous Fish Conservation Act, 16 U.S.C. §§ 757a–757g

Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661–667d

Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712

Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. § 1801 et seq.

Bald and Golden Eagle Protection Act, as amended, 16 USC 668-668c.

Historic and Cultural Resources
Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470(f) et seq. [1]

Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303 and 23 U.S.C. § 138; 23 CFR Part 774.

Archeological and Historic Preservation Act of 1966, as amended, 16 U.S.C. §§ 469–469(c)

Social and Economic Impacts
American Indian Religious Freedom Act, 42 U.S.C. § 1996[1]

Farmland Protection Policy Act (FPPA), 7 U.S.C. §§ 4201–4209

Water Resources and Wetlands
Clean Water Act, 33 U.S.C. §§ 1251–1377

Section 404

Section 401

Section 319

Coastal Barrier Resources Act, 16 U.S.C. §§ 3501–3510

Coastal Zone Management Act, 16 U.S.C. §§ 1451–1465

Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f–300j–6

Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401–406

Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287

Emergency Wetlands Resources Act, 16 U.S.C. §§ 3921, 3931

TEA-21 Wetlands Mitigation, 23 U.S.C. §§ 103(b)(6)(m), 133 (b)(11)

Flood Disaster Protection Act, 42 U.S.C. §§ 4001–4128

Parklands

Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303 and 23 U.S.C. § 128; 23 CFR Part 774.

Land and Water Conservation Fund (LWCF), 16 U.S.C. § 4601-4 (known as Section 6(f))

Hazardous Materials

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675

Superfund Amendments and Reauthorization Act of 1986 (SARA)

Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k

Land

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

Executive Orders Relating to Highway Projects

E.O. 11990, Protection of Wetlands

E.O. 11988, Floodplain Management

E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations

E.O. 11593, Protection and Enhancement of Cultural Resources[1]

E.O. 13007, Indian Sacred Sites[1]

E.O. 13175, Consultation and Coordination with Indian Tribal Governments

E.O. 13112, Invasive Species

Note:

1. Under these laws and Executive Orders, FHWA will retain responsibility for conducting formal government-to-government consultations with Federally recognized Indian tribes. Caltrans will continue to handle routine consultations with the tribes and understands that a tribe has the right to direct consultation with FHWA upon request. Caltrans may also assist FHWA with formal consultations, with the consent of a tribe, but FHWA remains responsible that this consultation occurs. FHWA's retention of formal consultation responsibilities under NAGPRA will not limit Caltrans' existing activities under this law.

Appendix C

List of Caltrans Programmatic Agreements/Memoranda of Understanding

The agreements listed below are in effect as of the date of the execution of this MOU. During the term of this MOU, the State may enter into new or revised agreements. Any person interested in reviewing an agreement is encouraged to check with Caltrans to ensure that the agreement remains in effect or that they obtain the most current version if the agreement has been revised.

Statewide Agreements

- National Environmental Policy Act and Clean Water Act Section 404 Integration process for Federal Aid Surface Transportation Projects in California
  - **Signatories to Agreement:** FHWA, Caltrans, US EPA USACE, USFWS, NOAA
  - **Effective Date:** 5/17/2006
  - **Web Address:** http://www.dot.ca.gov/ser/downloads/MOUs/NEPA404/nepa404_2006_final_mou.pdf

- Programmatic Agreement Among the Federal Highway Administration, the California State Historic Preservation Officer, and the California Department of Transportation Regarding Compliance With Section 106 of the National Historic Preservation Act, As It pertains to the Administration of the Federal-Aid Highway Program in California.
  - **Signatories to Agreement:** ACHP, SHPO, FHWA, Caltrans Director
  - **Effective Date:** 1/1/2004
  - **Web Address:** http://www.dot.ca.gov/ser/vol2/PA_04-EH.pdf

- Programmatic Agreement Regarding Seismic Retrofit of Bridge Structures in California
  - **Signatories to Agreement:** ACHP, SHPO, FHWA, Caltrans
  - **Effective Date:** 3/21/1995
  - **Web Address:** http://www.dot.ca.gov/hq/env/cultural/files/SeismicPA.pdf

- Memorandum of Understanding – Bridge Evaluations
  - **Signatories to Agreement:** SHPO, FHWA, CT
  - **Effective Date:** 12/12/1980
  - **Web Address:** http://www.dot.ca.gov/ser/vol2/exhibits/exhibit_7_3_BridgeMOU.htm

- Bridge Permits Procedures and guidelines MOA
    - **Signatories to Agreement**: USCG and FHWA
    - **Effective Date:** 8/17/1981
    - **Web Address:**
    http://www.fhwa.dot.gov/legsregs/directives/notices/n6640-22.htm
- Memorandum of Agreement, Early Mitigation Planning for Transportation Improvement in California
    - **Signatories to Agreement:** Caltrans, FHWA, DFG, FWS and the Corps
    - **Effective Date:** 5/13/1991
    - **Web Address:**
    http://www.dot.ca.gov/ser/downloads/MOUs/CT_DFG_Species_MOU_1990.pdf