

**FIRST RENEWED MEMORANDUM OF UNDERSTANDING BETWEEN THE
FEDERAL HIGHWAY ADMINISTRATION AND
THE ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES CONCERNING
STATE OF ALASKA'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 ALASKA, acting by and through its ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES (DOT&PF), hereby provides as follows:

WITNESSETH

Whereas, Section 327 of Title 23 of the United States Code (U.S.C.) establishes the Surface Transportation Project Delivery Program (Program) that allows the Secretary of the United States Department of Transportation (USDOT Secretary) to assign and states to assume the USDOT Secretary's responsibilities under the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq. (NEPA), and all or part of the USDOT Secretary's responsibilities for environmental review, consultation, or other actions required by Federal environmental law with respect to highway, public transportation, railroad, and multimodal projects within the State; and

Whereas, 23 U.S.C. 327(b)(2) and 23 Code of Federal Regulations (C.F.R.) part 773.109(a) require a state to submit an application in order to participate in the Program; and

Whereas, on May 1, 2016, prior to submittal of its application to FHWA, DOT&PF published notice of, and solicited public comment on, its draft application to participate in the Program as required by 23 U.S.C. 327(b)(3) and 23 C.F.R. parts 773.107(b) and 773.109(a)(8), and addressed the comments received as appropriate; and

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

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

Whereas, on August 25, 2017, FHWA published a notice in the *Federal Register* providing an opportunity for comment on its preliminary decision to approve DOT&PF's application and solicited the views of other appropriate Federal agencies concerning DOT&PF's application as required by 23 U.S.C. 327(b)(5) and 23 C.F.R. part 773.111(a); and

Whereas, the USDOT Secretary, acting by and through FHWA pursuant to 49 C.F.R. part 1.85(a)(3), determined that DOT&PF's application met the requirements of 23 U.S.C. 327 with respect to the Federal environmental laws and highway projects identified in the Original MOU (defined below); and

Whereas, On November 3, 2017, following FHWA's approval of DOT&PF's application, FHWA and DOT&PF entered into the original Memorandum of Understanding (Original MOU) under which DOT&PF assumed and carried out the assigned duties and responsibilities of the USDOT Secretary under NEPA and other Federal environmental laws; and

Whereas, on August 20, 2020, FHWA and DOT&PF executed an amendment of the Original MOU; and

Whereas, Section 13.1.1 of the Original MOU established a November 12, 2022, expiration date;

Whereas, FHWA conducted audits as required by the Original MOU and 23 U.S.C. 327(g)(1)(B) during the State's participation in the Program; and

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

Whereas, DOT&PF has also conducted self-assessments and monthly reports on its performance on the Program; and

Whereas, FHWA's audit reports are publicly available for inspection at https://environment.fhwa.dot.gov/nepa/program_assignment.aspx; and

Whereas, on October 5, 2021, pursuant to 23 C.F.R. part 773.115(a), DOT&PF notified FHWA of its intent to renew participation in the program with respect to highway projects DOT&PF confirmed that the State of Alaska still has laws to allow the State, by and through DOT&PF, to participate in the Program; and

Whereas, pursuant to 23 C.F.R. part 773.115(b), DOT&PF coordinated with FHWA to determine if significant changes had occurred, or new assignment responsibilities would be sought that would warrant a statewide notice and comment opportunity prior to the State's submission of its application for renewal and supplemental information (Renewal Package); and

Whereas, on April 28, 2022, after coordination between the agencies, FHWA determined that a statewide notice and comment period was unnecessary prior to the State's submission of the Renewal Package; and

Whereas, pursuant to 23 C.F.R. part 773.115(d), DOT&PF submitted its Renewal Package to FHWA on May 11, 2022, for approval to continue the assigned duties and responsibilities for highway projects pursuant to the Program; and

Whereas, on October 14, 2022, FHWA sent a letter to DOT&PF authorizing an extension of DOT&PF's assigned and assumed responsibilities under the 2017 MOU in accordance with 23 CFR 773.115(h) to allow the parties to complete the renewal process for this renewal MOU. The letter extended the term of the 2017 MOU to either March 13, 2023, or the effective date of this renewal MOU, whichever occurs earlier; and

Whereas, on XXXXXX ##, ####, FHWA published a Federal Register notice and provided an opportunity for comment on DOT&PF's renewal request and solicited the views of the public and other Federal agencies concerning DOT&PF's renewal request as required by 23 C.F.R. part 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 DOT&PF's Renewal Package meets all the requirements of 23 C.F.R. part 773 and 23 U.S.C. 327.

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

PART 1. PURPOSE OF MEMORANDUM OF UNDERSTANDING

1.1 Purpose

- 1.1.1 This MOU officially approves DOT&PF's application to renew participation in the Program and is the written agreement required by 23 U.S.C. 327(a)(2)(A) and (c) under which the USDOT Secretary may assign, and DOT&PF may assume, the responsibilities of the USDOT Secretary for Federal environmental laws with respect to one or more highway projects within the State of Alaska.
- 1.1.2 FHWA's decision to execute this MOU is based upon the information, representations, and commitments contained in DOT&PF's May 11, 2022 application (Renewal Package), audit reports, and the State's overall performance in the program since November 13, 2017. As such, this MOU incorporates the Renewal

Package. However, this MOU shall control to the extent there is any conflict between this MOU and the Renewal Package.

- 1.1.3 This MOU shall be effective upon final execution by both parties (Effective Date).
- 1.1.4 Pursuant to 23 U.S.C. 327(c)(3)(B) and 327(c)(3)(C), and subpart 4.3 of this MOU, third parties may challenge DOT&PF's action in carrying out environmental review responsibilities assigned under this MOU. Otherwise, this MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the State of Alaska, its departments, agencies, or entities, its officers, employees, or agents. This MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the United States, its departments, agencies, or entities, its officers, employees, or agents.

PART 2. [RESERVED]

PART 3. ASSIGNMENTS AND ASSUMPTIONS OF RESPONSIBILITY

3.1 Assignments and Assumptions of NEPA Responsibilities

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

3.1.2 On the cover page of each Environmental Assessment (EA), Finding of No Significant Impact (FONSI), Environmental Impact Statement (EIS), and Record of Decision (ROD) prepared under the authority granted by this MOU, and for memoranda corresponding to any Categorical Exclusion (CE) determination it makes, DOT&PF shall insert the following language in a way that is conspicuous to the reader:

The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated [TO BE FILLED], and executed by FHWA and DOT&PF.

3.1.3 The DOT&PF shall disclose to the public and agencies, as part of agency outreach and public involvement procedures, including any Notice of Intent or scoping meeting notice, the disclosure in subpart 3.1.2 above.

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

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

Air Quality

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

Alaska Specific

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

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

- E.O. 11593, Protection and Enhancement of the Cultural Environment
- E.O. 11988, Floodplain Management (except approving design standards 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. 13007, Indian Sacred Sites
- E.O. 13112, Invasive Species, as amended by E.O. 13751, Safeguarding the Nation from the Impacts of Invasive Species
- E.O. 13175, Consultation and Coordination with Indian Tribal Governments
- 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 Resources Protection Act of 1979, 16 U.S.C. 470(aa)-(mm)
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001-3013; 18 U.S.C.1170
- Preservation of Historical and Archeological Data, 54 U.S.C. 312501-312508
- Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. 306108

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
 - Section 319, 33 U.S.C. 1329
 - Section 401, 33 U.S.C. 1341
 - Section 402, 33 U.S.C. 1342
 - Section 404, 33 U.S.C. 1344
- Emergency Wetlands Resources Act, 16 U.S.C. 3901 and 3921
- Flood Disaster Protection Act, 42 U.S.C. 4001-4130
- Mitigation of Impacts to Wetlands and Natural Habitat, 23 C.F.R. part 777
- Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401, 403, and 408
- Safe Drinking Water Act (SDWA), 42 U.S.C. 300f- 300j-26
- Wetlands Mitigation, 23 U.S.C. 119(g)
- Wild and Scenic Rivers Act, 16 U.S.C. 1271-1287

Wildlife

- Anadromous Fish Conservation Act, 16 U.S.C. 757a-757f

- Bald and Golden Eagle Protection Act, as amended, 16 U.S.C. 668-668c
 - Fish and Wildlife Coordination Act, 16 U.S.C. 661-667d
 - Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801-1891d
 - Marine Mammal Protection Act, 16 U.S.C. 1361-1423h
 - Migratory Bird Treaty Act, 16 U.S.C. 703-712
 - Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1536
- 3.2.2 In accordance with 23 U.S.C. 327(a)(2)(D), any FHWA environmental review responsibility not explicitly listed above and assumed by DOT&PF shall remain the responsibility of FHWA unless the responsibility is added by written agreement of the parties through the amendment process established in Part 13 of this MOU and pursuant to 23 C.F.R. 773.113(b). This provision shall not be interpreted to abrogate DOT&PF's responsibilities to comply with the requirements of any Federal environmental laws that apply directly to DOT&PF independent of FHWA's involvement (through Federal assistance or approval).
- 3.2.3 The USDOT Secretary's responsibilities for government-to-government consultation with Indian tribes, as defined in 36 C.F.R. 800.16(m), are not assigned to or assumed by DOT&PF under this MOU. The FHWA remains responsible for government-to-government consultation, including initiation of government-to-government consultation consistent with Executive Order 13175- Consultation and Coordination with Indian Tribal Governments, unless otherwise agreed as described below. A notice from DOT&PF to an Indian tribe advising the tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 C.F.R. 800.16(m), and is related to NEPA or another Federal law or which DOT&PF has assumed responsibilities under this MOU, and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by DOT&PF, then FHWA may withdraw the assignment of all or part of the responsibilities for processing the project. In this case, the provisions of subpart 9.1 of this MOU concerning FHWA initiated withdrawal of an assigned project or part of an assigned project will apply.
- This MOU is not intended to abrogate, or prevent future entry into, an agreement among DOT&PF, FHWA, and a tribe under which the tribe agrees to allow DOT&PF to consult for highway projects in Alaska. However, such agreements are administrative in nature and do not relieve FHWA of its legal responsibility for government-to-government consultation.
- 3.2.4 Nothing in this MOU shall be construed to permit DOT&PF's assumption of the USDOT Secretary's responsibilities for conformity determinations required by Section 176 of the Clean Air Act (42 U.S.C. 7506) or any responsibility for the transportation planning process under 23 U.S.C. 134 or 135, or under 49 U.S.C. 5303 or 5304.
- 3.2.5 On the cover page of each biological evaluation or assessment, historic properties or cultural resources report, Section 4(f) evaluation, or other analyses prepared under the authority granted by this MOU, DOT&PF shall insert the following language in a way that is conspicuous to the reader:
- The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated [TO BE FILLED] and executed by FHWA and DOT&PF.
- 3.2.6 The DOT&PF shall disclose to the public and agencies, as part of agency outreach and public involvement procedures, the disclosure in subpart 3.2.5 of this MOU.

- 3.2.7 The DOT&PF agrees to assume FHWA's environmental review role and responsibilities as identified in existing interagency agreements among DOT&PF, USFWS, NMFS, and FHWA, and/or negotiate new agreements with USFWS and NMFS, if needed. The DOT&PF agrees to assume FHWA's Endangered Species Act Section 7 responsibilities of consultations (formal and informal) ongoing as of the date of the Original MOU execution.
- 3.2.8 The DOT&PF will not make any determination that an action constitutes a constructive use of a publicly owned park, public recreation area, wildlife refuge, waterfowl refuge, or historic site under 49 U.S.C. 303/23 U.S.C. 138 [Section 4(f)] without first consulting with FHWA and obtaining FHWA's approval of such determination.

3.3 Highway Projects

- 3.3.1 Except as provided in subpart 3.3.2 of this MOU or otherwise specified in this subpart, the assignments and assumptions of the USDOT Secretary's responsibilities under subparts 3.1 and 3.2 of this MOU shall apply to the environmental review, consultation, or any other action pertaining to the environmental review or approval of the following classes of highway projects located within the State of Alaska. The definition of "highway project" is found at 23 C.F.R. part 773.103, and for purposes of this MOU, "highway project" includes eligible preventative maintenance activities. The DOT&PF shall conduct any reevaluation required by 23 C.F.R. part 771.129 for projects for which construction is not completed prior to the date of the Original MOU, in accordance with the provisions of this MOU and the Original MOU. Prior to approving any CE determination, FONSI, final EIS, or final EIS/ROD, DOT&PF shall ensure and document that for any proposed project the design concept, scope, and funding are consistent with the current Transportation Improvement Plan (TIP), Regional Transportation Plan (RTP), or Metropolitan Transportation Plan (MTP), as applicable.
- A. All Class I, or EIS projects that are funded by FHWA or require FHWA approvals.
 - B. All Class II, or CE projects, that are funded by FHWA or require FHWA approvals.
 - C. All Class III, or EA projects, that are funded by FHWA or require FHWA approvals.
 - D. The DOT&PF will not assume the NEPA responsibilities of other Federal agencies. However, DOT&PF may use or adopt another Federal agency's NEPA analysis or documents consistent with 40 C.F.R. parts 1500-1508, current law, and USDOT and FHWA regulations, policies, and guidance.
- 3.3.2 The following are specifically excluded from the list in subpart 3.3.1 of highway projects:
- A. Any Federal Lands Highway projects authorized under 23 U.S.C. 202, 203, 204, and Section 1123 of the Fixing America's Surface Transportation Act (P.L. 114-94), unless such projects will be designed and constructed by DOT&PF.
 - B. Any project that crosses or is adjacent to international boundaries. For purposes of this MOU, a project is considered "adjacent to international boundaries" if it requires the issuance of a new, or the modification of an existing, Presidential Permit by the U.S. Department of State.
 - C. Projects under the Recreational Trails Program (23 U.S.C. 206).
 - D. Denali Commission projects (fully administered by the Denali Commission, with no FHWA involvement after transfer of funds.)
 - E. The Shakwak Program (1976 highway construction funding accord between the United States and Canada.)
 - F. Any projects advanced by direct recipients other than DOT&PF.

- G. Privately funded or other agency funded projects requiring NEPA review as part of Interstate access approvals, unless such projects will be designed and constructed by DOT&PF.
- H. NEPA review for private requests for changes in controlled access, unless such projects will be designed and constructed by DOT&PF.
- I. Projects designed and constructed by FHWA under a 23 U.S.C. 308 agreement between the FHWA Western Federal Lands Highway Division and DOT&PF.

3.4 Limitations

- 3.4.1 As provided at 23 U.S.C. 327(e), DOT&PF shall be solely responsible and solely liable for carrying out, in lieu of and without further approval by FHWA, all of the responsibilities it has assumed under this MOU.
- 3.4.2 As provided at 23 U.S.C. 327(a)(2)(D), any highway project or responsibility of the USDOT Secretary that is not explicitly assumed by DOT&PF under subpart 3.3.1 of this MOU remains the responsibility of the USDOT Secretary.

PART 4. CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

4.1 Certifications

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

4.2 State Commitment of Resources

- 4.2.1 As required by 23 U.S.C. 327(c)(3)(D), DOT&PF will maintain the financial resources necessary to carry out the responsibilities it is assuming. The DOT&PF's substantial compliance with the Original MOU demonstrates that the DOT&PF's financial resources are adequate for the purpose of fulfilling the terms of this MOU. Should FHWA determine, after consultation with DOT&PF, that DOT&PF's financial resources are inadequate to carry out the USDOT Secretary's responsibilities, DOT&PF will take appropriate action to obtain the additional financial resources needed to carry out these responsibilities. If DOT&PF is unable to obtain the necessary additional financial resources, DOT&PF shall inform FHWA, and this MOU will be amended to assign only the responsibilities that are commensurate with DOT&PF's financial resources.
- 4.2.2 Similarly, DOT&PF has and will maintain adequate organizational and staff capability, including competent and qualified consultants where necessary or desirable, to effectively carry out the responsibilities it has assumed under this MOU. This includes, without limitation:

- A. Using appropriate environmental, technical, legal, and managerial expertise;
- B. Devoting adequate staff resources; and
- C. Demonstrating, in a consistent manner, the capacity to perform DOT&PF's assumed responsibilities under this MOU and applicable Federal laws.

Should FHWA determine, after consultation with DOT&PF, that DOT&PF's organizational and staff capability is inadequate to carry out the USDOT Secretary's responsibilities, DOT&PF will take appropriate action to obtain adequate organizational and staff capability to carry out these responsibilities. If DOT&PF is unable to obtain adequate organizational and staff capability, DOT&PF shall inform FHWA, and the MOU will be amended to assign only the responsibilities that are commensurate with DOT&PF's available organizational and staff capability. Should DOT&PF choose to meet these requirements, in whole or in part, with consultant services, including outside counsel, DOT&PF shall maintain on its staff an adequate number of trained and qualified personnel, including counsel provided by the Alaska Department of Law, to oversee the consulting work.

- 4.2.3 The DOT&PF Chief Engineer will serve as the Senior Agency Official. Consistent with 40 CFR 1508.1(dd), this position must be one that is equivalent to an Assistant Director of the State DOT or higher. Any changes to the title designation must be provided in writing to FHWA with a justification.
- 4.2.4 When carrying out the requirements of Section 106 of the National Historic Preservation Act (NHPA), as amended, DOT&PF staff (including consultants) shall comply with 36 C.F.R. part 800.2(a)(1). All actions that involve identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation (including 36 C.F.R. part 800.11) of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meet the Secretary of the Interior's Professional Qualifications Standards (36 C.F.R. part 61, Appendix A). The DOT&PF shall ensure that all documentation required under 36 C.F.R. part 800.11 is reviewed and approved by a staff member who meets the Professional Qualifications Standards.

4.3 Federal Court Jurisdiction

- 4.3.1 As required under 23 U.S.C. 327(c)(3)(B), and authorized by Alaska Statute 44.23.020(g), DOT&PF hereby expressly consents, on behalf of the State of Alaska, to accept the jurisdiction of the Federal courts in cases that involve the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary assumed by DOT&PF under Part 3 of this MOU. The consent to Federal court jurisdiction shall remain valid after termination of this MOU, or FHWA's withdrawal of assignment of the USDOT Secretary's responsibilities, for any decision or approval made by DOT&PF pursuant to an assumption of responsibility under this MOU. The DOT&PF understands and agrees that, in accordance with 23 U.S.C. 327, the United States district court shall have exclusive jurisdiction over any civil action against the State of Alaska alleging a failure to carry out any responsibility assumed under this MOU, which constitutes a limited waiver of the State of Alaska's immunity under the Eleventh Amendment to the U.S. Constitution.

PART 5. APPLICABILITY OF FEDERAL LAW

5.1 Procedural and Substantive Requirements

- 5.1.1 As provided at 23 U.S.C. 327(a)(2)(C), in assuming the USDOT Secretary's responsibilities under this MOU, DOT&PF shall be subject to the same procedural and substantive requirements that apply to the USDOT Secretary in carrying out these responsibilities. Such procedural and substantive requirements include, but are not limited to: Federal statutes and regulations; Executive Orders issued by the President of the United States; USDOT Orders; Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 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 (including, e.g., 2015 Red Book - Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects.) Official USDOT and FHWA guidance and policies relating to environmental review are posted on FHWA's website, contained in FHWA Environmental Guidebook, or published in the *Federal Register*, or will be sent to DOT&PF electronically or in hard copy.

- A. The DOT&PF has reviewed the 2014 MOA between the US Coast Guard (USCG) and FHWA and understands that by accepting FHWA's NEPA responsibilities, it also agrees to perform FHWA's obligations set forth in the MOU between the USDOT and the USCG and the MOA between FHWA and the USCG.
 - B. The USDOT Secretary's authorities under 23 U.S.C. 144(c) are not assigned under this MOU.
- 5.1.2 The FHWA will use its best efforts to ensure that any new or revised Federal policy or guidance, which are final and applicable to FHWA's responsibilities under NEPA and other laws that are assumed by DOT&PF under this MOU, are communicated to DOT&PF within 10 business days of issuance. Delivery may be accomplished by e-mail, web posting (with e-mail or mail to DOT&PF notifying of web posting), mail, or publication in the *Federal Register* (with e-mail or mail to DOT&PF notifying of publication). If communicated to DOT&PF by e-mail or mail, such material will be sent to DOT&PF's Statewide Environmental Program Manager and Statewide NEPA Program Manager. When FHWA is considering changes to the Program or changes that may or will impact DOT&PF's assumed responsibilities or resources, FHWA shall seek input from DOT&PF. In the event a new or revised FHWA policy or guidance is not made available to DOT&PF as described in this subpart, and if DOT&PF had no knowledge of such policy or guidance, then a failure by DOT&PF to comply with such Federal policy or guidance will not be a basis for termination of this MOU.
- 5.1.3 The DOT&PF will coordinate with Federal resource agencies concerning applicable laws, formal guidance, and policies that such other Federal agencies are responsible for administering with respect to DOT&PF's highway projects and the assumption of responsibilities under this MOU.
- 5.1.4 The DOT&PF may enter into an interagency agreement with a Federal, State, tribal, or local agency regarding appropriate processes and procedures to carry out the project-specific responsibilities assumed under this MOU. Although FHWA is not required to be a signatory, such an interagency agreement must conform with all provisions of this MOU, especially subpart 5.2.1.
- 5.1.5 Upon termination of this MOU, DOT&PF and FHWA shall contact the Federal resource agency to determine whether any interagency agreement should be amended or reinstated as appropriate.

5.2 Rulemaking

- 5.2.1 As provided under 23 U.S.C. 327(f), nothing in this MOU allows DOT&PF to assume any rulemaking authority of the USDOT Secretary. Additionally, DOT&PF may not establish policy and guidance on behalf of the USDOT Secretary or FHWA for highway projects covered in this MOU. The DOT&PF's authority to establish State regulations, policy, and guidance concerning the State environmental review of State highway projects shall not supersede applicable Federal environmental review regulations, formal policy, or guidance established by or applicable to the USDOT Secretary or FHWA.
- 5.2.2 Nothing in this MOU prevents DOT&PF from commenting on any *Federal Register* notice for any matter, including Notices of Proposed Rulemaking and other public notices.

5.3 Effect of Assumption

- 5.3.1 For purposes of carrying out the responsibilities assumed under this MOU, and subject to the limitations contained in 23 U.S.C. 327 and this MOU, DOT&PF shall be deemed to be acting as FHWA with respect to the environmental review, consultation, and other related actions required under those responsibilities.

5.4 Other Federal Agencies

- 5.4.1 As provided under 23 U.S.C. 327(a)(2)(E), nothing in this MOU preempts or interferes with any power, jurisdiction, responsibility, or authority of any Federal agency other than USDOT (including FHWA), under applicable statutes and regulations with respect to a project.

PART 6. LITIGATION

6.1 Responsibility and Liability

- 6.1.1 As provided in 23 U.S.C. 327(e), DOT&PF will be solely liable and solely responsible for carrying out the responsibilities assumed under this MOU, in lieu of and without further approval of the USDOT Secretary. The FHWA and USDOT will have no responsibility or liability for the performance of the responsibilities assumed by DOT&PF, including any decision or approval made by DOT&PF while participating in the Program.

6.2 Litigation

- 6.2.1 Nothing in this MOU affects the United States Department of Justice's (USDOJ) authority to litigate claims, including the authority to approve a settlement on behalf of the United States if either FHWA or another agency of the United States is named in such litigation or if the United States intervenes pursuant to 23 U.S.C. 327(d){3}. In the event FHWA or any other Federal agency is named in litigation related to matters under this MOU or the United States intervenes in the litigation, DOT&PF will coordinate with FHWA and any USDOJ or Federal agency attorneys in the defense of that action.
- 6.2.2 The DOT&PF shall defend all claims brought in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, DOT&PF will provide qualified and competent legal counsel, including outside counsel if necessary. The DOT&PF will provide the defense at its own expense, subject to 23 U.S.C. 327(a)(2)(G) concerning Federal-aid participation in attorney's fees for DOT&PF's counsel.
- 6.2.3 The DOT&PF will notify the FHWA's Alaska Division Office and USDOJ's Assistant Attorney General for the Environment and Natural Resources Division, within seven (7) calendar days of DOT&PF's receipt of service of process of any complaint, concerning its discharge of any responsibility assumed under this MOU. The DOT&PF's notification to the FHWA and USDOJ shall be made prior to its response to the complaint. In addition, DOT&PF shall notify the FHWA's Alaska Division Office within seven (7) calendar days of receipt of any notice of intent to sue concerning its discharge of any responsibility assumed under this MOU.
- 6.2.4 The DOT&PF will provide the FHWA's Alaska Division Office and USDOJ copies of any motions, pleadings, briefs, and other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. The DOT&PF will provide such copies to the FHWA and USDOJ within seven (7) calendar days of receipt of service of any document or, in the case of any documents filed by or on behalf of DOT&PF, within seven (7) calendar days of the date of filing.
- 6.2.5 The DOT&PF will notify the FHWA's Alaska Division Office and USDOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and USDOJ with a reasonable amount of time of at least ten (10) calendar days, to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. The DOT&PF will not execute any settlement agreement until: (1) FHWA and USDOJ have provided comments on the proposed settlement; (2) indicated that they will not provide comments on the proposed settlement; or (3) the review period has expired, whichever occurs first.

- 6.2.6 Within seven (7) calendar days of receipt by DOT&PF, DOT&PF will provide notice to FHWA's Division Office and USDOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities DOT&PF has assumed under this MOU. The DOT&PF shall notify FHWA's Alaska Division Office and USDOJ within five (5) days of filing a notice of appeal of a court decision. The DOT&PF shall confer with FHWA and USDOJ regarding the appeal at least forty-five (45) days before filing its initial brief on the merits of the appeal.
- 6.2.7 The DOT&PF's notifications to FHWA and USDOJ in subparts 6.2.3, 6.2.4, 6.2.5, and 6.2.6 shall be made by electronic mail to FHWA_assignment_lit@dot.gov, and 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, DOT&PF may opt to either send the materials to the email addresses identified above, send hardcopies to the mail address below, or add to the distribution list in the court's electronic filing system (e.g., PACER) the following two email addresses: FHWA_assignment_lit@dot.gov and efile_nrs.enrd@usdoj.gov. The FHWA and USDOJ's comments under subpart 6.2.5 and 6.2.6 shall be made by electronic mail to NEPA@alaska.gov unless otherwise specified by DOT&PF. In the event that regular mail is determined necessary, mail should be sent by overnight mail service to:

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

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

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

6.3 Conflict Resolution

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

PART 7. INVOLVEMENT WITH OTHER AGENCIES

7.1 Coordination

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

7.2 Processes and Procedures

- 7.2.1 The DOT&PF will ensure that it has appropriate processes and procedures in place that provide for proactive and timely consultation, coordination, and communication with applicable Federal agencies in order to carry out the responsibilities assumed under this MOU, including the submission of all EISs together with comments and responses to the Environmental Protection Agency (EPA) as required by 40 CFR 1506.10 and for EPA's review as required by Section 309 of the Clean Air Act, 42 U.S.C. 7609. These processes and procedures shall be formally documented. Documentation may be a formally executed interagency agreement or other format as appropriate.

PART 8. INVOLVEMENT WITH FHWA

8.1 Generally

- 8.1.1 In discharging any of the USDOT Secretary's and FHWA's responsibilities under this MOU, DOT&PF and FHWA agree to work cooperatively to resolve substantive issues regarding the implementation or interpretation of this MOU.
- 8.1.2 Except as specifically provided otherwise in this MOU, FHWA will not provide project-level assistance to DOT&PF in carrying out the responsibilities it has assumed under this MOU. Project-level assistance includes advice, consultation, or review of draft documents. However, project-level assistance does not include: process or Program-level assistance as described in subpart 8.1.5 of this MOU, including discussions concerning issues addressed in prior projects, interpretations of applicable law contained in Title 23 U.S.C. or Title 49 U.S.C., interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance.
- 8.1.3 The FHWA will not intervene, broker, act as intermediary, or otherwise be involved in any issue involving DOT&PF's consultation or coordination with other Federal resource agencies with respect to DOT&PF's discharge of any of the responsibilities assumed under this MOU for any particular highway project. However, FHWA may attend meetings between DOT&PF and other Federal agencies. Further, FHWA may submit comments to DOT&PF and the other Federal agency in the following extraordinary circumstances:
- A. FHWA reasonably believes that DOT&PF is not in compliance with this MOU;
 - B. FHWA determines that an issue between DOT&PF and the other Federal agency concerns an emerging national policy issue under consideration by the USDOT; or
 - C. Upon request by DOT&PF Environmental Program Manager, DOT&PF Commissioner, DOT&PF Deputy Commissioner, or DOT&PF Chief Engineer, or the Federal agency, with agreement by the FHWA.
- The FHWA will notify both DOT&PF and the relevant Federal agency prior to attending any meetings between DOT&PF and such other Federal agency.
- 8.1.4 Other Federal agencies may raise concerns regarding compliance with this MOU by DOT&PF and may communicate these concerns to FHWA. The FHWA will review the concerns and any information provided to FHWA by such other Federal agency. If FHWA determines the concern has merit, FHWA shall inform the DOT&PF Environmental Program Manager. The DOT&PF will review the concerns and any information provided to FHWA, and work with the other Federal agency to resolve the concern. If the concern remains unresolved, FHWA will notify DOT&PF and will work with both DOT&PF and the other Federal agency to resolve the issue and, if necessary, take appropriate action to ensure compliance with this MOU.
- 8.1.5 At DOT&PF's request, FHWA may assist DOT&PF in evaluating its environmental program and developing or modifying any of its processes or procedures to carry out the responsibilities it has assumed under this MOU, including, but not limited to, emerging national policy issues and those processes and procedures concerning DOT&PF's consultation, coordination, and communication with other Federal agencies.

- 8.1.6 Communications between DOT&PF and FHWA regarding the administration of the responsibilities assigned and assumed under this MOU, and other process and Program-level communications described in subparts 8.1 .2 and 8.1.5 of this MOU, are normally considered intra-agency communications for the purpose of deliberative process privileges under the Freedom of Information Act and the Alaska Public Records Act. The DOT&PF and FHWA shall promptly notify each other of requests for public records regarding the administration of the Program in Alaska.
- 8.1.8 The DOT&PF's obligations and responsibilities under 23 C.F.R. 1.5 are not altered in any way by executing this MOU.

8.2 MOU Monitoring and Oversight

- 8.2.1 Pursuant to 23 U.S.C. 327(h), the FHWA shall monitor and provide oversight over DOT&PF's performance in order to ensure DOT&PF's compliance with the MOU and all applicable Federal laws and policies, including environmental justice, and to evaluate whether DOT&PF is meeting 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 DOT&PF and take into account the FHWA Alaska Division's annual risk assessments. DOT&PF agrees to comply with all requests from FHWA related to monitoring under this MOU that FHWA reasonably considers necessary to ensure that DOT&PF is adequately carrying out the responsibilities assigned to DOT&PF. FHWA shall discuss with DOT&PF its annual risk assessments regarding matters pertaining to DOT&PF's performance under this MOU.
- 8.2.2 In order to minimize the impact of the monitoring reviews on DOT&PF's day-to-day project delivery workload, the FHWA and DOT&PF will coordinate when scheduling joint monitoring reviews. The FHWA will complete two monitoring reviews during the term of the MOU. The first monitoring review shall be conducted within two years of the last audit and the second monitoring review shall be within two years of the first monitoring review. The FHWA may conduct additional monitoring activities during the off years, if deemed necessary by either DOT&PF or FHWA. DOT&PF and the FHWA Alaska Division Office will each designate a point of contact, who will be responsible for coordinating monitoring review schedules, requests for information and organizing meetings.
- 8.2.3 In order for FHWA to provide oversight and evaluate whether DOT&PF is meeting performance measures established pursuant to Part 10 of this MOU, DOT&PF shall make available for inspection by the FHWA any project files, general administrative files, and letters or comments received from governmental agencies and the public which pertain to DOT&PF 's discharge of the responsibilities it has assumed under this MOU. DOT&PF will work with the FHWA to provide documents electronically to the extent it does not create an undue burden. DOT&PF environmental staff will be available for interviews as part of the monitoring reviews.
- 8.2.4 Pursuant to 23 U.S.C. 327(c)(4), DOT&PF is responsible for providing to the FHWA any information the FHWA reasonably considers necessary to ensure that DOT&PF is adequately carrying out the responsibilities assigned. At the request of the FHWA, DOT&PF will (within five business days or a mutually agreeable time frame) provide the FHWA with any information the FHWA considers necessary to ensure that DOT&PF is adequately carrying out the responsibilities assigned to DOT&PF.
- 8.2.5 DOT&PF agrees to perform regular quality assurance and quality control (*QA/QC*) activities to ensure responsibilities assumed under Part 3 of this MOU are being conducted in accordance with applicable laws and this MOU, to identify areas needing improvements in the process, and to timely take any corrective actions necessary to address the areas needing improvement. At a minimum, DOT&PF's *QA/QC* activities will include the review and monitoring of its processes relating to project decisions, environmental analysis, including environmental justice, project file documentation, checking for errors and omissions, and legal sufficiency reviews. DOT&PF will provide documentation of this data and any identified trends to FHWA on an annual basis.

- 8.2.6 Upon the Effective Date of this MOU, DOT&PF will maintain a list of NEPA approvals and decisions (CE, EA, FONSI, DEIS, FEIS, FEIS/ROD, ROD) and Section 4(f) approvals it makes under this MOU. The DOT&PF will provide an updated list to FHWA every six (6) months. The list will include project names, locations, and decisions. In addition, from the effective date of this MOU, DOT&PF will provide annually to the FHWA Alaska Division a report regarding any commitments related to mitigation for projects included on the list referenced in this paragraph, including environmental justice analysis and associated mitigation, where applicable.
- 8.2.7 Monitoring review reports, whether prepared by the FHWA or DOT&PF, 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 needing improvement. The reports shall identify findings that require corrective actions and shall discuss corrective actions that have been or will be implemented.
- 8.2.8 Prior to making any monitoring review report available to the public, the FHWA will transmit to DOT&PF a draft of the report and allow DOT&PF at least 14 calendar days to respond in writing. The FHWA will grant any reasonable request by DOT&PF 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.
- 8.2.9 DOT&PF agrees to post all FHWA monitoring reports on the DOT&PF Statewide Environmental Office website to make them available to the public.

8.3 Records Retention

- 8.3.1 DOT&PF will retain project files, and files pertaining to the discharge of its responsibilities under this MOU, in accordance with the DOT&PF Statewide Design and Engineering Services Division, State of Alaska Records Retention and Disposition Schedule, provided that those requirements meet or exceed requirements established in 2 CFR 200.334, the FHWA Records Disposition Manual (Field Offices) Chapter 4, FHWA Order No. 1324.1B, Issued July 29, 2013, or any successor or additional orders, policy documents, or formal guidance issued by FHWA related to records retention. In accordance with DOT&PF Records Retention and Disposition Schedule 25-539.2, records will be retained for six (6) fiscal years after the completion of the project, reporting requirement or other applicable activity. Capital project files of historical significance (NEPA decision documents including CE, EA and EIS) will be retained permanently.

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

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

- 8.3.2 For the following record types, DOT&PF will ensure that the following retention periods are maintained in the following manner:
- A. **FHWA-DOT&PF Environment Correspondence Files:** Correspondence between FHWA and DOT&PF relative to the interpretation, administration, and execution of this MOU and the environmental aspects of the Federal-aid Highway Program, as established in 8.1.2 and 8.1.5, shall be maintained by DOT&PF for a period of six (6) years after the resolution of the particular issue or after the guidance has been superseded. After six (6) years DOT&PF may follow the State records disposition process for these records.
 - B. **National Environmental Policy Act (NEPA) and Related Documents:** For a period of 8 years after approval of the final construction voucher DOT&PF shall maintain Final NEPA Documents (Draft EISs, Final EISs, Supplemental EISs, RODs, EAs, FONSI, CE documentation and determinations), Supporting Materials (documentation supporting the Sec. 139 environmental review process [i.e., coordination plans that include project schedules, evidence for opportunities for public/agency input in purpose and need, alternatives];scoping, public and agency comments;

meeting minutes; NOI, Public Involvement Plans, public meeting summaries, public hearing certifications and transcripts, mitigation reports/tracking, technical reports; correspondence; studies and reports (including environmental justice analysis); references; errata sheets; and reevaluation documents); NEPA Reference Documents (written statements and supporting documents needed for reference); and official documents and correspondence related to reviews under other environmental requirements (e.g., ESA, CWA, Section 4(f), Section 106). After 8 years DOT&PF may follow the State records disposition process for these records except that DOT&PF will permanently store the above referenced records for Significant Transportation Projects as they are defined in Order No. 1224.1 B.

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

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

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

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

8.4 Federal Register

8.4.1 For any documents that are required to be published in the *Federal Register*, such as the Notice of Intent under 23 C.F.R. 771.123(a) and Notice of Final Agency Action under 23 U.S.C. 139(l)(2), DOT&PF shall transmit such document to FHWA's Alaska Division Office, with a request for publication in the *Federal Register* on behalf of DOT&PF. The FHWA's Alaska Division Office will submit such document to the *Federal Register* within five (5) calendar days of receipt of DOT&PF's request for publication in the *Federal Register*. If requested, DOT&PF shall reimburse FHWA for costs associated with publishing such documents in the *Federal Register* (excluding FHWA's overhead).

8.5 Data and Information Requests

8.5.1 DOT&PF will provide data and information requested by FHWA and resource agencies for the preparation of national reports, and 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 environmental documentation for EIS, EA, and documented CE projects processed under this MOU;
- B. Archeology Reports requested by the National Park Service;
- C. Endangered Species Act Expenditure Reports requested by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service;

- D. NEPA Litigation Reports requested by CEQ;
- E. Environmental Conflict Resolution reports requested by the Office of Management and Budget and CEQ;
- F. 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;
- G. Project status information for EAs and EISs for use on the searchable website maintained under section 41003(b) of the FAST Act [Fixing America's Surface Transportation Act, 42 U.S.C. 4370m-2(b) and 23 U.S.C. 139(o)] (Federal Permitting Dashboard) to be submitted in accordance with current and any future reporting standard issued by USDOT pursuant to such provisions; and
- H. Any such information that may be requested by the FHWA Administrator.

8.6 Conformity Determinations

- 8.6.1 Pursuant to 23 U.S.C. 327(a)(2)(B)(iv)(II), for any project requiring a project-level conformity determination under the Clean Air Act and its implementing regulations, FHWA's Alaska Division Office will document the project level conformity determination within a reasonable timeframe. The FHWA's Alaska Division Office will restrict its review to only that data, analyses, applicable comments and responses, and other relevant documentation that enable FHWA to make the project-level conformity determination.

8.7 Certification of NEPA Compliance

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

8.8 Enforcement

- 8.8.1 Should FHWA determine that DOT&PF is not in compliance with this MOU, then FHWA shall take appropriate action to ensure DOT&PF's compliance, including appropriate remedies provided at 23 C.F.R. 1.36 for violations of or failure to comply with Federal law or regulations at 23 C.F.R. with respect to a project, withdrawing assignment of any responsibilities that have been assumed as provided in Part 9 of this MOU, or terminating DOT&PF's participation in the Program as provided in Part 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 DOT&PF under this MOU for any highway project or highway projects upon FHWA's determination that:
 - A. With respect to such project or projects, DOT&PF is not in compliance with a material term of this MOU or applicable Federal laws or policies, and DOT&PF has not taken sufficient corrective action to the satisfaction of FHWA;

- B. The highway project or highway projects involve significant or unique national policy interests for which DOT&PF's assumption of the USDOT Secretary's responsibilities would be inappropriate, including instances where the FHWA receives a complaint under Title VI of the Civil Rights Act of 1964 involving a project that is subject to this MOU and the FHWA accepts the complaint for investigation or determines that the project may have significant negative community impacts; or
 - C. DOT&PF cannot satisfactorily resolve an issue or concern raised in government-to-government consultation process, as provided in subpart 3.2.3.
- 9.1.2 Upon the FHWA's determination to withdraw assignment of the USDOT Secretary's responsibilities under subpart 9.1.1, FHWA will informally notify DOT&PF of FHWA's determination. After informally notifying DOT&PF of its determination, FHWA will provide DOT&PF written notice of its determination including the reasons for its determination. Upon receipt of this notice, DOT&PF may submit any comments that would resolve the compliance concern or objections to FHWA within 30 calendar days, unless FHWA agrees to an extended period of time. Upon receipt of DOT&PF's comments or objections, FHWA will make a final determination within 30 calendar days, unless extended by FHWA for cause, and notify DOT&PF of its decision. In making its determination, FHWA will consider DOT&PF's comments or objections, the effect the withdrawal of assignment will have on the Program, the amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.
- 9.1.3 The FHWA shall withdraw assignment of the responsibilities DOT&PF has assumed for any highway project when the preferred alternative that is identified in the CEs, EA, or FEIS is a highway project or part of a program that is specifically excluded in subpart 3.3.2. In such case, subpart 9.1.2 of this MOU shall not apply.

9.2 DOT&PF-Initiated Withdrawal of Assignment of Projects

- 9.2.1 The DOT&PF may, at any time, provide FHWA with notice of its intent to withdraw a highway project assumed under this MOU.
- 9.2.2 Upon DOT&PF's decision to request FHWA withdraw the assignment of the USDOT Secretary's responsibilities under subpart 9.2.1, DOT&PF shall informally notify FHWA of its desire for FHWA to withdraw assignment of its responsibilities. After informally notifying FHWA of its desire, DOT&PF will provide FHWA written notice of its desire, including the reasons for wanting FHWA to withdraw assignment of the responsibilities. Upon receipt of this notice, FHWA will have 30 calendar days, unless extended by FHWA for cause, to determine whether it will withdraw assignment of the responsibilities requested. In making its determination, FHWA will consider the reasons DOT&PF desires FHWA to withdraw assignment of the responsibilities, the effect the withdrawal of assignment will have on the Program, amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.

PART 10. PERFORMANCE MEASURES

10.1 General

- 10.1.1 FHWA and DOT&PF will continue to utilize a mutually established set of performance measures to evaluate DOT&PF's administration of its responsibilities under this MOU. The agreed-upon performance measures will be available on DOT&PF's website. With FHWA's review and consultation, DOT&PF may modify the performance measures, as needed.
- 10.1.2 The DOT&PF's attainment of the performance measures indicated in this part of the MOU will be considered during FHWA monitoring, as required by 23 U.S.C. 327(h).

10.1.3 The DOT&PF shall collect and maintain all necessary and appropriate data related to the attainment of performance measures. In collecting this data, DOT&PF shall monitor its progress toward meeting the performance measures and include its progress in the summary described in subpart 8.2.5 of this MOU.

10.2 Performance Measures

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

- Compliance with NEPA, the provisions of the NEPA Assignment MOU, and other Federal environmental statutes, regulations, executive orders, policy and guidance.
- Compliance with DOT&PF's environmental document policies and procedures as outlined in the Alaska DOT&PF Environmental Procedures Manual and DOT&PF guidance documents.
- Efficiency and timeliness in completion of the NEPA process.
- Relationships with agencies as evaluated under an annual resource agency survey.
- Meaningful public engagement, including with environment justice communities.

PART 11. TRAINING

11.1 The FHWA will provide DOT&PF with training, to the extent that FHWA and DOT&PF deem necessary, in all appropriate areas with respect to the environmental responsibilities that DOT&PF has assumed. Such training may be provided to DOT&PF by either FHWA, another Federal agency or other parties, as may be appropriate.

11.2 The DOT&PF will continue to implement training necessary to meet its environmental obligations under this Renewal Package. In developing the training plan, DOT&PF will consult with FHWA and other Federal agencies on an ongoing basis and will update its training plan annually. FHWA will remain available to aid in the training needs and development of training program elements. DOT&PF will be responsible for the final 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) and 23 C.F.R. part 773.117(a), FHWA may terminate DOT&PF's participation in the Program, in whole or in part, at any time subject to the procedural requirements in 23 U.S.C. 327 and subpart 12.2.2 of this MOU. Termination may be based on DOT&PF's failure to adequately carry out its responsibilities under this MOU including, but not limited to:

- A. persistent neglect of, or noncompliance with Federal laws, regulations, and policies;
- B. failure to cooperate with FHWA during any oversight or monitoring reviews;
- C. failure to address deficiencies identified during the audit or monitoring process;
- D. failure to secure or maintain adequate personnel and/or financial resources to carry out the responsibilities assumed;
- E. substantial 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 DOT&PF is not adequately carrying out the responsibilities assigned to DOT&PF, then:
- A. The FHWA shall provide DOT&PF written notification of its non-compliance determination detailing a description of each responsibility in need of corrective action regarding an inadequacy identified; and
 - B. The FHWA shall provide DOT&PF a period of not less than 120 days to take such corrective action as the FHWA determines is necessary to comply with this MOU.
- 12.2.3 If DOT&PF, after notification and the 120-day period, fails to take satisfactory corrective action, as determined by FHWA, FHWA shall provide notice to DOT&PF of its determination of termination. Any responsibilities identified to be terminated in the notice that have been assumed by DOT&PF under this MOU shall transfer to FHWA.

12.3 Termination by DOT&PF

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

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

12.5 Renewal

- 12.5.1 This MOU is renewable in accordance with 23 U.S.C. 327 and implementing regulations in effect at the time of the renewal. The DOT&PF and FHWA agree to initiate the renewal process at least 12 months prior to the expiration of this 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 DOT&PF, pursuant to 23 CFR 773.113(b).

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

- 13.2.1 The FHWA may assign, and DOT&PF may assume, responsibility for additional projects and additional environmental review responsibilities beyond those identified in Part 3 of this MOU, by executing an amendment to this MOU.
- 13.2.2 If DOT&PF decides to request amendment of this MOU to add or withdraw responsibility for projects or classes of projects, or environmental review responsibilities beyond those identified in Part 3 of this MOU, such request shall be treated as an amendment to DOT&PF's Renewal Package that was submitted to FHWA pursuant to 23 U.S.C. 327(b) and 23 C.F.R. part 773.115. In developing the amendment, DOT&PF shall identify the projects, classes of projects, and environmental review responsibilities it wishes to assume or withdraw and make any appropriate adjustments to the information contained in DOT&PF's Renewal Package, including verification of personnel and financial resources.

PART 14. IMPLEMENTATION OF NON-ENVIRONMENTAL 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 DOT&PF 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 DOT&PF's analyses and decisions, if any, that are made pursuant to the responsibilities assumed under this MOU.
- 14.1.2 Nothing in the MOU prevents or otherwise limits the FHWA's ability to ask DOT&PF for information or clarification regarding any NEPA or other environmental decision or analysis made or conducted by DOT&PF under this MOU for any highway project.
- 14.1.3 The FHWA's requests for such information or clarification do not change DOT&PF'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 DOT&PF's compliance with the responsibilities it has assumed under this MOU, the FHWA may request that DOT&PF take appropriate action and will give DOT&PF a reasonable period of time to respond. The FHWA may also take action to reassume responsibilities for such project if the FHWA deems appropriate as provided for under Part 9 of this MOU.

14.2 Title VI of the Civil Rights Act of 1964

- 14.2.1 Although Title VI is not part of NEPA, the public has the right to file a Title VI complaint. The FHWA's responsibilities with respect to such complaints, as well as other issues related to Title VI compliance that have been identified by the FHWA, may require the FHWA to ask DOT&PF for information or clarification regarding any NEPA or environmental decision or analysis made or conducted by DOT&PF under this MOU for any highway project.
- 14.2.2 DOT&PF agrees to comply with all requests from FHWA related to monitoring under this MOU. Title VI investigations involving highway projects subject to this MOU may result in additional monitoring in accordance with this MOU.

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

STATE OF ALASKA

Ryan Anderson
Commissioner
Department of Transportation and Public Facilities

Dated: _____

Attorney General
Department of Law

Dated: _____

FEDERAL HIGHWAY ADMINISTRATION

Stephanie Pollack
Deputy Administrator
Federal Highway Administration

Dated: _____

DRAFT