

**FIRST RENEWED 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 FIRST RENEWED MEMORANDUM OF UNDERSTANDING (MOU) entered into by and between the FEDERAL HIGHWAY ADMINISTRATION (FHWA), an administration in the UNITED STATES DEPARTMENT OF TRANSPORTATION (USDOT), and the STATE OF 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 (USDOT Secretary) to assign and states to assume the USDOT Secretary's responsibilities under the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq. (NEPA), and all or part of the USDOT Secretary's responsibilities for environmental review, consultation, or other actions required by Federal environmental law with respect to highway, public transportation, railroad, and multimodal projects within the state; and

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

**Whereas**, on 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) continues to authorize 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 USDOT Secretary, acting by and through FHWA pursuant to 49 C.F.R. 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; and

**Whereas**, on April 16, 2019, FHWA and the State of Arizona, acting by and through ADOT, jointly executed a MOU (hereinafter "2019 MOU") under which FHWA assigned and ADOT assumed the duties and responsibilities of the USDOT Secretary under NEPA and other related Federal environmental laws for all classes of highway projects with limited exceptions defined in the 2019 MOU (and as discussed in Section 3.3, Highway Projects below); and

**Whereas**, consistent with 23 U.S.C. § 327(c)(5) and sub-part 13.1.1 of the 2019 MOU, a five-year term was established, with the applicable expiration date being April 16, 2024; and

**Whereas**, the FHWA conducted audits annually as required by Part 11 of the 2019 MOU and 23 U.S.C. § 327(g)(1)(B), during the first four years of the State's participation in the Program; and

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

**Whereas**, the FHWA Arizona Division and ADOT executed the FHWA/ADOT Tribal Consultation Letter Agreement on August 5, 2022, created in response to an audit observation.

**Whereas**, in implementing its Program, ADOT conducted self-assessments; and

**Whereas**, on November 28, 2022, ADOT notified the FHWA of its intent to renew participation in the Program with respect to highway projects for an additional five-year period; and

**Whereas**, on August 31, 2023, ADOT requested the Tier II environmental impact statement for the Interstate-11, I-10 to Wickenburg project be withdrawn from state assumption of responsibility under the 2019 MOU, and this withdrawal request was accepted by the Arizona Division Office on October 2, 2023; and

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

**Whereas**, on October 31, 2023, after coordination between the agencies, the FHWA determined that a statewide notice and comment opportunity was unnecessary prior to the State's submission of the renewal package; and

**Whereas**, pursuant to 23 U.S.C. 773.115(d), ADOT submitted a Renewal Package to the FHWA on October 19, 2023, for approval to continue the assigned duties and responsibilities for highway projects pursuant to the Program; and

**Whereas**, on XX, 202X, FHWA published a *Federal Register* notice soliciting public comment on ADOT's renewal request as required by 23 C.F.R. 773.115(f); and

**Whereas**, the USDOT Secretary acting by and through FHWA, has considered the Renewal Package, comments received as a result of the *Federal Register* notice, auditing reports, and the State's overall performance in the Program, as required by 23 C.F.R. 773.115(g), and has determined that ADOT's Renewal Package meets all the necessary requirements of 23 C.F.R. part 773 and 23 U.S.C. § 327 to support ADOT's continued participation in the Program.

**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 USDOT Secretary may assign, and ADOT may assume, the responsibilities of the USDOT 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 Renewal Package transmitted to FHWA on October 19, 2023, the auditing reports, consideration of comments received during the renewal comment period, and the State's overall performance in the Program since April 16, 2019. This MOU incorporates the October 19, 2023 Renewal Package. However, to the extent there is any conflict between this MOU and the Renewal Package, this MOU shall control.
- 1.1.3 This MOU is effective upon final execution by both parties (hereinafter "Effective Date").
- 1.1.4 Pursuant to 23 U.S.C. 327(d), and subpart 4.3 of this MOU, third parties may challenge ADOT's actions in carrying out environmental review responsibilities assigned under this MOU. Third parties also have the right to file a complaint against ADOT with the FHWA under Title VI of the Civil Rights Act of 1964 and the FHWA has the authority and jurisdiction to accept, investigate, and make a determination regarding the allegations in the complaint. Otherwise, this MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the State of 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.
- 1.1.5 The assignment of responsibilities under this MOU is made pursuant to the authority granted to the Secretary under 23 U.S.C. 327. Any provision of this MOU, or any portion of any provision, that is deemed to be illegal, unenforceable, or beyond the scope of the Secretary's authority shall be severed from this MOU, without affecting the validity of the remainder of the MOU. In such event, all other provisions or parts of provisions of this MOU shall remain in full force and effect.

## **PART 2. [RESERVED]**

## **PART 3. ASSIGNMENTS AND ASSUMPTIONS OF RESPONSIBILITY**

### **3.1 Assignments and Assumptions of NEPA Responsibilities**

- 3.1.1 On the Effective Date of this MOU, FHWA and ADOT renew their participation in the Program and, pursuant to 23 U.S.C. 327(a)(2)(A), FHWA assigns, and ADOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all the USDOT Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321, et seq., with respect to the highway projects specified under subpart 3.3. This includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for Federal-aid highway projects, 23 U.S.C. 139, 40 C.F.R. parts 1500—1508, USDOT Order 5610.1C, and 23 C.F.R. part 771, as applicable.

- 3.1.2 On the cover page of each Environmental Assessment (EA), Finding of No Significant Impact (FONSI), Environmental Impact Statement (EIS), and Record of Decision (ROD) prepared under the authority granted by this MOU, and for memoranda corresponding to any Categorical Exclusion 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 Memorandum of Understanding dated [INSERT DATE], and executed by FHWA and ADOT.

- 3.1.3 ADOT shall clearly 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 in conformance with the ADOT Public Involvement Plan.

## **3.2 Assignments and Assumptions of Responsibilities to Comply with Federal 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 the USDOT Secretary's responsibilities for environmental review, reevaluation, consultation, or other action pertaining to the review or approval of highway projects specified under subpart 3.3 of this MOU, required under the following Federal environmental requirements:

### 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 C.F.R. 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
- E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government
- E.O. 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis

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

#### FHWA-Specific

- Efficient Project Reviews for Environmental Decision Making, 23 U.S.C. 139
- Environmental Impact and Related Procedures, 23 C.F.R. part 771
- Planning and Environmental Linkages, 23 U.S.C. 168, with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135
- Programmatic Mitigation Plans, 23 U.S.C. 169, with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135

#### Hazardous Materials Management

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

#### Historic and Cultural Resources

- Archeological and Historic Preservation Act of 1974, as amended, 54 U.S.C. 312501—312508
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470(aa)—(mm)
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001—3013; 18 U.S.C. 1170
- 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 C.F.R. part 774

#### Noise

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

#### Parklands and Other Special Land Uses

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

#### Social and Economic Impacts

- American Indian Religious Freedom Act, 42 U.S.C. 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 C.F.R. 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 (SDWA), 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)
- 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 C.F.R. 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 USDOT Secretary's responsibilities for government-to-government consultation with Indian tribes, as defined in 36 C.F.R. 800.16(m), are not assigned to or assumed by 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 by an Indian tribe in a government-to-government consultation process, as defined in 36 C.F.R. 800.16(m) and in accordance with the *Coordination Procedures between FHWA Arizona Division and ADOT Environmental Planning for Government-to-Government Requests*, 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.

On August 5, 2022, the FHWA Arizona Division Office and ADOT executed the FHWA-ADOT Tribal Consultation Process Letter Agreement that defines the tribal consultation protocol for Federal Aid highway projects in Arizona. To ensure consistency and adequacy of tribal consultation for assigned projects in this agreement, the letter agreement and any revisions based on meetings with tribes will be applied to projects assigned pursuant to Section 3.3 below.

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 USDOT Secretary's responsibilities for conformity determinations required by Section 176 of the Clean Air Act (42 U.S.C. 7506) or any responsibility under 23 U.S.C. 134 or 135, or under 49 U.S.C. 5303 or 5304.
- 3.2.5 The assignment under this Part does not alter the scope and terms of Section 326 MOU signed on January 3, 2018, renewed on January 4, 2021, and subsequently on December 20, 2023, between ADOT and FHWA. As applicable ADOT will conduct all environmental reviews authorized under the terms of that MOU.
- 3.2.6 On the report cover page and included in each consultation communication that is submitted with any biological evaluation or assessment, historic properties or cultural resources report, Section 4(f) evaluation, or other decision-making document prepared under the authority granted by this MOU, 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 Memorandum of Understanding dated [INSERT DATE] and executed by FHWA and ADOT.
- 3.2.7 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.
- 3.2.8 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 USDOT Secretary's responsibilities under subparts 3.1 and 3.2 of this MOU shall apply to the environmental review, consultation, or any other action pertaining to the environmental review or approval of the following classes of highway projects located within the State of Arizona. The definition of "highway project" is found at 23 C.F.R. 773.103, and for purposes of this MOU, "highway project" includes eligible preventative maintenance activities. ADOT shall conduct any reevaluation required by 23 C.F.R. 771.129 for projects for which construction is not completed prior to the date of this MOU in accordance with the provisions of this MOU. Prior to approving any CE determination, FONSI, final EIS, or final EIS/ROD, 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.
- 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.
- 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 C.F.R. parts 1500-1508, current law, and USDOT and FHWA regulations, policies, and guidance.
- E. FHWA will retain responsibility for the South Mountain Freeway EIS until the notices of limitation of claims issued by FHWA pursuant to 23 U.S.C. 139(l) have expired. ADOT agrees to be responsible for any re-evaluations needed under 23 C.F.R. 771.129 or other environmental reviews needed for the South Mountain Freeway project thereafter.

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 connects to port of entry land; or requires the issuance of a new or the modification of an existing, Presidential Permit by the U.S. Department of State. ADOT shall notify FHWA in writing of such project and provide relevant project information or materials before initiating any project-related activities. FHWA will determine whether the project is subject to assignment after reviewing relevant project information and meeting with ADOT to discuss the project.
- C. Any highway project that crosses State boundaries.
- D. FHWA retains responsibility for the Interstate 11 (I-11) Corridor Tier 1 EIS, Nogales to Wickenburg until resolution of the complaint filed against FHWA (*Coalition for Sonoran*



*Desert Protection et al v. Federal Highway Administration et al.*, Case No. 4:22-cv-00193-JCH), any re-evaluations or other actions not ordered by the court, and any subsequent appeals.

- E. FHWA will be the lead federal agency for the I-11, I-10 to US 93 Tier 2 EIS in Maricopa County until the notice of limitation of claims issued by FHWA pursuant to 23 U.S.C. 139(l) for the ROD has expired.
- F. Projects advanced by direct recipients of Federal assistance other than ADOT, including but not limited to:
  - 1. 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 the responsibilities it has assumed under this MOU.
- 3.4.2 As provided at 23 U.S.C. 327(a)(2)(D), any highway project or responsibility of the USDOT Secretary that is not explicitly assumed by ADOT under subpart 3.3.1 of this MOU remains the responsibility of the USDOT Secretary.

## **PART 4. CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION**

### **4.1 Certifications**

- 4.1.1 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 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. The summary of financial resources contained in ADOT's application, dated November 16, 2018, and as supplemented in ADOT's Renewal Package submitted October 19, 2023, are adequate for this purpose. Should FHWA determine, after consultation with ADOT, that ADOT's financial resources are inadequate to carry out the USDOT 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 ADOT 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 USDOT 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 The Deputy Director for Transportation/State Engineer will serve as the Senior Agency Official consistent with 40 C.F.R. 1508.1(dd). This position must be one that is equivalent to an Assistant Secretary of the State DOT or higher. Any changes to the title designation must be provided in writing to the FHWA with a justification.
- 4.2.4 When carrying out the requirements of Section 106 of the National Historic Preservation Act (NHPA), as amended, ADOT staff (including consultants) shall comply with 36 C.F.R. 800.2(a)(1) and the *Final April 2020 Programmatic Agreement Pursuant to Section 106 of the National Historic Preservation Act Regarding Implementation of Federal-Aid Transportation Projects in the State of Arizona* (September 2020). All Section 106 actions that involve identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation (including 36 C.F.R. 800.11) of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meet the Secretary of the Interior's Professional Qualifications Standards (36 C.F.R. part 61, Appendix A). ADOT shall ensure that all documentation required under 36 C.F.R. 800.11 is reviewed and approved by a staff member or consultant who meets the Professional Qualifications Standards.
- 4.2.5 As part of its commitment of resources, ADOT will continue to develop, implement, and update its manuals, guidance, 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. ADOT will submit updated manuals, guidance, and procedures to FHWA as substantial updates are completed and approved by ADOT.

### **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 USDOT 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 USDOT 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 USDOT Secretary's responsibilities under this MOU, ADOT shall be subject to the same procedural and substantive requirements that apply to the USDOT Secretary in carrying out these responsibilities, including, but not limited to, environmental justice. Such procedural and substantive requirements include, but are not limited to, Federal statutes and regulations; Executive Orders issued by the President of the United States; USDOT Orders; Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 C.F.R. parts 1500-1508); FHWA Orders, guidance, and policy issued by CEQ, Office of Management and Budget (OMB), USDOT, or FHWA (e.g., Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects); and any applicable Federal court decisions, and, subject to subpart 5.1.4 of this MOU, interagency agreements, and other similar documents that relate to the environmental review process, (e.g., 2015 Red Book - Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects). Official USDOT and FHWA guidance and policies relating to environmental review are posted on FHWA's website, contained in the FHWA Environmental Guidebook, published in the *Federal Register*, or sent to ADOT electronically or in hard copy.

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

- 5.1.2 The FHWA will use its best efforts to ensure that any new or revised Federal policy or guidance relating to environmental review matters of national application, which are final and applicable to FHWA's responsibilities under NEPA and other laws that are assumed by ADOT under this MOU, are posted online at FHWA's website and sent in writing to ADOT electronically to [NEPA@azdot.gov](mailto:NEPA@azdot.gov) within 10 business days of issuance. 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.

- 5.1.3 ADOT will work with all other appropriate Federal agencies concerning the laws, 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.

If an affected agency does not agree to modify an interagency agreement that existed prior to the 2019 MOU 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 and ADOT must notify FHWA of its intent to enter into such an agreement prior to execution.
- 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 USDOT Secretary. Additionally, ADOT may not establish policy and guidance on behalf of the USDOT 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 USDOT Secretary or FHWA.

## **5.3 Effect of Assumption**

- 5.3.1 For purposes of carrying out the responsibilities assumed under this MOU, and subject to the limitations contained in 23 U.S.C. 327 and this MOU, 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 USDOT (including FHWA), under applicable statutes and regulations with respect to a highway project.

# **PART 6. LITIGATION**

## **6.1 Responsibility and Liability**

- 6.1.1 As provided in 23 U.S.C. 327(e), 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 USDOT Secretary. The FHWA and USDOT 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 United States Department of Justice's (USDOJ) authority to litigate claims, including the authority to approve a settlement on behalf of the United States, if either FHWA or another agency of the United States is named in such litigation or if the United States intervenes pursuant to 23 U.S.C. 327(d)(3). In the event FHWA or any other Federal agency is named in litigation related to matters under this MOU or the United States intervenes in the litigation, ADOT will coordinate with FHWA and any USDOJ 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 the FHWA and USDOJ 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 USDOJ copies of any motions, pleadings, briefs, and other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. ADOT will provide such copies to the FHWA and USDOJ within seven (7) calendar days of receipt of service of any document or, in the case of any documents filed by or on behalf of ADOT, within seven (7) calendar days of the date of filing.
- 6.2.5 ADOT will notify the FHWA's Arizona Division Office and USDOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and USDOJ with a reasonable amount of time of at least ten (10) calendar days, to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. ADOT will not execute any settlement agreement until: (1) FHWA and USDOJ have provided comments on the proposed settlement; (2) indicated that they will not provide comments on the proposed settlement; or (3) the review period has expired, whichever occurs first.

6.2.6 Within seven (7) calendar days of receipt by ADOT, ADOT will provide notice to FHWA's Arizona Division Office and USDOJ 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 USDOJ within five (5) calendar days of filing a notice of appeal of a court decision. ADOT shall confer with FHWA and USDOJ 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 USDOJ in subparts 6.2.3, 6.2.4, 6.2.5, and 6.2.6 shall be made by electronic mail to FHWA\_assignment\_lit@dot.gov, and NRS DOT.enrd@usdoj.gov, unless otherwise specified by FHWA and USDOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in subpart 6.2.4, 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 USDOJ'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 USDOJ: Assistant Attorney General for the Environment and Natural Resources Division at 950 Pennsylvania Avenue, NW, Room 2143, Washington, DC, 20530.

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

For ADOT: Environmental Planning Administrator, Arizona Department of Transportation, 205 S. 17<sup>th</sup> Ave., MD EM02, Phoenix AZ 85007.

### **6.3 Conflict Resolution**

6.3.1 In discharging any of the USDOT Secretary's responsibilities under this MOU, ADOT agrees to comply with any applicable requirements of USDOT and FHWA statute, regulation, guidance, or policy regarding conflict resolution. This includes compliance with the USDOT Secretary's responsibilities for issue resolution under 23 U.S.C. 139(h) with the exception of the USDOT Secretary's responsibilities under 23 U.S.C. 139(h)(7) regarding financial penalties.

6.3.2 ADOT agrees to follow 40 C.F.R. 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 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 C.F.R. 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 USDOT regulation, or interpretations of FHWA or USDOT 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 USDOT; or
  - C. Upon request by either ADOT or the other Federal Agency and agreement by FHWA.

The FHWA will notify both ADOT and the relevant Federal agency prior to attending any meetings between ADOT and such other Federal agency or prior to responding to any request from either party to provide comments.

- 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 8.1.1 and 8.1.4 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 C.F.R. 1.5 are not altered in any way by executing this MOU.
- 8.1.8 In discharging any of the USDOT Secretary's responsibilities under this MOU, ADOT and FHWA agree to work cooperatively to resolve substantive issues regarding the implementation or interpretation of this MOU.

## **8.2 MOU Monitoring and Oversight**

- 8.2.1 Pursuant to 23 U.S.C. 327(h), FHWA shall monitor and provide oversight over ADOT's performance in order to ensure ADOT's compliance with the MOU and all applicable Federal laws and policies, including environmental justice, and to evaluate whether ADOT is meeting the performance measures established pursuant to Part 10 of the MOU. The FHWA's monitoring program will consist of monitoring reviews, which will be coordinated with ADOT and take into account the FHWA Arizona Division's annual risk-based assessments. ADOT agrees to comply with all requests from FHWA related to monitoring under this MOU that FHWA reasonably considers necessary to ensure that ADOT is adequately carrying out the responsibilities assigned to ADOT.
- 8.2.2 In order to minimize the impact of the monitoring reviews on ADOT's day-to-day project delivery workload, the FHWA and ADOT will coordinate when scheduling joint monitoring reviews. Normally, the FHWA expects to complete two monitoring reviews during the term of the MOU, although the FHWA may conduct additional reviews if deemed necessary. The first monitoring review should be conducted sometime during calendar year 2026 and the second monitoring review should be sometime during calendar year 2028. ADOT Environmental Planning and the FHWA Arizona Division Office will each designate a point of contact (POC), who will be responsible for coordinating the monitoring reviews, requests for information, and organizing meetings. Environmental Planning will meet quarterly with the FHWA POC to discuss updates, report on actions taken, and resolve any concerns.



- 8.2.3 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. With the request of the FHWA, ADOT will (within five business days or a mutually agreeable time frame), provide FHWA with any information the FHWA considers necessary to ensure that ADOT is adequately carrying out the responsibilities assigned to ADOT.
- 8.2.4 In order for FHWA to provide oversight, monitor, and evaluate whether ADOT is meeting the performance measures listed in Part 10 of this MOU, 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. ADOT will work with the FHWA to provide documents electronically to the extent it does not create an undue burden. ADOT staff will be available for interviews as part of the monitoring reviews.
- 8.2.5 Annually from the Effective Date of this MOU, ADOT shall provide a report to the FHWA Arizona Division Office listing all NEPA approvals and decisions ADOT has made with respect to the responsibilities ADOT has assumed under Part 3 of this MOU. Further, in the report, ADOT will provide project names, locations, decisions, and any commitments related to mitigation for all analyses, including environmental justice analysis. The information related to commitments will be summarized in the annual report, with more detailed information provided through a hyperlink to the environmental document, for each project that has environmental commitments.
- 8.2.6 In carrying out the responsibilities assumed under this MOU, ADOT agrees to carry out regular quality assurance and quality control (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, including environmental justice, project file documentation, checking for errors and omissions, and legal sufficiency reviews, and taking appropriate corrective action as needed.
- 8.2.7 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. ADOT will transmit a report on the results of this self-monitoring to the FHWA Arizona Division office. The report shall include 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. ADOT shall solicit feedback from agencies and Tribes regarding ADOT's performance measures listed in MOU subpart 10.2.1.C. The responses ADOT receives will be included in the annual report.
- 8.2.8 Monitoring review reports completed by FHWA and ADOT shall include a description of the scope of the monitoring reviews, the compliance areas reviewed, a description of the monitoring process, and a list of areas identified as best practices and areas needing improvement. The FHWA reports shall identify findings that require corrective actions and the ADOT reports shall discuss corrective actions that have been or will be implemented.

- 8.2.9 Prior to making any monitoring review reports available to the public, the FHWA will transmit to ADOT a draft of the report and allow ADOT at least 14 calendar days to respond in writing. The FHWA may grant any reasonable request to extend this response period up to a total of 30 calendar days. The FHWA will review the comments and revise the draft monitoring report, as appropriate.
- 8.2.10 ADOT agrees to post all monitoring reports on the ADOT Environmental Planning NEPA Assignment website in order to make them available to the public.

### **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 C.F.R. 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 C.F.R. 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, the more stringent retention requirements shall control.

8.3.4 Nothing contained in this MOU is intended to relieve ADOT of its recordkeeping responsibilities under 2 C.F.R. 200.334-200.338 (Record Retention and Access) or other applicable laws.

#### **8.4 Federal Register**

8.4.1 For any documents that are required to be published in the *Federal Register*, such as the Notice of Intent under 23 C.F.R. 771.123(a) and Notice of Final Agency Action under 23 U.S.C. 139(l)(2), ADOT shall transmit such document to FHWA's Arizona Division Office, and the FHWA will cause such document to be published in the *Federal Register* on behalf of ADOT and will submit such document to the *Federal Register* within five (5) business days of receipt of such document from ADOT. To the extent that the operating procedures of the Government Printing Office and the *Federal Register* permit, ADOT will take over the procedures described above from the FHWA Arizona Division Office.

#### **8.5 Data and Information Requests**

8.5.1 ADOT agrees to provide data and information requested by FHWA and resource agencies for the preparation of national reports, the Federal Permitting Dashboard, and other purposes to the extent that the information relates to determinations, findings, and proceedings associated with projects processed under this MOU. Such data and information requests may include but are not limited to:

- A. Information on the completion 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 U.S. 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.

- I. Environmental information for all EAs and EISs subject to this MOU. Such information shall include, but not be limited to, environmental justice information, including a summary of all known and potential environmental justice concerns identified by project; and
- J. Any such information that may be requested by the FHWA Administrator.

## **8.6 Conformity Determinations**

- 8.6.1 Pursuant to 23 U.S.C. 327(a)(2)(B)(iv)(II), for any project requiring a project-level conformity determination under the 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 subject to assignment under this MOU, 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 C.F.R. 1.36 for violations of or failure to comply with Federal law or regulations at 23 C.F.R. with respect to a project, withdrawing assignment of any responsibilities that have been assumed as provided in Part 9 of this MOU, or terminating ADOT's participation in the NEPA Assignment Program as provided in Part 12 of this MOU.

# **PART 9. WITHDRAWAL OF ASSIGNED RESPONSIBILITIES**

## **9.1 FHWA-Initiated Withdrawal of Assigned Projects**

- 9.1.1 The FHWA may, at any time, withdraw the assignment of all or part of the USDOT Secretary's responsibilities that have been assumed by 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 USDOT Secretary's responsibilities would be inappropriate, including instances where the FHWA receives a complaint

under Title VI of the Civil Rights Act of 1964 involving a project that is subject to this MOU and FHWA accepts the complaint for investigation or determines that the project may have significant negative community impacts; 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 USDOT 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. Following its final determination, when FHWA withdraws assignment for any project or projects, FHWA will assume sole responsibility and liability for the decisions and approvals it has re-assumed for the project or projects based on such determination. However, ADOT will remain responsible for other decisions and approvals for the project or projects, for which FHWA has not reassumed responsibility or liability, such as decisions and approvals beyond the scope of the USDOT Secretary's responsibilities under NEPA and related Federal environmental laws.

9.1.3 The FHWA shall withdraw assignment of the responsibilities ADOT has assumed for any highway project when the preferred alternative that is identified in the NEPA document 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 all or part of its assumed responsibilities of the USDOT Secretary for an existing or future highway project or highway projects assumed under this MOU.

9.2.2 Upon ADOT's decision to request FHWA withdraw the assignment of the USDOT 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 as part of FHWA's monitoring of ADOT's Program, which is required by 23 U.S.C. 327(h).
- 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 8.2.6 of this MOU. This summary shall be made available to the FHWA as provided in subpart 8.2.7.

## **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 requirements of all applicable Federal statutes and regulations for which responsibility is assumed (e.g., NEPA, 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 compliance with FHWA's and ADOT's environmental document content standards and procedures, including those related to QA/QC.
  - C. Relationships with the general public, agencies and Tribes:
    - i. Ensure meaningful public engagement, including with environmental justice communities.
    - ii. Maintain relationships with agencies and tribes, including regularly occurring coordination meetings and solicitation of feedback.
  - 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.

## **PART 11. TRAINING**

- 11.1 ADOT may request and, subject to FHWA's resource availability, FHWA will provide training with respect to the responsibilities 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 agrees to have all appropriate employees (including

consultants hired for the purpose of carrying out the USDOT Secretary's responsibilities) attend such training.

- 11.2 ADOT will continue to implement training necessary to meet its environmental obligations and provide training opportunities to ADOT staff and consultants. ADOT will periodically review its training program and update as necessary to reflect responsibilities assumed under the Program and this MOU. ADOT will be solely responsible for the development and implementation of its training program.

## **PART 12. TERM, TERMINATION AND RENEWAL**

### **12.1 Term**

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

### **12.2 Termination by FHWA**

- 12.2.1 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 cooperate with FHWA during any oversight or monitoring reviews;
- C. failure to address deficiencies identified during the monitoring process;
- D. failure to secure or maintain adequate personnel and/or financial resources to carry out the responsibilities assumed;
- E. intentional non-compliance with this MOU; or
- F. 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.

- 12.2.2 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.

- 12.2.3 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.

### **12.3 Termination by ADOT**

- 12.3.1 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.
- 12.3.2 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.

### **12.4 Validity of ADOT Actions**

- 12.4.1 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.

### **12.5 Renewal**

- 12.5.1 This MOU is renewable in accordance with 23 U.S.C. 327(c)(6) and 23 C.F.R. 773.115.
- A. ADOT shall notify FHWA at least twelve (12) months prior to the expiration of this MOU of its intent to renew participation in the Program.
- B. Prior to requesting renewal, ADOT shall coordinate with FHWA to determine if significant changes have occurred or if new assignment responsibilities are being sought that would warrant a statewide notice and opportunity for public comment prior to ADOT's submittal of the Renewal Package.
- C. ADOT's Renewal Package shall meet the requirements in 23 C.F.R. 771.115(c); and
- D. ADOT shall submit the Renewal Package no later than 180-days prior to the expiration date of the MOU.

## **PART 13. AMENDMENTS**

### **13.1 Generally**

- 13.1.1 All parts of this MOU may be amended at any time upon mutual agreement by both FHWA and ADOT, pursuant to 23 C.F.R. 773.113(b).



## **13.2 Additional Projects, Classes of Projects and Environmental Review Responsibilities**

- 13.2.1 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.
- 13.2.2 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 C.F.R. 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.

## **PART 14. IMPLEMENTATION OF NONENVIRONMENTAL LAWS**

### **14.1 Generally**

- 14.1.1 It is recognized and understood that the FHWA remains responsible for implementing other laws, requirements and policies that are not assumed by ADOT under this MOU, or other MOUs and agreements, with respect to highway projects. This includes, but is not limited to, laws, requirements and policies related to Interstate access, right-of-way (including advance acquisition of right-of-way), value engineering, design, and other areas related to such projects. The FHWA's implementation of such laws, requirements and policies should be consistent with ADOT's analyses and decisions, if any, that are made pursuant to the responsibilities under this MOU.
- 14.1.2 Nothing in the MOU prevents or otherwise limits FHWA's ability to ask ADOT for information or clarification regarding any NEPA or other environmental decision or analysis made or conducted by ADOT under this MOU for any highway project.
- 14.1.3 The FHWA's requests for such information or clarification do not change ADOT's responsibility and liability for such decisions and analyses under this MOU.
- 14.1.4 Should FHWA determine that further action is necessary with respect to ADOT compliance with the responsibilities it has assumed under this MOU, the FHWA may request that ADOT take appropriate action and will give ADOT a reasonable period of time to respond. The FHWA may also take action to reassume responsibilities for such project if the FHWA deems appropriate as provided under Part 9 of this MOU.

### **14.2 Title VI of the Civil Rights Act of 1964**

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

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

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IN WITNESS THEREOF, the parties hereto have caused this First Renewal of the 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 to be duly executed in duplicate as of the date of the last signature written below.

**STATE OF ARIZONA**

\_\_\_\_\_  
Jennifer Toth  
Director  
Arizona Department of Transportation

Dated: \_\_\_\_\_

**FEDERAL HIGHWAY ADMINISTRATION**

\_\_\_\_\_  
Shailen P. Bhatt  
Administrator  
Federal Highway Administration

Dated: \_\_\_\_\_