

**MEMORANDUM OF UNDERSTANDING BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION AND THE
ARIZONA DEPARTMENT OF TRANSPORTATION CONCERNING THE
STATE OF ARIZONA'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 (DOT), and the STATE OF ARIZONA, acting by and through its ARIZONA DEPARTMENT OF TRANSPORTATION (ADOT), 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 (DOT Secretary) to assign and States to assume the DOT 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 DOT 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 June 29, 2018, prior to submittal of its application to FHWA, ADOT 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, Arizona Revised Statutes (A.R.S.) § 28-334(C) authorizes ADOT to participate in the Program; and

Whereas, on November 16, 2018, the State of Arizona acting by and through ADOT, submitted an application to FHWA with respect to highway projects in the State of Arizona ; and

Whereas, on February 11, 2019, FHWA published a notice in the *Federal Register* providing an opportunity for comment on its preliminary decision to approve ADOT's application and solicited the views of other appropriate Federal agencies concerning ADOT's application as required by 23 U.S.C. 327(b)(5); and

Whereas, the DOT Secretary, acting by and through FHWA pursuant to 49 CFR 1.85(a)(3), has determined that ADOT'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 ADOT agree as follows:

PART 1. PURPOSE OF MEMORANDUM OF UNDERSTANDING

1.1 Purpose

- 1.1.1 This MOU officially approves ADOT'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 DOT Secretary may assign, and ADOT may assume, the responsibilities of the DOT Secretary for Federal environmental laws with respect to one or more highway projects within the State of Arizona.
- 1.1.2 FHWA's decision to execute this MOU is based upon the information, representations, and commitments contained in ADOT's November 16, 2018, 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 upon the date of the final signature (Effective Date).
- 1.1.4 This MOU does not supersede the existing MOU between FHWA and ADOT under which FHWA assigned its responsibilities to ADOT, pursuant to 23 U.S.C. 326, for determining whether certain projects qualify for Categorical Exclusions ("CE") and assigned certain other responsibilities for those projects ("Section 326 MOU"). The FHWA and ADOT initially executed the Section 326 MOU on January 3, 2018.
- 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 ADOT'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 Arizona, 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 ADOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the DOT 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 CFR parts 1500—1508, DOT Order 5610.1C, and 23 CFR part 771, as applicable.
- 3.1.2 On the cover page of each Environmental Assessment (EA), Finding of No Significant Impact (FONSI), Environmental Impact Statement (EIS), and Record of Decision (ROD) prepared under the authority granted by this MOU, and for memoranda corresponding to any CE determination it makes, ADOT 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 ADOT pursuant to 23 U.S.C. 327 and a MOU dated 04/16/2019 and executed by FHWA and ADOT.

- 3.1.3 ADOT shall disclose to the public, Tribes 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 ADOT assumes, subject to the terms and conditions set forth in this MOU, all of the DOT 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

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

- 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. 13112, Invasive Species, as amended by E.O. 13751, Safeguarding the Nation from the Impacts of Invasive Species
- E.O. 13807 Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure

FHWA-Specific

- Efficient Project Reviews for Environmental Decision Making, 23 U.S.C. 139
- Environmental Impact and Related Procedures, 23 CFR 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, 42 U.S.C. 9601—9675

- Resource Conservation and Recovery Act, 42 U.S.C. 6901—6992k
- Superfund Amendments and Reauthorization Act, 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, 25 U.S.C. 3001—3013; 18 U.S.C. 1170
- Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. 306101 et seq.
- 23 U.S.C. 138 and Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303 and implementing regulations at 23 CFR part 774

Noise

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

Parklands and Other Special Land Uses

- Land and Water Conservation Fund 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 CFR part 774

Social and Economic Impacts

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

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. 1251-1387 (Sections 319 and 401, 402, 404 and 408)
- 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
- Rivers and Harbors Act of 1899, 33 U.S.C. 403
- Safe Drinking Water Act, 42 U.S.C. 300f—300j-26
- Wetlands Mitigation, 23 U.S.C. 119(g) and 133(b)(14)
- Wild and Scenic Rivers Act, 16 U.S.C. 1271—1287

Wildlife

- Fish and Wildlife Coordination Act, 16 U.S.C. 661—667d

- Migratory Bird Treaty Act, 16 U.S.C. 703—712
- Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d)
- Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531-1544

3.2.2 In accordance with 23 U.S.C. 327(a)(2)(D), any FHWA environmental review responsibility not explicitly listed above and assumed by ADOT 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 CFR 773.113(b). This provision shall not be interpreted to abrogate ADOT's responsibilities to comply with the requirements of any Federal environmental laws that apply directly to ADOT independent of FHWA's involvement (through Federal assistance or approval).

3.2.3 The DOT Secretary's responsibilities for government-to-government consultation with Indian tribes, as defined in 36 CFR 800.16(m), are not assigned to or assumed by ADOT under this MOU. The FHWA remains responsible for government-to-government consultation, including initiation of government-to-government consultation consistent with E.O. 13175 - Consultation and Coordination with Indian Tribal Governments, unless otherwise agreed as described below. A notice from ADOT to an Indian tribe advising the tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 CFR 800.16(m), and is related to NEPA or another Federal law for which ADOT 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 ADOT, 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 ADOT, FHWA, and a Tribe under which the Tribe agrees to allow ADOT to consult for highway projects in Arizona. 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 ADOT's assumption of the DOT 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 The assignment under this part does not alter the scope and terms of Section 326 MOU signed on January 3, 2018, between ADOT and FHWA. As applicable ADOT will conduct all environmental reviews authorized under the terms of that MOU.

3.2.6 Included in each consultation letter that is submitted with any 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, ADOT shall insert the following language in a way that is conspicuous to the reader or include in a 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 ADOT pursuant to 23 U.S.C. 327 and a MOU dated 04/16/2019 and executed by FHWA and ADOT.

- 3.2.7 ADOT shall disclose to the public, Tribes and agencies, as part of Agency outreach and public involvement procedures, the disclosure in subpart 3.2.6 of this MOU.
- 3.2.8 ADOT will continue to adhere to the original terms of Biological Opinions, Memoranda of Agreement, Programmatic Agreements, other agreements with terms, and conditions, and any other commitments that were the result of the environmental review process and consultations prior to the execution of this MOU as long as these terms are not amended or revised. Any revisions or amendments to these agreements made after the Effective Date of this MOU would be ADOT's responsibility. ADOT agrees to assume FHWA's environmental review role and responsibilities as identified in existing interagency agreements among ADOT, FHWA, and other Federal or State agencies, and/or negotiate new agreements, if needed. ADOT agrees to assume FHWA's responsibilities of ongoing consultations as of the Effective Date of this MOU.
- 3.2.9 ADOT 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 DOT 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 Arizona. 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. ADOT 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, finding of no significant impact FONSI, final EIS, or final EIS/ROD, ADOT shall ensure and document that for any proposed project the design concept, scope, and funding are consistent with the current Transportation Improvement Program (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. This assignment does not include the environmental review associated with the development and approval of the Draft EIS, Final EIS, and ROD for the following projects:
- a. South Mountain Freeway
 - b. Interstate 11 (I-11) Corridor Tier 1 EIS, Nogales to Wickenburg
 - c. Sonoran Corridor Tier 1 Environmental Impact Statement
- B. All Class II, or CE projects, that are funded by FHWA or require FHWA approvals, and that do not qualify for assignment of responsibilities pursuant to ADOT's Section 326 MOU.
- C. All Class III, or EA projects, that are funded by FHWA or require FHWA approvals. This assignment does not include the environmental review associated with the development and approval of the EA and FONSI for the following project:
- a. State Route 303; I-10 to SR 30
- D. Projects funded by other Federal agencies [or projects without any Federal funding] that also require FHWA approvals. For these projects, ADOT would not assume the NEPA responsibilities of other Federal agencies. However, ADOT may use or adopt

another Federal agency's NEPA analysis or documents consistent with 40 CFR parts 1500—1508, current law, and DOT and FHWA regulations, policies, and guidance.

- E. Except the South Mountain Freeway, projects excluded under this section will be retained by FHWA until the expiration of the statute of limitations period with respect to projects for which a limitation of claims notice will be issued under 23 U.S.C. 139(l), or until the completion of the NEPA process with respect to projects for which such notice will not be issued. ADOT agrees to be responsible for any re-evaluations needed under 23 CFR 771.129 or other environmental reviews needed for such projects thereafter. FHWA will retain responsibility for the South Mountain Freeway EIS until the project is complete.

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, 204, and FAST Act Section 1123, unless such projects will be designed and constructed by ADOT.
- 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. Any highway project that crosses State boundaries.
- D. Projects advanced by direct recipients of Federal-aid Highway funds other than ADOT, including but not limited to:
 - 1. Transportation Investment Generating Economic Recovery (TIGER) and Better Utilizing Investments to Leverage Development (BUILD) discretionary grants and other competitive grant programs; and
 - 2. Transportation Infrastructure Finance and Innovation Act (TIFIA) Credit Program.

3.4 Limitations

- 3.4.1 As provided at 23 U.S.C. 327(e), ADOT 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 DOT Secretary that is not explicitly assumed by ADOT under subpart 3.3.1 of this MOU remains the responsibility of the DOT Secretary.

PART 4. CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

4.1 Certifications

4.1.1 ADOT hereby makes the following certifications:

- A. ADOT has the legal authority to accept all the assumptions of responsibility identified in this MOU;
- B. ADOT has the legal authority to take all actions necessary to carry out all of the responsibilities it has assumed under this MOU;
- C. ADOT has the legal authority to execute this MOU;
- D. The State of Arizona 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 Arizona Public Records Law (A.R.S. § 39-101 *et seq*); and

- E. The Arizona Public Records Law provides that any decision regarding the public availability of a document under that Act is reviewable by an Arizona court of competent jurisdiction.

4.2 State Commitment of Resources

4.2.1 As required by 23 U.S.C. 327(c)(3)(D), ADOT will maintain the financial resources necessary to carry out the responsibilities it is assuming. ADOT asserts, and FHWA agrees, that the summary of financial resources contained in ADOT's application, dated November 16, 2018, appears to be adequate for this purpose. Should FHWA determine, after consultation with ADOT, that ADOT's financial resources are inadequate to carry out the DOT Secretary's responsibilities, ADOT will take appropriate action to obtain the additional financial resources needed to carry out these responsibilities. If ADOT is unable to obtain the necessary additional financial resources, ADOT shall inform FHWA, and this MOU will be amended to assign only the responsibilities that are commensurate with ADOT's financial resources.

4.2.2 Similarly, ADOT 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 ADOT's assumed responsibilities under this MOU and applicable Federal laws.

Should FHWA determine, after consultation with ADOT, that ADOT's organizational and staff capability is inadequate to carry out the DOT Secretary's responsibilities, ADOT will take appropriate action to obtain adequate organizational and staff capability to carry out these responsibilities. If ADOT is unable to obtain adequate organizational and staff capability, ADOT shall inform FHWA, and the MOU will be amended to assign only the responsibilities that are commensurate with ADOT's available organizational and staff capability. Should ADOT choose to meet these requirements, in whole or in part, with consultant services, including outside counsel, ADOT shall maintain on its staff an adequate number of trained and qualified personnel, including counsel provided by the State of Arizona Office of Attorney General, 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, ADOT staff (including consultants) shall comply with 36 CFR 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 CFR 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 CFR part 61, Appendix A). ADOT 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.

4.2.4 As part of its commitment of resources, ADOT will continue to develop, implement and update its manuals and procedures which are not subject to FHWA review or approval, to support appropriate environmental analysis and decision-making under NEPA and associated laws and regulations. ADOT recognizes it is solely responsible for the

manuals and procedures for compliance with responsibilities assigned in this MOU and for establishing policy and guidance to implement its program.

4.3 Federal Court Jurisdiction

- 4.3.1 As required under 23 U.S.C. 327(c)(3)(B), and authorized by Arizona Statute § 28-334(C), ADOT hereby expressly consents, on behalf of the State of Arizona, to accept the jurisdiction of the Federal courts in cases that involve the compliance, discharge, and enforcement of any responsibility of the DOT Secretary assumed by ADOT 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 DOT Secretary's responsibilities, for any decision or approval made by ADOT pursuant to an assumption of responsibility under this MOU. ADOT understands and agrees that, in accordance with 23 U.S.C. 327(d)(1), the United States district court shall have exclusive jurisdiction over any civil action against the State of Arizona alleging a failure to carry out any responsibility assumed under this MOU, which constitutes a limited waiver of the State of Arizona'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 DOT Secretary's responsibilities under this MOU, ADOT shall be subject to the same procedural and substantive requirements that apply to the DOT 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; DOT 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), DOT, 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 DOT and FHWA guidance and policies relating to environmental review are posted on FHWA's Website, contained in the FHWA Environmental Guidebook, published in the *Federal Register*, or sent to ADOT electronically or in hard copy.

ADOT has reviewed the 2014 MOA between the U.S. 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 DOT and USCG and the MOA between FHWA and USCG.

- 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 ADOT under this MOU, are communicated to ADOT within 10 business days of issuance. Delivery may be accomplished by e-mail, Web posting (with e-mail or mail to ADOT notifying of Web posting), mail, or publication in the *Federal Register* (with e-mail or mail to ADOT notifying of publication). If communicated to ADOT by e-mail or mail, such material will be sent to ADOT's Environmental Planning Administrator. When FHWA is considering changes to the Program or changes that may or will impact ADOT's assumed responsibilities or resources, FHWA shall seek input from ADOT. In the event a new or revised FHWA policy or guidance is not made available to

ADOT as described in this subpart, and if ADOT had no knowledge of such policy or guidance, then a failure by ADOT 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 ADOT 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 ADOT's highway projects and the assumption of responsibilities under this MOU.

Within six (6) months of the Effective Date of this MOU, ADOT 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 ADOT for FHWA; or
- B. Amending an interagency agreement as needed so that the interagency agreement continues but that ADOT 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, ADOT 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 ADOT 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, ADOT 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 ADOT to assume any rulemaking authority of the DOT Secretary. In addition, ADOT may not establish policy and guidance on behalf of the DOT Secretary or FHWA for highway projects covered in this MOU. ADOT'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 DOT Secretary or FHWA.
- 5.2.2 Nothing in this MOU prevents ADOT 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, ADOT 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 DOT (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), ADOT 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 DOT Secretary. The FHWA and DOT will have no responsibility or liability for the performance of the responsibilities assumed by ADOT, including any decision or approval made by ADOT while participating in the Program.

6.2 Litigation

- 6.2.1 Nothing in this MOU affects the U.S. Department of Justice's (DOJ) authority to litigate claims, including the authority to approve a settlement on behalf of the United States, if either FHWA or another agency of the United States is named in such litigation or if the United States intervenes pursuant to 23 U.S.C. 327(d)(3). In the event FHWA or any other Federal agency is named in litigation related to matters under this MOU or the United States intervenes in the litigation, ADOT will coordinate with FHWA and any DOJ or Federal agency attorneys in the defense of that action.
- 6.2.2 ADOT shall defend all claims brought in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, ADOT will provide qualified and competent legal counsel, including outside counsel if necessary. ADOT 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 ADOT's counsel. ADOT 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 allocation of responsibility between ADOT and any co-defendant Federal agency.
- 6.2.3 ADOT will notify the FHWA's Arizona Division Office and DOJ's Assistant Attorney General for the Environment and Natural Resources Division, within seven (7) calendar days of ADOT's receipt of service of process of any complaint, concerning its discharge of any responsibility assumed under this MOU. ADOT's notification to FHWA and DOJ shall be made prior to its response to the complaint. In addition, ADOT shall notify the FHWA's Arizona 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 ADOT will provide the FHWA's Arizona Division Office and DOJ copies of any motions, pleadings, briefs, and other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. ADOT will provide such copies to the FHWA and DOJ within seven (7) calendar days of receipt of service of any document or, in the case of any documents filed by or on behalf of ADOT, within seven (7) calendar days of the date of filing.
- 6.2.5 ADOT will notify the FHWA's Arizona Division Office and DOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and DOJ with a reasonable amount of time of at least ten (10) calendar days, to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. ADOT will not execute any settlement agreement until: (1) FHWA and DOJ 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 ADOT, ADOT will provide notice to FHWA's Arizona Division Office and DOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities ADOT has assumed under this MOU. ADOT shall notify FHWA's Arizona Division Office and DOJ within five (5) calendar days of filing a notice of appeal of a court decision. ADOT shall confer with FHWA and DOJ regarding the appeal at least forty-five (45) calendar days before filing its initial brief on the merits of the appeal.
- 6.2.7 ADOT's notifications to FHWA and DOJ 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 NRS DOT.enrd@usdoj.gov, unless otherwise specified by FHWA and DOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in subpart 6.2.4, ADOT may opt to either send the materials to the email addresses identified above, send hardcopies to the mail address below, or add to the distribution list in the court's electronic filing system (e.g., PACER) the following two email addresses: FHWA_assignment_lit@dot.gov and efile_nrs.enrd@usdoj.gov. The FHWA and DOJ's comments under subpart 6.2.5 and 6.2.6 shall be made by electronic mail to NEPA_Assignment@azdot.gov unless otherwise specified by ADOT. In the event that regular mail is determined necessary, mail should be sent by overnight mail service to:

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

For FHWA: Division Administrator, Federal Highway Administration – Arizona Division 4000 N. Central Avenue, Suite 1500 Phoenix, Arizona 85012-3500.

For ADOT: Environmental Planning Administrator, Arizona Department of Transportation, 1611 West Jackson St. MD EM04, Phoenix AZ 8507

6.3 Conflict Resolution

- 6.3.1 In discharging any of the DOT Secretary's responsibilities under this MOU, ADOT agrees to comply with any applicable requirements of DOT and FHWA statute, regulation, guidance, or policy regarding conflict resolution. This includes compliance with the DOT Secretary's responsibilities for issue resolution under 23 U.S.C. 139(h) with the exception of the DOT Secretary's responsibilities under 23 U.S.C. 139(h)(7) regarding financial penalties.
- 6.3.2 ADOT agrees to follow 40 CFR part 1504 in the event of pre-decision referrals to CEQ for Federal actions determined to be environmentally unsatisfactory. ADOT also agrees to coordinate and work with CEQ on matters brought to CEQ with regards to the environmental review responsibilities for Federal highway projects ADOT has assumed under this MOU.

PART 7. INVOLVEMENT WITH OTHER AGENCIES

7.1 Coordination

- 7.1.1 ADOT 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 ADOT 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 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 Except as specifically provided otherwise in this MOU, FHWA will not provide project-level assistance to ADOT 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 DOT regulation, or interpretations of FHWA or DOT policies or guidance.
- 8.1.2 The FHWA will not intervene, broker, act as intermediary, or otherwise be involved in any issue involving ADOT's consultation or coordination with other Federal resource agencies with respect to ADOT's discharge of any of the responsibilities assumed under this MOU for any particular highway project. However, FHWA may attend meetings between ADOT and other Federal agencies. Further, FHWA may submit comments to ADOT and the other Federal agency in the following extraordinary circumstances:
 - A. FHWA reasonably believes that ADOT is not in compliance with this MOU;
 - B. FHWA determines that an issue between ADOT and the other Federal agency concerns an emerging national policy issue under consideration by the DOT.

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

- 8.1.3 Other Federal agencies may raise concerns regarding compliance with this MOU by ADOT 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 ADOT Environmental Planning Administrator. ADOT 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 ADOT and will work with both ADOT and the other Federal agency to resolve the issue and, if necessary, take appropriate action to ensure compliance with this MOU.

- 8.1.4 At ADOT's request, FHWA may assist ADOT 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 ADOT's consultation, coordination, and communication with other Federal agencies.
- 8.1.5 Communications between ADOT 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. ADOT and FHWA shall promptly notify each other of requests for public records regarding the administration of the Program in Arizona.
- 8.1.6 For active projects where ADOT is assuming responsibilities from FHWA under this MOU, FHWA shall allow ADOT access to its project files and arrange for copies to be provided upon request by ADOT.
- 8.1.7 ADOT'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 ADOT'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 ADOT's participation in the Program, FHWA will monitor ADOT's compliance with the MOU including the provision by ADOT of financial resources to carry out the MOU as provided at 23 U.S.C. 327(h). The FHWA's monitoring and oversight may also include submitting requests for information to ADOT and other relevant Federal agencies, verifying ADOT'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), ADOT is responsible for providing FHWA any information FHWA reasonably considers necessary to ensure that ADOT is adequately carrying out the responsibilities assigned. When requesting information subject to section 327(c)(4), FHWA will provide the request to ADOT 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. ADOT will, in good faith, work to ensure the information requested is provided by the deadline. ADOT's response to an information request under this paragraph will include, where appropriate, making relevant employees and consultants available at their work location (including via an in-person meeting, teleconference, videoconference or other electronic means as may be available).
- 8.2.3 ADOT 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 ADOT's discharge of the responsibilities assumed under this MOU.

- 8.2.4 In carrying out the responsibilities assumed under this MOU, ADOT 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, ADOT'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, ADOT shall finalize a QA/QC process that satisfies the requirements in this subpart. In developing and implementing the QA/QC process, ADOT shall consult with the FHWA Arizona Division Office. ADOT agrees to cooperate with FHWA to consider recommendations FHWA may have made with respect to its QA/QC process.
- 8.2.5 ADOT 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, ADOT will take appropriate and timely corrective actions to address such areas. At least one month prior to the date of a scheduled FHWA audit ADOT will transmit a summary of its most recent self-assessment to FHWA Arizona 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, a statement from ADOT's Environmental Planning Administrator concerning whether the processes are ensuring that the responsibilities ADOT 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 ADOT's progress toward attaining the performance measures listed in Part 10 of this MOU.
- 8.2.6 Upon the Effective Date of this MOU, ADOT 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. ADOT will provide an updated list to FHWA Arizona Division every six (6) months (January 1 through June 30, and July 1 through December 31).

8.3 Records Retention

- 8.3.1 ADOT will retain project files, and files pertaining to the discharge of its responsibilities under this MOU in accordance with 2 CFR 200.333.
- 8.3.2 State public records are maintained pursuant to state law and published retention schedules. For the following record types, ADOT will ensure that the applicable retention schedules reflect the following minimum retention periods and records are maintained in the following manner:
- A. **FHWA-ADOT Environment Correspondence Files:** Correspondence between FHWA and ADOT 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 ADOT 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 ADOT will follow the State records retention/disposition schedule 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 ADOT 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 [e.g., coordination plans that include project schedules, evidence of opportunities for public/agency input in the purpose and need and alternatives], scoping documents, public and agency comments; meeting minutes; Notices of Intent (NOI's), 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 ADOT will follow the State records retention/disposition schedule for these records, except that ADOT will permanently store the above referenced records for Significant Transportation Projects as they are defined in Order No. 1224.1B.

- C. **Environmental Impact Statements - Other Agencies:** Files containing reviews and comments furnished by ADOT to other Federal agencies following reviews of an EIS for which another Federal agency is the lead agency shall be maintained by ADOT for a period of 5 years. After 5 years, ADOT may destroy these files when no longer needed.
- D. **Noise Barriers:** ADOT agrees to maintain the necessary information to comply with 23 CFR 772.13(f) regarding noise abatement measures reporting. ADOT 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, ADOT Records Management Policy, Retention and Disposal Schedule, ADOT will work to update the State retention schedule such that the more stringent retention requirements are met.

8.4 Federal Register

8.4.1 For any documents that are required to be published in the *Federal Register*, such as the NOI under 23 CFR 771.123(a) and Notice of Final Agency Action under 23 U.S.C. 139(l)(2), ADOT shall transmit such document to FHWA's Arizona Division Office, with a request for publication in the *Federal Register* on behalf of ADOT. The FHWA's Arizona Division Office will promptly submit such document to be published in the *Federal Register* on behalf of ADOT. If requested, ADOT 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 ADOT 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;

- C. Endangered Species Act Expenditure Reports requested by the U.S. Fish & Wildlife Service and National Marine Fisheries Service;
- 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 DOT pursuant to such provisions;
- F. NEPA Litigation Reports requested by CEQ;
- G. Environmental Conflict Resolution reports requested by the Office of Management and Budget and CEQ; and
- H. Noise abatement measure reporting.

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 Arizona Division Office will document the project level conformity determination within a reasonable timeframe. The FHWA's Arizona 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, ADOT shall ensure that a certification is included with each NEPA approval specifying that ADOT 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. ADOT shall ensure that this certification is made prior to the execution of any future Federal-aid approval or action. ADOT shall include the certification in its request for authority to proceed to final design, right-of-way acquisition, or construction. ADOT agrees to provide FHWA access to NEPA approvals and certifications.

8.8 Enforcement

- 8.8.1 Should FHWA determine that ADOT is not in compliance with this MOU, then FHWA shall take appropriate action to ensure ADOT's compliance, including appropriate remedies provided at 23 CFR 1.36 for violations of or failure to comply with Federal law or regulations at 23 CFR with respect to a project, withdrawing assignment of any responsibilities that have been assumed as provided in Part 9 of this MOU, or terminating ADOT's participation in the NEPA Assignment 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 DOT Secretary's responsibilities that have been assumed by ADOT under this MOU for any highway project or highway projects upon FHWA's determination that:

- A. With respect to such project or projects, ADOT is not in compliance with a material term of this MOU or applicable Federal laws or policies, and ADOT 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 ADOT's assumption of the DOT Secretary's responsibilities would be inappropriate; or
 - C. ADOT 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 DOT Secretary's responsibilities under subpart 9.1.1, FHWA will informally notify ADOT of FHWA's determination. After informally notifying ADOT of its determination, FHWA will provide ADOT written notice of its determination including the reasons for its determination. Upon receipt of this notice, ADOT 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 ADOT's comments or objections, FHWA will make a final determination within 30 calendar days, unless extended by FHWA for cause, and notify ADOT of its decision. In making its determination, FHWA will consider ADOT'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 ADOT 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 ADOT-Initiated Withdrawal of Assignment of Projects

- 9.2.1 ADOT may, at any time, provide FHWA with notice of its intent to withdraw a highway project assumed under this MOU.
- 9.2.2 Upon ADOT's decision to request FHWA withdraw the assignment of the DOT Secretary's responsibilities under subpart 9.2.1, ADOT shall informally notify FHWA of its desire for FHWA to withdraw assignment of its responsibilities. After informally notifying FHWA of its desire, ADOT 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 ADOT 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 ADOT have determined it is desirable to mutually establish a set of performance measures to consider ADOT's administration of the responsibilities assumed under this MOU.

10.1.2 ADOT'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 ADOT shall collect and maintain all necessary and appropriate data related to the attainment of performance measures. In collecting this data, ADOT 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 ADOT 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 ADOT'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. Maintain communication among ADOT, Federal and State resource agencies, and the public from the effective date of 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. Report actual time to completion for key interagency consultations (e.g., Section 7 biological opinions, Section 106 resolution of adverse effects)

PART 11. AUDITS

11.1 General

- 11.1.1 As required at 23 U.S.C. 327(g), FHWA will conduct audits of ADOT'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 ADOT's compliance with this MOU, ensure compliance with applicable Federal laws and policies, evaluate ADOT's progress toward achieving the performance measures identified in Part 10, and collect information needed for the DOT 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 ADOT. Such consultation shall include a reasonable opportunity for ADOT 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), ADOT is responsible for providing FHWA any information FHWA reasonably considers necessary to ensure that ADOT is adequately carrying out the responsibilities assigned. ADOT 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, ADOT will work with FHWA to provide documents through e-mail, CD-ROM or mail to the extent it does not create an undue burden.
- 11.1.3 ADOT 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 DOT 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 ADOT and FHWA Arizona 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 ADOT's technical competency and organizational capacity, adequacy of the financial resources committed by ADOT 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 ADOT's participation in the Program, FHWA will monitor ADOT's compliance with the MOU, including the provision by ADOT 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 ADOT will work to establish a general audit schedule within 180 calendar 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 ADOT 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 ADOT'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. ADOT 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 ADOT'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 ADOT 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, ADOT 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 or Tribes 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 ADOT'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. ADOT 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 ADOT a draft of the audit report and allow ADOT a period of 14 calendar days within which to submit written comments to FHWA. The FHWA will grant any reasonable request by ADOT to extend its deadline to respond in writing to a draft audit report not to exceed a total review period of 30 calendar days. The FHWA will review the comments provided by ADOT and revise the draft audit report as may be appropriate. ADOT and FHWA may also meet and discuss the draft report and ADOT's comments. If ADOT anticipates an additional meeting will be beneficial, ADOT 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 ADOT 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 ADOT may request and, subject to FHWA's resource availability, FHWA will provide training with respect to the responsibilities being assigned to ADOT under this MOU. Such training may be provided to ADOT by either FHWA or another Federal agency or other parties, as appropriate. ADOT may also conduct its own training for staff and consultants.
- 12.2 ADOT will continue to implement training necessary to meet its environmental obligations. Prior to or within six (6) months of the effective date of the MOU, ADOT will update its training program to reflect the responsibilities assumed under the Program and this MOU. FHWA will remain available to provide assistance in the assessment of training needs and development of training program elements; however, ADOT will be solely responsible for the development and implementation of its training program.

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 ADOT'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 ADOT'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. intentional 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 ADOT is not adequately carrying out the responsibilities assigned to ADOT, then FHWA may:
- A. provide ADOT 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 ADOT a period of not less than 120 calendar days to take such corrective action as the FHWA determines is necessary to comply with this MOU.
- 13.2.3 If ADOT, after notification and the 120 calendar day period, fails to take satisfactory corrective action, as determined by FHWA, subject to administrative/judicial review, FHWA shall provide notice to ADOT of its determination of termination. Any responsibilities identified to be terminated in the notice that have been assumed by ADOT under this MOU shall transfer to FHWA.

13.3 Termination by ADOT

- 13.3.1 ADOT 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 ADOT seeks to terminate and subject to such terms and conditions as FHWA may provide. In that event, FHWA and ADOT may develop a plan to transition the responsibilities that ADOT 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 ADOT Actions

- 13.4.1 Any environmental approvals made by ADOT pursuant to the responsibilities ADOT has assumed under this MOU shall remain valid after termination of ADOT's participation in the Program or withdrawal of assignment by FHWA. ADOT 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 and implementing regulations, in effect at the time of the renewal. ADOT 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 ADOT, 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 ADOT 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 ADOT 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 ADOT's original application that was submitted to FHWA pursuant to 23 U.S.C. 327(b) and 23 CFR 773.113(b). In developing the application supplement, ADOT 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 ADOT'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.

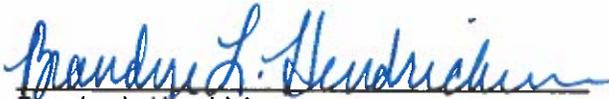
STATE OF ARIZONA



John S. Halikowski
Director
Arizona Department of Transportation

Dated: 4/16/2019

FEDERAL HIGHWAY ADMINISTRATION



Brandye L. Hendrickson
Deputy Administrator
Federal Highway Administration

Dated: 4/16/2019