

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

2022 MEMORANDUM OF UNDERSTANDING

Between the

Federal Highway Administration, California Division

and the

California Department of Transportation

State Assumption of Responsibility for Categorical Exclusions

THIS 2022 MEMORANDUM OF UNDERSTANDING (“MOU”) made and entered upon the last date of signature by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION (“FHWA”) and the STATE of California, acting by and through its DEPARTMENT OF TRANSPORTATION (“Caltrans”), hereby provides as follows:

WITNESSETH

Whereas, Section 326 of Chapter 3 of Title 23, United States Code (23 U.S.C. 326) allows the Secretary of the United States Department of Transportation (DOT Secretary), to assign, and a State to assume, responsibility for determining whether certain designated activities are included within classes of action that are categorically excluded from requirements for environmental assessments or environmental impact statements pursuant to regulations promulgated by the Council on Environmental Quality under part 1500 of title 40, Code of Federal Regulations (CFR) (as in effect on September 14, 2020); and

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

Whereas, on June 7, 2007, FHWA and Caltrans executed a MOU assigning responsibilities to Caltrans pursuant to 23 U.S.C. 326 for a three-year period, expiring on June 7, 2010 (“2007 MOU”); and

Whereas, FHWA has continually assigned CE responsibilities to Caltrans pursuant to 23 U.S.C. 326 since June 7, 2007; and

Whereas, the history of the assignment of CE responsibilities to Caltrans pursuant to 23 U.S.C. 326 is set forth in detail in the FHWA-Caltrans MOU dated April 18, 2019, hereby incorporated by reference; and

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

Whereas, FHWA and Caltrans seek to renew the existing assigned responsibilities to Caltrans for an additional five-year period, pursuant to a new MOU (“2022 MOU”); and

Whereas, on March 14, 2022, FHWA published a notice of the availability of the proposed 2022 MOU in the Federal Register and provided a thirty (30) day opportunity for comment in the USDOT Docket Management System FHWA-2022-0001; and

Whereas, on March 14, 2022, Caltrans published the proposed notice of availability of the 2022 MOU on its website at <http://www.dot.ca.gov/hq/env/nepa/> and provided a 30-day opportunity for comment; and

Whereas, Caltrans and FHWA have considered the comments received on the 2022 MOU; and

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

Whereas, Caltrans wishes to renew its assumption of such Federal agency responsibilities in accordance with this MOU and applicable law;

Now, therefore, FHWA and Caltrans agree as follows:

STIPULATIONS

I. CATEGORICAL EXCLUSION RESPONSIBILITIES ASSIGNED TO CALTRANS BY THE FHWA

- A. For the projects covered by this MOU, FHWA hereby assigns, and Caltrans hereby assumes, subject to the terms and conditions set forth in 23 U.S.C. 326 and this MOU, the responsibility for determining whether a proposed Federal action is within a category of action that has been designated as a CE by the DOT Secretary, as specified in Stipulation I(B), and meets the definition of a CE as provided in 40 CFR 1508.1(d) (as in effect on September 14, 2020) and 23 CFR 771.117 (a) and (b). This assignment does not apply to responsibilities carried out by other modal administrations of the U.S. Department of Transportation (USDOT) or the Office of the Secretary.
- B. This assignment pertains only to the designated activities described in this Stipulation I(B).
 - 1. The assignment includes the following:
 - a. Activities listed in 23 CFR 771.117(c);
 - b. The example activities listed in 23 CFR 771.117(d); and
 - c. Additional actions listed in Appendix A.

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

2. Any activities added through FHWA rulemaking to those listed in 23 CFR 771.117(c) or example activities listed in 23 CFR 771.117(d) after the date of the execution of this MOU.
- C. This MOU transfers to Caltrans all responsibility for processing the CEs designated in Stipulation I(B) of this MOU, including any necessary CE approval actions. Caltrans shall process all proposed projects that are CE candidates (CE projects), and any required reevaluations of CEs under 23 CFR 771.129 for all CE projects not completed prior to the date of this MOU, in accordance with the provisions of this MOU. With respect to matters covered by and subject to the terms of this MOU, this MOU supersedes any existing programmatic agreement that is solely between Caltrans and FHWA concerning CEs.
 - D. Caltrans, when acting pursuant to 23 U.S.C. 326 and this MOU, holds assigned authority to make environmental decisions and commitments pertaining to only the individual projects and activities within the scope of 23 U.S.C. 326 and this MOU. No action by Caltrans shall bind FHWA to future action of any kind. No determination or agreement made by Caltrans with respect to mitigation or other activities shall constitute a precedent for future determinations, agreements, or actions in the Federal-aid highway program unless FHWA consents, in writing, to such commitment.
- II. OTHER FHWA RESPONSIBILITIES ASSIGNED TO CALTRANS AND RESPONSIBILITIES RESERVED BY THE FHWA
- A. For projects covered by this MOU, FHWA hereby assigns, and Caltrans hereby assumes, the following FHWA responsibilities for environmental review, consultation, or other related actions required under Federal laws and Executive Orders applicable to CE projects: See Appendix B for a description of the environmental responsibilities assigned to Caltrans by FHWA for projects subject to this MOU.
 - B. FHWA reserves any responsibility for any environmental review, consultation, or other related action that is not expressly assigned under this MOU, including:
 1. All government-to-government consultation with Indian tribes as defined in 36 CFR 800.16(m). Notice from Caltrans to an Indian tribe advising the Indian tribe of a proposed activity is not considered “government-to- government consultation” within the meaning of this MOU. If Caltrans adequately resolves any project-specific Indian tribe issues or concerns, then FHWA’s role in the environmental process shall be limited to carrying out the government-to-government consultation process. If FHWA determines through consultation with an Indian tribe, or an Indian tribe indicates to FHWA, that the proposed resolution of tribal issues or concerns by Caltrans is not adequate, then Stipulation III(C) applies. This MOU is not intended to abrogate, or prevent future entry into, any written agreement among Caltrans, FHWA, and an Indian tribe under which the tribe agrees to permit Caltrans to administer government-to-government

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

consultation activities for FHWA. However, such agreements are administrative in nature and do not relieve FHWA of its legal responsibility for government-to-government consultation.

2. In connection with the execution of their respective responsibilities under this MOU, Caltrans and FHWA will ensure that:
 - a. Caltrans provides to FHWA any information necessary in order for FHWA to carry out its consultation, evaluation, or decision-making for Stipulation II(B) activities;
 - b. FHWA provides Caltrans with a documented decision and any related information used for Stipulation II(B) decisions and needed by Caltrans in order for Caltrans to evaluate the project and make its decision whether the project qualifies as a CE; and
 - c. As part of any request for FHWA authorization for funding or other action, Caltrans will provide to FHWA evidence that the CE processing and any other environmental responsibilities assigned under this agreement have been completed in accordance with this MOU.
- C. Caltrans agrees that its execution of environmental review, reevaluation, consultation, and other related responsibilities for CEs assigned under this MOU are subject to the same existing and future procedural and substantive requirements as if those responsibilities were carried out by FHWA. This includes, but is not limited to the responsibilities of FHWA under interagency agreements such as programmatic agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process for CE projects. If such interagency agreements are between Caltrans and FHWA only, then the assignment occurs automatically upon the signing of this MOU for projects covered by this MOU. If the interagency agreement involves signatories other than FHWA and Caltrans, then FHWA and Caltrans will work to obtain any necessary consents or amendments. Such actions include (See Appendix C):
 1. Consulting with the other parties to obtain written consent to the continuation of the interagency agreement in its existing form, but with the substitution through assignment of Caltrans for FHWA with respect to interagency agreement provisions applicable to CE projects;
 2. Negotiating with the other parties to amend the interagency agreement as needed so that the interagency agreement continues but that Caltrans assumes FHWA's responsibilities with respect to CE projects.
 3. If a third party does not agree to the assignment or amendment of the interagency agreement, then to the extent permitted by applicable law and regulation, Caltrans must carry out the assigned environmental review, consultation, or other related

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

activity in accordance with applicable laws and regulations but without the benefit of the provisions of the interagency agreement.

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

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

- A. Notwithstanding any other provision of this MOU, any activity that does not satisfy the criteria for the CE categories described in Stipulation I(B) is excluded from this assignment. Exclusion also may occur at any time during the environmental process if Caltrans determines that the project fails to meet the CE criteria.
- B. Because Caltrans assumes responsibility for environmental processing of the CEs designated in this MOU, FHWA no longer will be responsible for conducting the environmental review, consultation or other related actions assigned under this MOU (see Stipulation XI). However, in furtherance of its stewardship and oversight responsibilities, FHWA will evaluate Caltrans' environmental processing of any project if FHWA has any reason to believe that Caltrans' performance with respect to the project does not satisfy the terms and conditions of this MOU. The scope of the evaluation will be commensurate with the potential problem. If FHWA subsequently determines that Caltrans' performance does not satisfy the terms and conditions of this MOU, then FHWA will take action to resolve the problem. Such action may include facilitating Caltrans' compliance with the MOU, or excluding the project from assignment under this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.
- C. If a project-related concern or issue is raised in the coordination of project review with an Indian tribe, as defined in 36 CFR 800.16(m), and either the Indian tribe or FHWA determines that the concern or issue will not be satisfactorily resolved, then FHWA may reassume responsibility for processing that project. FHWA shall notify Caltrans in the event FHWA determines to exclude the project from this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.

IV. CALTRANS PERFORMANCE REQUIREMENTS

- A. Compliance with governing laws, regulations and MOU. Caltrans shall make all determinations under this MOU in accordance with 23 CFR 771.117(a) and (b) and succeeding regulations. All actions by Caltrans in carrying out its responsibilities under this MOU shall comply with, and be consistent with, the coordination provisions of Stipulation II and all applicable Federal laws, regulations, Executive Orders, policies, and formal guidance, as defined in Stipulation IV(A)(2). Caltrans also shall comply with State and local laws to the extent applicable.

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

1. Failure to meet the requirements of Stipulation IV(A) is grounds for a decision by FHWA to terminate this MOU pursuant to Stipulation IX(A) if FHWA determines, after good-faith consultation with Caltrans, that there is an irreconcilable material conflict between a provision of State law, regulation, policy, or guidance and applicable Federal law, regulation, policy, or guidance, and FHWA reasonably determines that such conflict is preventing Caltrans from meeting its Stipulation IV(A) obligations. The grounds for such decision may include, but are not limited to, the mere existence of the conflict (i.e., on its face) and/or the effect of the conflict on Caltrans' decision(s) on CE project(s) (i.e., as applied).
 2. Formal DOT and FHWA guidance and policies relating to environmental review matters of nationwide application are posted online at FHWA's website or sent in writing to Caltrans electronically or in hard copy.
 3. After the effective date of this MOU, FHWA will use its best efforts to ensure that any new or revised FHWA policies and guidance that are final and applicable to Caltrans' performance under this MOU are communicated to Caltrans within 10 days of issuance. Delivery may be accomplished by e-mail, mail, by publication in the Federal Register, or by means of a publicly available online posting including at the sites noted above. If communicated to Caltrans by e-mail or mail, such material may be sent either to the party specified in this MOU to receive notices, or to the Chief of Caltrans Division of Environmental Analysis.
 4. In the event that a new or revised FHWA policy or guidance is not made available to Caltrans as described in the preceding paragraph, and if Caltrans had no actual knowledge of such policy or guidance, then a failure by Caltrans to comply with such Federal policy or guidance will not be a basis for termination under this MOU.
 5. Caltrans will work with all other appropriate Federal agencies concerning the laws, guidance, and policies relating to any Federal laws that such other agencies administer.
 6. In order to minimize the likelihood of a conflict as described in Stipulation IV(A)(1) above, after the effective date of this MOU Caltrans will use its best efforts to ensure that any proposed new or revised State laws, regulations, policies, or guidance that are applicable to Caltrans' performance under this MOU are communicated to FHWA for review and comment before they become final. Delivery may be accomplished by e-mail, mail, or personal delivery. If communicated to FHWA by e-mail or mail, such material may be sent to the party specified in this MOU to receive notices for FHWA.
- B. Processing projects assigned under this MOU - Caltrans identification, documentation, and review of effects. For projects and other activities assigned under Stipulation I(A)-(B) that Caltrans determines are included in the classes of CE assigned to Caltrans under this MOU, Caltrans shall:

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

1. Maintain the process Caltrans has instituted to identify and review the environmental effects, including Environmental Justice impacts, of each project.
2. Carry out a review of CE determinations for CEs, including those designated in 23 CFR 771.117(c), and consider the environmental analysis and project file documentation, prior to Caltrans' approval of the CE determination. The CE decision, for all of the assigned categories, will be approved by the Department's District Environmental Office Chief (DEOC) or Senior Environmental Planner (SEP) or an individual that supervises environmental staff in the preparation of NEPA approvals. The approval by the DEOC or SEP represents the quality control review of the documentation and proposed determination.
3. Carry out the other environmental responsibilities that are assigned under this MOU, as necessary or appropriate for the activity.
4. Document its approval of the determination, specifying the assigned CE that applies to the project and including, at a minimum, the printed name, title, and date of the Caltrans' official approving the determination. Signature authority for the CE determination form will not be delegated below the Senior Environmental Planner or Branch Chief that supervises environmental staff in the preparation of environmental approvals.
5. Include the following determination statement when documenting the CE findings:

“Caltrans has determined that this project has no significant impacts on the environment as defined by NEPA, and that there are no unusual circumstances as described in 23 CFR 771.117(b). As such, the project is categorically excluded from the requirements to prepare an environmental assessment or environmental impact statement under the National Environmental Policy Act. Caltrans has been assigned, and hereby certifies that it has carried out the responsibility to make this determination pursuant to Chapter 3 of Title 23, United States Code, Section 326 and a Memorandum of Understanding dated _____, executed between the FHWA and Caltrans.”

6. Document in the project file the specific categorically excluded activity; the CE findings, including the determination that the project has no significant impact(s) on the environment; that there are no unusual circumstances (23 CFR 771.117(b)); and that all applicable FHWA responsibilities assigned under Stipulations I and II have been completed.

C. Required State resources, qualifications, expertise, standards, and training.

1. Caltrans must maintain adequate organizational and staff capability and expertise to effectively carry out the responsibilities assigned to it under this MOU. This includes, without limitation:

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

- a. Using appropriate technical and managerial expertise to perform the functions required under this MOU and applicable laws, regulations, policy, and guidance;
 - b. Devoting adequate financial and staff resources to carry out the responsibilities assumed by Caltrans; and
 - c. Demonstrating, in a consistent manner, the capacity to perform Caltrans' responsibilities under the MOU and applicable Federal law.
2. Caltrans agrees that it shall maintain on its staff or through consultant services all of the environmental and other technical expertise needed to carry out its responsibilities under this MOU and 23 U.S.C. 326. Without limiting the foregoing, when carrying out the requirements of Section 106 of the National Historic Preservation Act, as amended, Caltrans shall comply with 36 CFR 800.2(a)(1). All actions that involve the identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meet the Secretary of the Interior's Professional Qualifications Standards (published at 48 FR 44738-44739). Caltrans shall ensure that all documentation required under 36 CFR 800.11 is reviewed and approved by a staff member or consultant who meets the Professional Qualifications Standards.

D. Caltrans quality control.

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

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

- E. MOU performance monitoring and quality assurance. FHWA and Caltrans shall cooperate in monitoring performance under this MOU and each party shall modify its practices as needed to assure quality performance by Caltrans and FHWA. Monitoring will include consideration of the technical competency and organizational capacity of Caltrans, as well as Caltrans' performance of its CE processing functions. Performance considerations will include, without limitation, the quality and consistency of Caltrans' project determinations, adequacy and capability of the resources applied by Caltrans, and the quality and consistency of Caltrans' administration of its responsibilities under this MOU. In support of the monitoring efforts:
1. Caltrans shall annually submit to FHWA a list of the CE determinations and Section 4(f) determinations that Caltrans approved during the previous 12 months, within 30 business days after the end of each annual reporting period. Such reduction in reporting frequency, and any revocation of such reduction by FHWA, shall not be deemed an amendment under Stipulation VIII. In the annual report, project names, locations, and decisions shall be provided for all Environmental Justice analysis.
 2. Caltrans, at its discretion, may develop a voluntary self-assessment report summarizing its performance under this MOU. The report will identify any areas where improvement is needed and what measures Caltrans is taking to implement those improvements. The report will include actions taken by Caltrans as part of its quality control efforts under stipulation IV(D). Following submission of the report to FHWA (electronically or in hard copy), Caltrans shall schedule a follow-up meeting with FHWA at which the parties will discuss the report, Caltrans' performance of this MOU, and FHWA's monitoring activities.
 3. Caltrans shall maintain electronic or paper project records and general administrative records pertaining to its MOU responsibilities and the projects processed hereunder. The records shall be available for inspection by FHWA at any time during normal business hours. Caltrans shall provide FHWA with copies of any documents FHWA may request. Caltrans shall retain those records, including all letters and comments received from governmental agencies, the public, and others about the performance of activities assigned under this MOU, for a period of no less than 3 years after completion of project construction. This 3-year retention provision does not relieve Caltrans of its project or program recordkeeping responsibilities under 2 CFR 200.333 or any other applicable laws, regulations, or policies.
 4. Caltrans shall ensure that project records are available to the public consistent with requirements applicable to Federal agencies under 5 U.S.C. 552 (the Freedom of Information Act (FOIA), as amended in 2002) and NEPA.
 5. FHWA and Caltrans shall review Caltrans' records and may interview Caltrans staff to evaluate Caltrans' performance under this MOU. Such reviews will occur no sooner than the 19th month and no later than the 31st month of the MOU.

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

FHWA anticipates that, under normal circumstances, its evaluation of Caltrans' performance will be based on a modified version of a typical FHWA CE process review (to view FHWA guidance on how monitoring should occur visit <http://www.fhwa.dot.gov/hep/guidance/6004stateassumpt.cfm>). Modifications to the CE process review will include incorporation of measures specific to the responsibilities assigned to Caltrans pursuant to 23 U.S.C. 326 and will include performance measurements of compliance. However, FHWA reserves the right to determine in its sole discretion the frequency, scope, and procedures used for monitoring activities. Caltrans, by its execution of this MOU, acknowledges that it is familiar with FHWA CE Process Review procedures and with the expected modifications that will be adopted for the purpose of monitoring Caltrans' MOU performance.

6. Nothing in this Stipulation shall prevent FHWA from undertaking other monitoring actions, including audits, with respect to Caltrans' performance of the MOU. FHWA, in its sole discretion, may require Caltrans to perform such other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with this MOU, 23 U.S.C. 326, and other applicable Federal laws and regulations. Such requirement shall not be deemed an amendment under Stipulation VIII.
 7. Caltrans agrees to cooperate with FHWA in all quality assurance activities.
- F. Caltrans liability. Caltrans agrees that it is solely responsible and solely liable for complying with and carrying out this MOU, for the performance of all assigned responsibilities as provided by applicable law, and for any decisions, actions, or approvals by Caltrans. FHWA shall have no responsibility or liability for the performance of responsibilities assigned to Caltrans, including without limitation any decision or approval made by Caltrans pursuant to an assignment under 23 U.S.C. 326. Caltrans assumes sole responsibility and liability for any subsequent substantive action it takes under authority assigned in accordance with 23 U.S.C. 326 on a project FHWA determined to be a CE prior to June 7, 2007.
- G. Litigation.
1. Nothing in this MOU affects the United States Department of Justice's (hereinafter "DOJ") authority to litigate claims, including the authority to approve a settlement on behalf of the United States if either FHWA or another agency of the United States is named in such litigation, or if the United States intervenes. 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, Caltrans agrees to coordinate with DOJ in the defense of that action.
 2. Caltrans shall defend all claims brought in connection with the discharge of any responsibility assumed under this MOU. In the event of litigation, Caltrans shall provide qualified and competent legal counsel, including outside counsel if necessary. Caltrans shall provide the defense at its own expense, subject to 23

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

U.S.C. 326(f) concerning Federal-aid participation in attorney's fees for outside counsel hired by Caltrans. Caltrans shall 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.

3. Caltrans will notify FHWA and DOJ's Assistant Attorney General for the Environment and Natural Resources Division, within seven (7) calendar days of Caltrans Legal Division's receipt of service of process of any complaint, concerning its discharge of any responsibility assumed under this MOU. Caltrans' notification to FHWA and USDOJ shall be made prior to its response to the complaint. In addition, Caltrans shall notify FHWA within seven (7) calendar days of receipt of any notice of intent to sue concerning its discharge of any responsibility assumed under part 3 of this MOU.
4. Caltrans will provide FHWA and DOJ copies of any motions, pleadings, briefs, and other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. Caltrans will provide such copies to FHWA and DOJ within seven (7) calendar days of receipt of service of any document or, in the case of any documents filed by or on behalf of Caltrans, within seven (7) calendar days of the date of filing.
5. Caltrans will notify FHWA and DOJ prior to settling any lawsuit, in whole or in part, and shall provide FHWA and DOJ with a reasonable amount of time of at least ten (10) calendar days, to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. Caltrans will not execute any settlement agreement until FHWA and DOJ have provided comments on the proposed settlement, or the review period has expired, whichever occurs first.
6. Within seven (7) calendar days of receipt by Caltrans, Caltrans will provide notice to FHWA and DOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities Caltrans has assumed under this MOU. Caltrans shall notify FHWA and DOJ within five (5) days of filing a notice of appeal of a court decision. Caltrans shall confer with FHWA and DOJ regarding the appeal at least forty-five (45) days before filing an appeal brief in the case.
7. Caltrans's notifications to FHWA and DOJ in subparts IV(G)(3), (5), and (6) shall be made by electronic mail to FHWA_assignment_lit@dot.gov, and NRSDOT.enrd@usdoj.gov, unless otherwise specified by FHWA and DOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in subpart IV(G)(4), Caltrans 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. FHWA and DOJ's comments under subpart IV(G)(5)-(6) shall be made by electronic mail to Caltrans Chief Counsel, unless otherwise

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

specified by Caltrans. In the event that regular mail is determined necessary, mail should be sent by overnight mail service to:

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

For FHWA: Division Administrator for FHWA California Division, 650 Capitol Mall, Ste. 4-100, Sacramento, CA 95814-4708.

8. If FHWA withdraws responsibility for processing a project and makes the final CE determination for the project, then FHWA shall be responsible for defending that CE determination in the event of a challenge to that determination, including the final CE determination. Nothing in this paragraph shall relieve Caltrans of its liability for its final agency decisions prior to FHWA re-assumption of responsibility for processing the project.

H. Federal Register. While the MOU is in effect, if any CE project or program documents are required to be published in the Federal Register, such as a notice of final agency action under 23 U.S.C. 139(l), Caltrans shall transmit such document to FHWA and FHWA will publish such document in the Federal Register on behalf of Caltrans.

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

1. Archeology Report requested by the National Park Service;
2. Endangered Species Act Expenditure Reports requested by the United States Fish and Wildlife Service and the National Marine Fisheries Service;
3. NEPA Litigation Reports requested by the Council on Environmental Quality; and
4. Environmental Conflict Resolution reports requested by the Council on Environmental Quality.

V. CALTRANS CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

A. Caltrans hereby certifies that it has the necessary legal authority and the capacity to:

1. Accept the assignment under this MOU;
2. Carry out all of the responsibilities assigned to Caltrans; and

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

3. Agree to and perform all terms and conditions of the assignment as contained in this MOU and in 23 U.S.C. 326.
- B. The State of California hereby consents to, and accepts, the exclusive jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibilities of the USDOT Secretary assumed by Caltrans under this MOU. This 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 Caltrans pursuant to an assumption of responsibility under this MOU. The State of California understands and agrees that this acceptance constitutes a waiver of the State's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of addressing matters arising out of this MOU and carrying out the USDOT Secretary's responsibilities that have been assumed under this MOU.
1. FHWA and Caltrans shall have a plan to transition the responsibilities that Caltrans has assumed back to FHWA in the event that Caltrans' participation in the Program is terminated. This plan shall be developed to minimize disruption to projects, confusion to the public, and burdens on other affected Federal, State, and local agencies. The plan shall be approved by both FHWA and Caltrans.
- C. In accordance with 23 U.S.C. 326(e), Caltrans agrees that it shall be deemed to be a Federal agency for the purposes of the Federal law(s) under which Caltrans exercises any responsibilities pursuant to this MOU and 23 U.S.C. 326.
- D. Caltrans may not assign or delegate its rights or responsibilities under this MOU to any other agency, political subdivision, or entity, or to any private individual or entity. Without limiting the foregoing, Caltrans understands and agrees that it must retain the environmental decision-making responsibilities assigned to it under this MOU and may not assign or delegate such decision-making responsibilities to consultants or others.
- E. With respect to the public availability of any document or record under the terms of this MOU or the State's open records law, California Government Code 6250 et seq., Caltrans certifies that the laws of the State provide that any decision regarding the release or public availability of a document or record may be legally challenged or reviewed in the courts of the State.
- F. Caltrans certifies that the persons signing this MOU are each duly authorized to do so and have the respective legal authority among them to:
1. Waive the State's Eleventh Amendment rights pursuant to the authority in California Streets and Highways Code 820.1;
 2. Consent to Federal court jurisdiction as specified above;
 3. Enter into this MOU on behalf of the State;

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

4. Make the certifications set forth in this MOU; and
5. Bind the State to the terms and conditions contained in this MOU.

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

VI. PUBLIC NOTICE AND COMMENT

- A. The execution of this MOU, and of any amendment or renewal, requires prior public notice and an opportunity for comment.
- B. Caltrans shall publish notice of the availability of this MOU, and any proposed amendment or renewal, for public review and comment and information regarding access to the USDOT Docket Management System on its website.
- C. FHWA shall publish in the Federal Register a notice of availability of this MOU and any proposed amendment or renewal of this MOU, for public review and a thirty (30) day comment period. The notice will expressly request comments on any types of activities proposed for assignment under Stipulation I(B), and will include a statement of the public availability of supporting documentation for any assignment under Stipulation I(B). The notice also must advise the public about how to learn about FHWA's final decision on the proposed MOU, including how to obtain a copy of any resulting final MOU. FHWA will establish a docket in the USDOT Docket Management System to receive comments.
- D. Caltrans and FHWA shall consider comments provided by the respondents to the public notices before finalizing the MOU, or any proposed amendment or renewal agreement. Upon completion of the decision-making process, FHWA shall make the final MOU and any amendments available for public inspection. FHWA and Caltrans may rely on the Caltrans' website to meet this requirement.
- E. Caltrans agrees that at all times that this MOU is in effect, Caltrans will post on its website (<http://www.dot.ca.gov/hq/env/nepa/>) a notice of the availability to the public, upon request, of copies of Caltrans' annual reports of CE determination reports prepared pursuant to Stipulation IV(E)(2). FHWA will arrange for the posting of a similar notice on FHWA's website or create a link from FHWA's site to Caltrans' website.

VII. TERM AND RENEWAL

- A. This MOU shall have a term of five (5) years, beginning on the date of the last signature.
- B. This MOU is renewable in writing for additional terms of five (5) years each if Caltrans requests renewal, FHWA determines that Caltrans has satisfactorily carried

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

out the provisions of this MOU. In considering any renewal of this MOU, FHWA will evaluate the effectiveness of this MOU and its overall impact on the environmental review process. FHWA may decide not to renew this MOU if FHWA determines that the operation of this MOU has substantial adverse effects on the environmental review process. Such evaluation may include consideration of any effects from the assumption by Caltrans of only some, but less than all, of FHWA's environmental review, consultation, or other related responsibilities as listed in Stipulation II.

At least eight (8) months prior to the end of the five (5) year term of this MOU, Caltrans and FHWA shall meet to discuss the results of the monitoring and consider any amendments to this MOU. This meeting may be combined with a meeting to discuss performance under the monitoring provisions in Stipulation IV(E)(2) of this MOU.

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

VIII. AMENDMENTS

- A. Any party to this MOU may request that it be amended, or administratively modified to reflect non-substantive changes, whereupon the parties shall consult to consider such an amendment. Public notice and comment is not required for the parties to agree to a technical non-substantive change.
- B. If, after the required public notice and comment, the parties agree to amend the MOU, then FHWA and Caltrans may execute an amendment with new signatures and dates of the signatures. The term of the MOU shall remain unchanged unless otherwise expressly stated in the amended MOU. Any amendment that extends the term of the MOU shall be treated as a renewal and FHWA must make the determinations required for a renewal under Stipulation VII.

IX. TERMINATION

- A. Entire MOU. Caltrans, or Caltrans and FHWA by mutual agreement, may terminate this MOU in its entirety.
 - 1. FHWA may terminate this MOU without the agreement of Caltrans if:
 - a. FHWA determines that Caltrans has failed to adequately carry out the responsibilities assigned to Caltrans in this MOU; and
 - b. FHWA provides to Caltrans a written notification of its non-compliance determination detailing a description of each responsibility in need of corrective action regarding an inadequacy identified; and

23 U.S.C. 326 CE Assignment MOU

FHWA, California Division and the California Department of Transportation

- c. Caltrans shall have a period of not less than 120 days to take such corrective action as FHWA determines to be necessary to comply with this MOU; and
 - d. Caltrans fails to take satisfactory corrective action as determined by FHWA; and
 - e. After the notification and the period to take corrective action Caltrans has failed to take satisfactory corrective action as determined by FHWA, and FHWA provides Caltrans with a notice of termination.
 2. Caltrans may terminate its participation in the program by providing a written notice to FHWA no later than 90 calendar days before the date of termination.
 - B. Part of MOU. By mutual agreement, FHWA and Caltrans may terminate Caltrans' responsibilities with respect to particular designated activities under Stipulation I, or with respect to one or more responsibilities assigned under Stipulation II. FHWA may exercise such partial termination without the agreement of Caltrans if FHWA determines that Caltrans has failed to adequately meet MOU requirements for the responsibilities in question, but that termination of the entire MOU is not warranted. The procedures in Stipulation X apply.
- X. PROCEDURES FOR TERMINATION AND FHWA-INITIATED PROJECT EXCLUSIONS
- A. Except as provided in Stipulation X(B) below, the process for termination under Stipulation IX(B), and for exclusion of a project from the MOU assignment by FHWA under Stipulation III(B)-III(C), is as follows:
 1. The party wishing to initiate the termination or exclusion shall provide to the other party a written notice of intent. The notice should identify the proposed action and explain the reason(s) for the proposed action.
 2. Following the notice, the parties shall have a 30-day period during which FHWA and Caltrans shall consult on amendments or other actions that would avoid termination or exclusion. By agreement, the parties may extend this consultation period, provided that such extension may not exceed the term of the MOU.
 3. Following the consultation period, any termination or exclusion by FHWA shall be effective as of a date thirty (30) days after the date of either a post consultation agreement between Caltrans and FHWA or the date of Caltrans' receipt of a FHWA notice of final determination of termination or exclusion. In the event of termination initiated by Caltrans, the termination shall be effective 90 days after the date of FHWA's receipt of Caltrans' termination notice. All responsibilities covered by the termination or exclusion shall revert to FHWA as of that effective date.

23 U.S.C. 326 CE Assignment MOU

FHWA, California Division and the California Department of Transportation

4. In the event of termination or exclusion, Caltrans and FHWA agree to cooperate to make the transfer of responsibilities back to FHWA effective in as orderly and administratively efficient manner as possible. Caltrans will promptly provide FHWA any documents, records and other project-related material needed for FHWA to proceed with processing any affected project. Appropriate NEPA procedures, including those under any applicable CE agreement, shall apply to the subsequent processing of projects.
- B. FHWA, in its sole discretion, may exclude a project from this MOU pursuant to Stipulation III(B)-III(C) without the 30-day consultation or final notice periods, if FHWA determines that:
1. Caltrans is not performing in accordance with this assignment and has failed to take appropriate corrective action; and
 2. Extreme conditions exist that justify immediate exclusion or termination and transfer back to FHWA of the responsibilities covered by the exclusion or termination.

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

- C. Caltrans' liability for its final agency actions under this MOU, and the provisions of Stipulation V, shall survive the MOU. This survival clause includes, without limitation, the provisions of Stipulations IV(F)-IV(G) relating to liability and litigation.
- D. Termination and exclusion actions, and any decision not to renew, do not require public notice and comment.
- E. Termination or other action by FHWA in accordance with the provisions of this MOU does not limit or otherwise affect FHWA's ability to seek any other remedy or to take action under other provisions of applicable law, including without limitation any appropriate remedies as provided in 23 CFR1.36.

XI. STATE EXECUTION OF ASSIGNED RESPONSIBILITIES WITHOUT FHWA INVOLVEMENT

- A. FHWA will not provide any project-level assistance to Caltrans in carrying out any of the responsibilities assigned under this MOU. "Project-level assistance" includes advice, consultation, or document review with respect to the discharge of such responsibility for a particular project. However, project-level assistance does not include discussions concerning issues addressed in prior projects, legal interpretations of any applicable law contained in titles 23 or 49 of the United States Code, legal interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance. If a need for project-level assistance is identified as a result of the government-to-government consultation process

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

described in Stipulation II(B)(1), then FHWA shall reassume responsibility for the project as provided in Stipulation III(C).

- B. FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving Caltrans' consultation or coordination with another Federal, State, or local agency with respect to Caltrans' discharge of any of the responsibilities it has assumed under this MOU for any particular project. However, FHWA holds both monitoring and quality assurance obligations under this MOU and general oversight and stewardship obligations under the Federal-aid Highway Program. In furtherance of those obligations, FHWA occasionally may elect to attend meetings between Caltrans and other Federal agencies. Prior to attending such meetings, FHWA will make a reasonable and diligent effort to give Caltrans notice. In rare or extreme circumstances and based on its observations, FHWA may submit comments to Caltrans and the other Federal agency if FHWA determines such comment is necessary and in the Federal interest because:
1. FHWA reasonably believes that Caltrans is not in compliance with this MOU;
or
 2. FHWA determines that an issue between Caltrans and the other Federal agency has broad or unique policy implications for the administration of the national Federal-aid Highway Program.

XII. NOTICES

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

State of California Department of Transportation
Toks Omishakin, Director

1120 N Street, Mail Station 49
Sacramento, CA 95814

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

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

**23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation**

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

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



Date: April 18, 2022

Vincent Mammano
Division Administrator
Federal Highway Administration-California Division



Date: April 18, 2022

Steven Keck
Acting Director
California Department of Transportation



Date: April 18, 2022

Erin E. Holbrook
Chief Counsel

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

Appendix A

23 CFR 771.117(d) Determination that the USDOT Secretary Assigns to Caltrans

Pursuant to Stipulation I(B)(1)(c)

The following categories can be used by Caltrans under Stipulation I(B)(1)(c) on a project-by project basis for a proposed project located anywhere in the State of California.

1. Construction, modification, or repair of storm water treatment devices (e.g., detention basins, bioswales, media filters, infiltration basins), protection measures such as slope stabilization and other erosion control measures throughout California.
2. Replacement, modification, or repair of culverts or other drainage facilities.
3. Projects undertaken to assure the creation, maintenance, restoration, enhancement, or protection of habitat for fish, plants, or wildlife (e.g., revegetation of disturbed areas with native plant species; stream or river bank revegetation; construction of new, or maintenance of existing fish passage conveyances or structures; restoration or creation of wetlands).
4. Routine repair of facilities due to storm damage, including permanent repair, to return the facility to operational condition that meets current standards of design and public health and safety without expanding capacity (e.g., slide repairs, construction or repair of retaining walls).
5. Routine seismic retrofit of facilities to meet current seismic standards and public health and safety standards without expansion of capacity.
6. Actions including, but not limited to, right-of-way use agreements, encroachment permits, and consent letters that are subject to subpart D of 23 CFR 710.
7. Drilling of test bores/soil sampling to provide information for preliminary design and for environmental analyses and permitting purposes.

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

Appendix B

List of FHWA Responsibilities Assigned

Air Quality

- Clean Air Act, 42 U.S.C. 7401-7671q. Determinations for project-level conformity if required for the project.

Noise

- Noise Control Act of 1972, 42 U.S.C. 4901-4918
- FHWA noise regulations at 23 CFR Part 772

Wildlife

- Endangered Species Act of 1973, 16 U.S.C. 1531-1544
- Marine Mammal Protection Act, 16 U.S.C. 1361-1423h
- Anadromous Fish Conservation Act, 16 U.S.C. 757a-757f
- Fish and Wildlife Coordination Act, 16 U.S.C. 661-667d
- Migratory Bird Treaty Act, 16 U.S.C. 703-712
- Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801-1891d

Historic and Cultural Resources

- National Historic Preservation Act of 1966, as amended, 54 U.S.C. 300101 et seq.
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470aa-mm
- Native American Grave Protection and Repatriation Act 25 U.S.C. 3001-3013; 18 U.S.C. 1170
- Preservation of Historical and Archeological Data, 54 U.S.C. 312501-312508

Social and Economic Impacts

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

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. 1251-1387: (Sections 319, 401, and 404)
- Coastal Barrier Resources Act, 16 U.S.C. 3501-3510
- Coastal Zone Management Act, 16 U.S.C. 1451-1466
- Safe Drinking Water Act, 42 U.S.C. 300f-300j-26
- Rivers and Harbors Act of 1899, 33 U.S.C. 403
- Wild and Scenic Rivers Act, 16 U.S.C. 1271-1287
- Emergency Wetlands Resources Act, 16 U.S.C. 3901 and 3921
- Wetlands Mitigation 23 U.S.C. 119(g)
- FHWA wetland and natural habitat mitigation regulations at 23 CFR part 777
- Flood Disaster Protection Act, 42 U.S.C. 4001-4130

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

Parklands and Other Special Land Uses

- Section 4(f), 23 U.S.C. 138 and 49 U.S.C., 303
- FHWA/FTA Section 4(f) Regulations at 23 CFR Part 774
- Land and Water Conservation Fund, 54 U.S.C. 200302-200310

Hazardous Materials

- Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601-9675
- Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9671-9675
- Resource Conservation and Recovery Act, 42 U.S.C. 6901-6992k

Executive Orders Relating to Highway Projects

- E.O. 11990 - Protection of Wetlands
- E.O. 11988 - Floodplain Management, as amended by E.O. 13690 – Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 CFR. sections 650.113 and 650.115)
- 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

FHWA-Specific

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

Note:

Under these laws and Executive Orders, FHWA will retain responsibility for conducting formal government-to-government consultations with federally-recognized Indian tribes.

Caltrans will continue to handle routine consultations with the tribes and understands that a tribe has the right to direct consultation with FHWA upon request. Caltrans may also assist FHWA with formal consultations, with the consent of a tribe, but FHWA remains responsible that this consultation occurs.

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

Appendix C

List of Caltrans Programmatic Agreements/Memoranda of Understanding

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

Statewide Agreements

- National Environmental Policy Act and Clean Water Act Section 404 Integration Process for Federal Aid Surface Transportation Projects in California

Signatories to Agreement: FHWA, Caltrans, US EPA, USACE, USFWS, NOAA
Effective Date: 5/17/2006
Web Address: <http://www.dot.ca.gov/ser/mou.htm#nepa404>

- 2014 First Amended Programmatic Agreement among the Federal Highway Administration, the Advisory Council on Historic Preservation, the California State Historic Preservation Officer, and the California Department of Transportation Regarding Compliance with Section 106 of the National Historic Preservation Act, as it Pertains to the Administration of the Federal-aid Highway Program in California (PA)

Signatories to Agreement: ACHP, SHPO, FHWA, Caltrans Director
Effective Date: January 1, 2014
Web Address:
http://www.dot.ca.gov/hq/env/cultural/index.htm#Section_106_Programmatic

- Memorandum of Agreement, Early Mitigation Planning for Transportation Improvements in California

Signatories to Agreement: Caltrans, FHWA, DFG, FWS and the Corps
Effective Date: 5/13/1991
Web Address: <http://www.dot.ca.gov/ser/mou.htm#biomitplanning>

List of related Agreements/Memoranda of Understanding

- USCG/FHWA MOA to Coordinate and Improve Bridge Planning and Permitting

Signatories to Agreement: USCG and FHWA
Effective Date: 1/14/2014
Web Address: <http://www.dot.ca.gov/ser/mou.htm#bridgepermits>

23 U.S.C. 326 CE Assignment MOU
FHWA, California Division and the California Department of Transportation

- Bridge Permits Procedures and Guidelines MOU

Signatories to Agreement: USCG, FHWA, FRA, FTA

Effective Date: 1/14/2014

Web Address: <http://www.dot.ca.gov/ser/mou.htm#bridgepermits>