

**MEMORANDUM OF UNDERSTANDING BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION AND THE
OHIO DEPARTMENT OF TRANSPORTATION CONCERNING
STATE OF OHIO'S PARTICIPATION IN THE PROJECT DELIVERY PROGRAM PURSUANT TO 23
U.S.C. 327**

THIS MEMORANDUM OF UNDERSTANDING (hereinafter "MOU") entered into by and between the FEDERAL HIGHWAY ADMINISTRATION (hereinafter "FHWA"), an administration in the UNITED STATES DEPARTMENT OF TRANSPORTATION (hereinafter "DOT"), and the State of Ohio, acting by and through its OHIO DEPARTMENT OF TRANSPORTATION (hereinafter "ODOT"), hereby provides as follows:

WITNESSETH

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

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

Whereas, the State of Ohio has expressed an interest in participating in the Program with respect to highway projects, and its legislature has enacted laws to allow the State to participate in the Program; and

Whereas, on April 12, 2015, prior to submittal of its application to FHWA, ODOT published notice of and solicited public comment on its intended application to the Program as required by 23 U.S.C. 327(b)(3), and revised the application based on comments received; and

Whereas, on May 27, 2015, the State of Ohio, acting by and through the ODOT, submitted its application to FHWA for participation in the Program with respect to highway projects; and

Whereas, on October 15, 2015, FHWA published a notice and provided an opportunity for comment on its preliminary decision to approve ODOT's request and solicited the views of other appropriate Federal agencies

concerning ODOT's application as required by 23 U.S.C. 327(b)(5); and

Whereas, the DOT Secretary, acting by and through FHWA, has determined that ODOT's application meets all of the requirements of 23 U.S.C. 327 with respect to the Federal environmental laws and highway projects identified in this MOU.

Now, therefore, FHWA and ODOT agree as follows:

PART 1. PURPOSE OF MEMORANDUM OF UNDERSTANDING

1.1 Purpose

- 1.1.1 This MOU officially approves ODOT's application to participate in the Program and is the written agreement required pursuant to 23 U.S.C. 327(a)(2)(A) and 327(c) under which the DOT Secretary may assign, and ODOT may assume, the responsibilities of the DOT Secretary for Federal environmental laws with respect to one or more highway projects within the State of Ohio. For purposes of this MOU, "highway project" is defined in 23 CFR 773.103.
- 1.1.2 The FHWA's decision to execute this MOU is based upon the information, representations, and commitments contained in ODOT's May 27, 2015, application. As such, this MOU incorporates the Application Package. However, this MOU shall control to the extent there is any conflict between this MOU and the Application Package.
- ~~1.1.3 This MOU shall be effective upon execution by both parties (hereinafter the "Effective Date").~~
- 1.1.4 Pursuant to 23 U.S.C. 327(c)(3)(B)-(C), and subpart 4.3 of this MOU, third parties may challenge ODOT's actions 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 Ohio, 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 ODOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the DOT Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq. with respect to the highway projects specified under subpart 3.3. This assignment includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for Federal highway projects such as 23 U.S.C.

139, 40 CFR parts 1500-1508, DOT Order 5610.1 C, and 23 CFR part 771 as applicable.

- 3.1.2 On the cover page of each environmental assessment (EA), finding of no significant impact (FONSI), environmental impact statement (EIS), and record of decision (ROD) prepared under the authority granted by this MOU, and for any memorandum corresponding to any categorical exclusion (CE) determination it makes, ODOT shall insert the following language in a way that is conspicuous to the reader or include it in a CE project record:

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

- 3.1.3 ODOT 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 ODOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the DOT Secretary's responsibilities for environmental review, reevaluation, consultation, or other action pertaining to the review or approval of highway projects specified under subpart 3.3 required under the following Federal environmental laws:

Air Quality

- Clean Air Act (CAA), 42 U.S.C. 7401-7671q. *with the exception of any conformity determinations.*

Noise

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

Wildlife

- Endangered Species Act of 1973, 16 U.S.C. 1531-1544

- Fish and Wildlife Coordination Act, 16 U.S.C. 661-667d
- Migratory Bird Treaty Act, 16 U.S.C. 703-712

Hazardous Materials Management

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

Historic and Cultural Resources

- National Historic Preservation Act of 1966, as amended, 54 U.S.C. 306101 et seq.
- ~~Archeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm~~
- Title 54, Chapter 3125—Preservation of Historical and Archeological Data, 54 U.S.C. 312501-312508.
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001-3013; 18 U.S.C. 1170

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 401, 402, 404, 408, and Section 319)
- Coastal Barrier Resources Act, 16 U.S.C. 3501-3510
- Coastal Zone Management Act, 16 U.S.C. 1451-1466
- Safe Drinking Water Act (SDWA), 42 U.S.C. 300f - 300j-26
- General Bridge Act of 1946, 33 U.S.C. 525 – 533

- Rivers and Harbors Act of 1899, 33 U.S.C. 401-406
- Wild and Scenic Rivers Act, 16 U.S.C. 1271-1287
- Emergency Wetlands Resources Act, 16 U.S.C. 3901 and 3921
- Wetlands Mitigation, 23 U.S.C. 119(g) and 133(b)(14)
- FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777
- Flood Disaster Protection Act, 42 U.S.C. 4001-4130

Parklands

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

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

Executive Orders Relating to Highway Projects

- E.O. 11990, Protection of Wetlands
- E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 C.F.R. sections 650.113 and 650.115)
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13112, Invasive Species

3.2.2 Any FHWA environmental review responsibility not explicitly listed above and assumed by ODOT shall remain

the responsibility of FHWA unless the responsibility is added by written agreement of the parties through the amendment process established in Part 14 and pursuant to 23 CFR 773.113(b). This provision shall not be interpreted to abrogate ODOT's responsibilities to comply with the requirements of any Federal environmental law that apply directly to ODOT independent of FHWA's involvement (through Federal assistance or approval).

- 3.2.3 The DOT Secretary's responsibilities for government-to-government consultation with Indian Tribes as defined in 36 CFR 800.16(m) are not assigned to or assumed by ODOT under this MOU. The FHWA remains responsible for all government-to-government consultation, including initiation of government-to-government consultation consistent with Executive Order 13175 - Consultation and Coordination with Tribal Governments, unless otherwise agreed as described in this Part. A notice from ODOT to an Indian Tribe advising the Tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If a project-related concern or issue is raised in a government-to-government consultation process with an Indian Tribe, as defined in 36 CFR 800.16(m), and is related to NEPA or another Federal environmental law for which ODOT 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 ODOT, 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 concerning FHWA initiated withdrawal of assignment shall apply. This MOU is not intended to abrogate, or prevent future entry into, any agreement among ODOT, FHWA, and a Tribe under which the Tribe agrees to permit ODOT to administer government-to-government consultation activities for FHWA. However, such agreements are administrative in nature and do not relieve the FHWA of its legal responsibility for government-to-government consultation.
- 3.2.4 Nothing in this MOU shall be construed to permit ODOT's assumption of the DOT Secretary's responsibilities for conformity determinations required under Section 176 of the Clean Air Act (42 U.S.C. 7506) or any responsibility under 23 U.S.C. 134 or 135, or under 49 U.S.C. 5303 or 5304.
- 3.2.5 On the cover page of each biological evaluation or assessment, historic properties or cultural resources report, section 4(f) evaluation, feasibility study, underserved populations impact analysis report, alternative evaluation report, or other decision-making document made available to the public, ODOT shall insert the following language in a way that is conspicuous to the reader or include in the project record:

"The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried-out by ODOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 11, 2015, and executed by FHWA and ODOT."

- 3.2.6 ODOT shall disclose to the public and agencies, as part of the NEPA approval document (CE, EA, EIS), the disclosure in stipulation 3.2.5 above.
- 3.2.7 ODOT will continue to adhere to the original terms of Biological Opinions (BOs) issued by the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) or both USFWS and NMFS prior to the effective date of this MOU, so long as the original BO terms are not amended or revised. Any revisions or amendments to a BO made after the effective date of this MOU would be ODOT's responsibility. ODOT agrees to assume FHWA's environmental review role and responsibilities as identified in existing interagency agreements among ODOT, USFWS, and FHWA, such as the Programmatic Agreement for Biological Evaluations, or negotiate new agreements with USFWS, if needed. ODOT agrees to assume FHWA's ESA Section 7 responsibilities of consultations (formal and informal) ongoing as of the date of the MOU execution.
- 3.2.8 ODOT 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 by subpart 3.3.2 below or otherwise specified in this subpart, the assignments and assumptions of the DOT Secretary's responsibilities under subparts 3.1 and 3.2 above shall apply to the environmental review, consultation, or other action pertaining to the environmental review or approval of the following classes of highway projects located within the State of Ohio. The definition of "highway project" is found at 23 CFR 773.103, and for purposes of this MOU, "highway project" includes eligible preventative maintenance activities. The State shall conduct any reevaluations required under 23 CFR 771.129 for projects for which construction is not completed prior to the date of this MOU, in accordance with the provisions of this MOU. Prior to approving any CE determination, FONSI, final EIS, or final EIS/ROD, the State 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. Projects requiring an EIS, both on the State highway system (SHS) and local government projects off the SHS that are funded by FHWA or require FHWA approvals.
 - B. Projects qualifying for CEs, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals.
 - C. Projects requiring EAs, both on the SHS and local government projects off the SHS that are funded by

FHWA or require FHWA approvals.

- D. Projects funded by other Federal agencies [or projects without any Federal funding] that also require FHWA approvals. For these projects, ODOT would not assume the NEPA responsibilities of other Federal agencies. However, ODOT may use or adopt other Federal agencies' NEPA analyses consistent with 40 CFR parts 1500 -1508, and DOT 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 and classes of highway projects.

- A. Any highway projects authorized under 23 U.S.C. 202 and 203;
- B. Any highway projects authorized under 23 U.S.C. 204 unless such projects will be designed and constructed by ODOT.
- C. Any project that crosses State boundaries and any project that crosses or is adjacent to international boundaries. For purposes of this agreement 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. Current projects meeting these criteria are:

1. HAM-50/State Line Road Improvements, PID 93507- Addition of left/right turn lanes and widening.
2. HAM-IR 71/IR 75-0.00/0.22, PID 75119- Brent Spence Bridge.
3. SCI-US23-0.00, PID 98150- Bridge deck overlay/resurfacing.
4. JEF-Wellsburg Bridge, PID 79353- Project is a new bridge over Ohio River to WV.

- D. Programs and projects advanced by direct recipients of Federal-aid Highway Program funds other than ODOT, including but not limited to:
 - i. Recreational Trails program (23 USC 206);
 - ii. TIGER Discretionary grants;
 - iii. Direct recipient tribal project;
 - iv. National Significant Freight and Highway Project Program

3.4 Limitations

3.4.1 As provided at 23 U.S.C. 327(e), ODOT shall be solely responsible and solely liable for carrying out all of the responsibilities it has assumed under this Part.

3.4.2 As provided at 23 U.S.C. 327(a)(2)(D), any highway project or responsibility of the DOT Secretary that is not

explicitly assumed by ODOT under subpart 3.3.1 in this MOU remains the responsibility of the DOT Secretary.

PART 4. CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

4.1 Certifications

4.1.1 ODOT hereby makes the following certifications:

- A. ODOT has the legal authority to accept all the assumptions of responsibility identified in Part 3 of this MOU;
- B. ODOT has the legal authority to take all actions necessary to carry out all of the responsibilities it has assumed under this MOU;
- C. ODOT has the legal authority to execute this MOU;
- D. The State of Ohio currently has laws in effect that are comparable to 5 U.S.C. 552, and those laws are located at Ohio Revised Code § 149.43, et seq. (the Ohio Public Records Act); and
- E. The Ohio Public Records Act provides that any decision regarding the public availability of a document under that Act is reviewable by an Ohio court of competent jurisdiction.

4.2 State Commitment of Resources

4.2.1 As provided at 23 U.S.C. 327(c)(3)(D), ODOT will maintain the financial resources necessary to carry out the responsibilities it is assuming. ODOT believes, and FHWA agrees, that the summary of financial resources contained in ODOT's application, dated May 27, 2015, appears to be adequate for this purpose. Should FHWA determine, after consultation with ODOT, that ODOT's financial resources are inadequate to carry out the DOT Secretary's responsibilities, ODOT will take appropriate action to obtain the additional financial resources needed to carry out these responsibilities. If ODOT is unable to obtain the necessary additional financial resources, ODOT shall inform FHWA, and this MOU will be amended to assign only the responsibilities that are commensurate with ODOT's financial resources.

4.2.2 ODOT 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 ODOT's assumed responsibilities under this MOU and applicable Federal laws.

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

4.2.3 When carrying out the requirements of Section 106 of the National Historic Preservation Act, as amended, ODOT staff (including consultants) shall comply with 36 CFR 800.2(a)(1). All actions that involve the identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meet the Secretary of Interior's Professional Qualifications Standards (published at 48 FR 44738-39, Sept. 29, 1983). ODOT shall ensure that all documentation required under 36 CFR 800.11 is reviewed and approved by a staff member or consultant who meets the Professional Qualifications Standards.

4.3 Federal Court Jurisdiction

4.3.1 As provided at 23 U.S.C. 327(c)(3)(B), and pursuant to Ohio Revised Code Section 5531.30(B), ODOT hereby expressly consents, on behalf of the State of Ohio, to accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the DOT Secretary assumed by ODOT 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 DOT Secretary's responsibilities for any decision or approval made by ODOT pursuant to an assumption of responsibility under this MOU. ODOT understands and agrees that, in accordance with 23 U.S.C. 327, this acceptance constitutes a waiver of the State of Ohio's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of carrying out the DOT Secretary's responsibilities that have been assumed under this MOU.

PART 5. APPLICABILITY OF FEDERAL LAW

5.1 Procedural and Substantive Requirements

- 5.1.1 As provided at 23 U.S.C. 327(a)(2)(C), in assuming the DOT Secretary's responsibilities under this MOU, ODOT shall be subject to the same procedural and substantive requirements that apply to the DOT Secretary in carrying out these responsibilities. Such procedural and substantive requirements include, but are not limited to, Federal statutes and regulations, Executive Orders issued by the President of the United States, DOT Orders, Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500 -1508), FHWA Orders, official guidance and policy issued by the CEQ, Office of Management and Budget (OMB), DOT, or the 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 below, interagency agreements such as programmatic agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process [e.g., the 2015 Red Book – Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects, etc.].
- A. ODOT 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 DOT and the USCG and the MOA between FHWA and the USCG.
- 5.1.2 Official DOT and FHWA formal guidance and policies relating to environmental review are posted on the FHWA's Website, contained in the FHWA Environmental Guidebook, published in the Federal Register, or may be sent to ODOT electronically or in hard copy.
- 5.1.3 After the Effective Date of this MOU, FHWA will use its best efforts to ensure that any new or revised Federal policies and guidance that are final and applicable to FHWA's responsibilities under NEPA and other environmental laws that are assumed by ODOT under this MOU are communicated to ODOT within 10 calendar days of issuance. Delivery may be accomplished by e-mail, Web posting (with email or mail to ODOT notifying of Web posting), mail, or publication in the Federal Register (with email or mail to ODOT notifying of publication). If communicated to ODOT by e-mail or mail, such material will be sent to ODOT's Administrator of Environmental Services. In the event that a new or revised FHWA policy or guidance is not made available to ODOT as described in the preceding sentence, and if ODOT had no actual knowledge of such policy or guidance, then a failure by ODOT to comply with such Federal policy or guidance will not be a basis for termination under this MOU.
- 5.1.4 ODOT will work with all other appropriate Federal agencies concerning the laws, guidance, and policies that such other Federal agencies are responsible for administering. For interagency agreements that involve signatories in addition to FHWA and ODOT, within 6 months after the effective date of this MOU, FHWA and

ODOT will contact the relevant third party or parties to determine whether any action should be taken with respect to such agreement. Such actions may include:

- A. Consulting with the third party to obtain written consent to the continuation of the interagency agreement in its existing form, but with the substitution through assignment of ODOT for FHWA; or
- B. Negotiating with the third party to amend the interagency agreement as needed so that the interagency agreement continues but that ODOT assumes FHWA's responsibilities.

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, ODOT will carry out the assumed environmental review, consultation, or other related activity in accordance with applicable laws and regulations but without the benefit of the provisions of the interagency agreement.

- 5.1.5 Upon termination of this MOU, FHWA and ODOT shall contact the relevant third party to any interagency agreement and determine whether the interagency agreement should be amended or reinstated as it was on the effective date of this MOU.

5.2 Rulemaking

- 5.2.1 As provided at 23 U.S.C. 327(f), nothing in this MOU permits ODOT to assume any rulemaking authority of the DOT Secretary. In addition, ODOT may not establish policy and guidance on behalf of the DOT Secretary or FHWA for highway projects covered in this MOU. ODOT'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, policy, or guidance established by or applicable to the DOT Secretary or FHWA.

5.3 Effect of Assumption

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

5.4 Other Federal Agencies

- 5.4.1 As provided at 23 U.S.C. 327(a)(2)(E), nothing in this MOU preempts or interferes with any power, jurisdiction, responsibility, or authority of an agency other than DOT (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), ODOT shall be solely liable and solely responsible for carrying out the responsibilities assumed under this MOU, in lieu of and without further approval of the DOT Secretary. The FHWA and DOT shall have no responsibility or liability for the performance of the responsibilities assumed by ODOT, including any decision or approval made by ODOT in the course of participating in the Program.

6.2 Litigation

- 6.2.1 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 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, ODOT agrees to coordinate with DOJ in the defense of that action.
- 6.2.2 ODOT shall defend all claims brought in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, ODOT shall provide qualified and competent legal counsel, including outside counsel if necessary. ODOT shall 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 ODOT's counsel. ODOT 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.
- 6.2.3 ODOT will notify the FHWA's Ohio Division Office and DOJ's Assistant Attorney General for the Environment and Natural Resources Division, within seven (7) calendar days of ODOT's receipt of service of process of any complaint, concerning discharge of any responsibility assumed under this MOU. ODOT's notification to the FHWA and DOJ shall be made prior to its response to the complaint. In addition, ODOT shall notify FHWA's Ohio 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 ODOT will provide FHWA's Ohio Division Office and DOJ copies of any motions, pleadings briefs, or other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. ODOT will provide such copies to the FHWA and DOJ within seven (7) calendar days of service of any document, or in the case of any documents filed by or on behalf of ODOT, within seven (7) calendar days of the date of filing.

- 6.2.5 ODOT will notify the FHWA's Ohio Division Office and DOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and DOJ with a reasonable amount of time of at least ten (10) calendar days, to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. ODOT will not execute any settlement agreement until: (1) FHWA and DOJ have provided comments on the proposed settlement; (2) FHWA and DOJ have 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 ODOT, ODOT will provide notice to FHWA's Ohio Division Office and DOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities ODOT has assumed under this MOU. ODOT shall notify FHWA's Ohio Division Office and DOJ within five (5) days of filing a notice of appeal of a court decision. ODOT shall confer with FHWA and DOJ regarding the appeal at least forty-five (45) days before filing an appeal brief in the case.
- 6.2.7 ODOT's notification to FHWA and DOJ in subparts 6.2.3, 6.2.4, 6.2.5, and 6.2.6, shall be made by electronic mail to FHWA_assignment_lit@dot.gov and NRS DOT.enrd@doj.gov, unless otherwise specified by FHWA and DOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in subpart 6.2.4, ODOT 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 6.2.5 and 6.2.6 shall be made by electronic mail to Tim.Hill@dot.ohio.gov unless otherwise specified by ODOT. 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, FHWA Ohio Division, 200 North High Street, Rm 328, Columbus, OH 43215.

6.3 Conflict Resolution

- 6.3.1 In discharging any of the DOT Secretary's responsibilities under this MOU, ODOT agrees to comply with any applicable requirements of DOT and FHWA statute, regulation, guidance or policy regarding conflict resolution. This includes the DOT Secretary's responsibilities for issue resolution under 23 U.S.C. 139(h), with the exception of the DOT Secretary's responsibilities under 23 U.S.C. 139(h)(6) regarding financial penalties.

- 6.3.2 ODOT agrees to follow 40 CFR part 1504 in the event of pre-decision referrals to CEQ for Federal actions determined to be environmentally unsatisfactory. ODOT also agrees to coordinate and work with CEQ on matters brought to CEQ with regards the environmental review responsibilities for Federal highway projects ODOT has assumed.

PART 7. INVOLVEMENT WITH OTHER AGENCIES

7.1 Coordination

- 7.1.1 ODOT agrees to seek early and appropriate coordination with all appropriate 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 ODOT will ensure that it has appropriate processes and procedures in place that provide for proactive and timely consultation, coordination, and communication with all appropriate Federal agencies in order to carry out any of the responsibilities assumed under this MOU, including the submission of all environmental impact statements together with comments and responses to the Environmental Protection Agency (EPA) as required at 40 CFR 1506.9 and for EPA's review as required by section 309 of the Clean Air Act. These processes and procedures shall be formally documented. Such formal documentation may be in the form of a formal executed interagency agreement or in other such form as appropriate.~~

PART 8. INVOLVEMENT WITH FHWA

8.1 Generally

- 8.1.2 Except as specifically provided otherwise in this MOU, FHWA will not provide any project-level assistance to ODOT in carrying out any of the responsibilities it has assumed under this MOU. Project-level assistance shall include any advice, consultation, or document review with respect to the discharge of such responsibility for a particular highway project. However, project-level assistance does not include process or program level assistance as provided in subpart 8.1.5, discussions concerning issues addressed in prior projects, interpretations of any applicable law contained in 23 U.S.C. or 49 U.S.C, interpretations of any FHWA or DOT regulation, or interpretations of FHWA or DOT policies or guidance.
- 8.1.3 The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving ODOT's consultation or coordination with another Federal agency with respect to ODOT's discharge of any of

the responsibilities assumed under this MOU for any particular highway project. However, the FHWA may attend meetings between ODOT and other Federal agencies. Further, FHWA may submit comments to ODOT and the other Federal agency in the following extraordinary circumstances:

- A. FHWA reasonably believes that ODOT is not in compliance with this MOU;
- B. FHWA determines that an issue between ODOT and the other Federal agency concerns emerging national policy issues under development by the DOT; or
- C. Upon request by either ODOT or the Federal agency and agreement by FHWA.

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

- 8.1.4 Other Federal agencies may raise concerns regarding the compliance with this MOU by ODOT and may communicate these concerns to the FHWA. The FHWA will review the concerns and any information provided to FHWA by such other Federal agency. If, after reviewing these concerns, FHWA and such other Federal agency still have concerns regarding ODOT'S compliance, FHWA will notify ODOT of the potential compliance issue and will work with both ODOT and the relevant Federal agency to resolve the issue and, if necessary, take appropriate action to ensure compliance with this MOU.
- 8.1.5 At ODOT's request, FHWA may assist ODOT 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, those processes and procedures concerning ODOT'S consultation, coordination, and communication with other Federal agencies.
- 8.1.6 ODOT's obligations and responsibilities under 23 CFR 1.5 are not altered in any way by executing this MOU.

8.2 MOU Monitoring and Oversight

- 8.2.1 The FHWA will provide necessary and appropriate monitoring and oversight of ODOT's compliance with this MOU. The FHWA's monitoring and oversight activities under this MOU in years 1 through 4 of this MOU's term will primarily consist of auditing as provided at 23 U.S.C. 327(g) and Part 11 of this MOU, and evaluating attainment of the performance measures listed in Part 10 of this MOU. After the fourth year of ODOT's participation in the Project Delivery Program, FHWA will monitor ODOT's compliance with the MOU, including the provision by ODOT of financial resources to carry out the MOU. The FHWA's monitoring and oversight

may also include submitting requests for information to ODOT and other relevant Federal agencies, verifying ODOT's financial and personnel resources dedicated to carrying out the responsibilities assumed, and reviewing documents and other information.

- 8.2.2 Pursuant to 23 U.S.C. 327(c)(4), ODOT is responsible for providing FHWA any information FHWA considers necessary to ensure that ODOT is adequately carrying out the responsibilities assigned. When requesting information subject to section 327(c)(4), FHWA will provide the request to ODOT in writing, and the request will identify with reasonable specificity the information required. FHWA will also indicate in the request a deadline for the information to be provided. ODOT will, in good faith, work to ensure the information requested is provided by the deadline. ODOT's response to an information request under this paragraph will include, where appropriate, making relevant employees and consultants available at their work location (including in-person meeting, teleconference, videoconference or other electronic means as may be available).
- 8.2.3 ODOT shall make project files and general administrative files pertaining to its discharge of the responsibilities it has assumed under this MOU reasonably available for inspection by FHWA at the files' locations upon reasonable notice, which is not less than 5 business days. These files shall include, but are not limited to, all letters and comments received from governmental agencies, the public, and others with respect to ODOT's discharge of the responsibilities assumed under this MOU.
- 8.2.4 In carrying out the responsibilities assumed under this MOU, ODOT agrees to carry-out regular quality control and quality assurance activities to ensure that the assumed responsibilities are being conducted in accordance with applicable law and this MOU. At a minimum, ODOT's quality control/quality assurance (QA/QC) activities will include the review and monitoring of its processes and performance relating to project decisions, environmental analysis, project file documentation, checking for errors and omissions, legal sufficiency reviews, and taking appropriate corrective action as needed. Within 3 months of the effective date of this MOU, ODOT shall finalize a QA/QC process that satisfies the requirements of this subpart. In developing and implementing the QA/QC process, ODOT shall consult with the FHWA Ohio Division Office. ODOT agrees to cooperate with FHWA to incorporate recommendations FHWA may have with respect to its QA/QC process.
- 8.2.5 ODOT shall perform regular self-assessments of its QA/QC process and performance to determine whether its process is working as intended, to identify any areas needing improvements in the process, and to timely take any corrective actions necessary to address the areas needing improvement. At least 1 month prior to the date of a scheduled FHWA audit, ODOT shall transmit a summary of the previous year's self-assessment(s) to the FHWA Ohio Division Office. The summary shall include a description of the scope of the self-assessment(s) conducted and the areas reviewed, a description of the process followed in conducting the self-assessment, a list of the areas identified as needing improvement, any corrective actions that have been or will be implemented, a statement from the Administrator of ODOT's Office of Environmental Services concerning

whether the processes are ensuring that the responsibilities ODOT has assumed under this MOU are being carried-out in accordance with this MOU and all applicable Federal laws and policies, and a summary of ODOT's progress toward attaining the performance measures listed in Part 10 of this MOU. After a period of 2 years from the Effective Date of this MOU, ODOT shall conduct its self-assessments no less frequently than annually.

- 8.2.6 ODOT will provide FHWA Ohio Division Office with access to its electronic system for environmental documentation and develop a query that creates a report of real time data, the listing of any approvals and decisions ODOT has made with respect to the responsibilities ODOT has assumed under this MOU.

8.3 Record Retention

- 8.3.1 ODOT will retain project files and files pertaining to the discharge of its responsibilities under this MOU in perpetuity, in accordance with the ODOT State Records Retention and Disposition Schedule Series Authorization No. 770-2385, or as amended, which meets or exceeds requirements established in FHWA Records Disposition Manual (Field Offices) Chapter 4, FHWA Order No. 1324.1 B, issued July 29, 2013, or in accordance with any subsequent order that supersedes or replaces Order No. 1324.1 B. 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, ODOT will meet such requirement.

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

- 8.3.2 In addition to the period of time specified in 2 C.F.R. 200.333, ODOT will ensure that the following retention periods are maintained for each specified type of record:

- A. **Environment Correspondence Files:** Correspondence between FHWA and ODOT 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 ODOT 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 ODOT may follow the State records disposition process for these records.
- B. **Environmental Impact Statements and/or Section 4(f) Statements – FHWA:** For a period of 8 years after approval of the final construction voucher ODOT 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; 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 ODOT may follow the State records disposition process for these records except that ODOT will permanently store the above referenced records for Significant Transportation Projects as they are defined in Order No. 1224.1B.

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:** Environmental Impact Statements - Other Agencies: Files containing reviews and comments furnished by ODOT to other Federal agencies following reviews of an EIS for which another Federal agency is the lead agency shall be maintained by ODOT for a period of 5 years. After 5 years, ODOT may destroy these files when no longer needed.

- D. **Noise Barriers:** ODOT agrees to maintain an inventory of all constructed noise abatement measures containing the information required to comply with 23 C.F.R. 772.13(f). ODOT will retain the required information for a period of four (4) years after the end of the Federal fiscal year in which construction of the particular noise abatement measure is completed

8.3.3. Nothing contained in this MOU is intended to relieve ODOT of its recordkeeping responsibilities under 2 CFR 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), ODOT shall transmit such document to the FHWA's Ohio Division Office and FHWA will cause such document to be published in the *Federal Register* on behalf of ODOT and will submit such document to the *Federal Register* within 5 calendar days of receipt of such document from ODOT. ODOT shall, upon request by FHWA, reimburse FHWA for the expenses associated with publishing such documents in the *Federal Register* (excluding FHWA's overhead).

8.5 Participation in Resource Agency Reports

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

- A. Information on the completion of and duration to complete environmental documentation of all NEPA types (EIS, EA, CE);
- B. Archeology Reports requested by the National Park Service;
- C. Endangered Species Act Expenditure Reports requested by the USFWS and the NMFS;
- D. Project schedules and other project information for nationwide infrastructure transparency initiatives;
- E. NEPA Litigation Reports requested by CEQ; and
- F. Environmental Conflict Resolution reports requested by the Office of Management and Budget and CEQ.

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 Federal Clean Air Act and its implementing regulations, the FHWA's Ohio Division Office will document the project level conformity determination. FHWA's Ohio 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, ODOT shall ensure that a certification is included with each NEPA approval

specifying that ODOT 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. ODOT shall ensure that this certification is made prior to the execution of any future Federal-aid approval or action. ODOT agrees to provide FHWA access to NEPA approvals and certifications.

8.8 Enforcement

- 8.8.1. Should FHWA determine that ODOT is not in compliance with this MOU, then FHWA shall take appropriate action to ensure ODOT's compliance, including appropriate remedies provided at 23 CFR 1.36 for violations of or failure to comply with Federal law or the regulations at 23 CFR with respect to a project, withdrawing assignment of any responsibilities that have been assumed as provided in Part 9 of this MOU, or terminating ODOT's participation in the Project Delivery Program as provided in Part 13 of this MOU.

PART 9. WITHDRAWAL OF ASSIGNED RESPONSIBILITIES

9.1 FHWA-Initiated Withdrawal of Assigned Projects

- 9.1.1 The FHWA may, at any time, withdraw the assignment of all or part of the DOT Secretary's responsibilities that have been assumed by ODOT under this MOU for any highway project or highway projects upon FHWA's determination that:
- A. With respect to that particular highway project or those particular highway projects, ODOT is not in compliance with a material term of this MOU or applicable Federal laws or policies, and ODOT 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 ODOT's assumption of the DOT Secretary's responsibilities would be inappropriate; or
 - C. ODOT cannot satisfactorily resolve an issue or concern raised in a government-to-government consultation process, as provided in subpart 3.2.3.
- 9.1.2 Upon the FHWA's determination to withdraw assignment of the DOT Secretary's responsibilities under subpart 9.1.1, FHWA will informally notify ODOT of FHWA's determination. After informally notifying ODOT of its determination, FHWA will provide ODOT written notice of its determination including the reasons for its determination. Upon receipt of this notice, ODOT may submit any comments or objections to FHWA within 30 calendar days, unless FHWA agrees to an extended period of time. Upon receipt of ODOT's comments or objections, FHWA will make a final determination within 30 calendar days, unless extended by FHWA for cause,

and notify ODOT of its decision. In making its determination, FHWA will consider ODOT'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 ODOT has assumed for any highway project when the preferred alternative that is identified in the categorical exclusions, EA, or final EIS is a highway project that is specifically excluded in subpart 3.3.2. In such case, subpart 9.1.2 shall not apply.

9.2 ODOT-Initiated Withdrawal of Assignment of Projects

- 9.2.1 ODOT may, at any time, request FHWA to withdraw all or part of the DOT Secretary's responsibilities ODOT has assumed under this MOU for any existing or future highway project or highway projects.
- 9.2.2 Upon ODOT's decision to request FHWA withdraw the assignment of the DOT Secretary's responsibilities under subpart 9.2.1, ODOT shall informally notify FHWA of its desire for FHWA to withdraw assignment of its responsibilities. ~~After informally notifying FHWA of its desire, ODOT 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, the 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 ODOT desires FHWA to withdraw assignment of the responsibilities, the effect the withdrawal of assignment will have on the Program, amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.~~

PART 10. PERFORMANCE MEASURES

10.1 General

- 10.1.1 Both FHWA and ODOT have determined that it is desirable to mutually establish a set of performance measures that FHWA can take into account in its evaluation of ODOT's administration of the responsibilities it has assumed under this MOU.
- 10.1.2 ODOT's attainment of the performance measures indicated in this Part 10 will be considered during the FHWA audits, which are required under 23 U.S.C. 327(g).
- 10.1.3 ODOT shall collect and maintain all necessary and appropriate data related to the attainment of the performance

measures. In collecting this data, ODOT shall monitor its progress toward meeting the performance measures and include its progress in the self-assessment summary provided under subpart 8.2.5 of this MOU. The summary shall be made available to the FHWA as provided in subpart 8.2.5.

10.2 Performance Measures

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

A. Compliance with NEPA and other Federal environmental statutes and regulations:

- i. Maintain documented compliance with procedures and processes set forth in this MOU for the environmental responsibilities assumed under the Program.
- ii. Maintain documented compliance with requirements of all applicable Federal statutes and regulations for which responsibility is assumed (Section 106, Section 7, etc.).

B. Quality Control and Assurance for NEPA decisions:

- i. Maintain and apply internal quality control and assurance measures and processes, including a record of:
 - a. Legal sufficiency determinations made by counsel; this shall include the legal sufficiency reviews of Notices of Intent and Notices of Final Agency Action as required by law, policy, or guidance; and,
 - b. Compliance with FHWA's and ODOT's environmental document content standards and procedures, including those related to QA/QC; and,
 - c. Completeness and adequacy of documentation of project records for projects done under the Program.

C. Relationships with agencies and the general public:

- i. Assess change in communication among ODOT, Federal and State resource agencies and the public resulting from assumption of responsibilities under this MOU.
- ii. Maintain effective responsiveness to substantive comments received from the public, agencies and interest groups on NEPA documents and environmental concerns.

- iii. Maintain effective NEPA conflict resolution processes whenever appropriate.

D. Increased efficiency and timeliness in completion of NEPA process:

- i. Compare time of completion for NEPA approvals before and after assumption of responsibilities under this MOU.
- ii. Compare time to completion for key interagency consultation formerly requiring FHWA participation (e.g., Section 7 biological opinions, Section 106 resolution of adverse effects) before and after assumption of responsibilities under this MOU.

PART 11. AUDITS

11.1 General

- 11.1.1 As required at 23 U.S.C. 327(g), FHWA will conduct audits of ODOT's discharge of the responsibilities it has assumed under this MOU. Audits will be the primary mechanism used by FHWA to oversee ODOT's compliance with this MOU ensure compliance with applicable Federal laws and policies, evaluate ODOT's progress toward achieving the performance measures identified in Part 10, and collect information needed for the DOT Secretary's annual report to Congress.
- 11.1.2 Pursuant to 23 U.S.C. 327(c)(4), ODOT is responsible for providing FHWA any information FHWA considers necessary to ensure that ODOT is adequately carrying out the responsibilities assigned. ODOT will make documents and records available for review by FHWA in conducting audits and shall provide FHWA with copies of any such documents and records as may be requested by FHWA. In general, all documents and records will be made available to FHWA at their normal place of repository. However, ODOT will work with FHWA to provide documents through e-mail, CD-ROM, mail, or facsimile to the extent it does not create an undue burden.
- 11.1.3 ODOT agrees to cooperate with FHWA in conducting audits, including providing access to all necessary information, making all employees available to answer questions (including consultants hired for the purpose of carrying out the DOT Secretary's responsibilities), and providing all requested information (including making employees available) to FHWA in a timely manner. Employees will be made available either in-person at their normal place of business or by telephone, at the discretion of FHWA.
- 11.1.4 ODOT and the FHWA Ohio Division Office will each designate an audit coordinator who will be responsible for coordinating audit schedules, requests for information, and arranging audit meetings.

11.1.5 The FHWA audits will include, but not be limited to, consideration of ODOT's technical competency and organizational capacity, adequacy of the financial resources committed by ODOT to administer the responsibilities assumed, QC/QA process, attainment of performance measures, compliance with this MOU's requirements, and compliance with applicable Federal laws and policies in administering the responsibilities assumed.

11.2 Scheduling

11.2.1 As provided at 23 U.S.C. 327(g), FHWA will conduct annual audits during each of the first 4 years after the Effective Date of this MOU. In the event the frequency of the audits is modified by amendments to 23 U.S.C. 327(g), then the frequency established by the statutory amendments will control and apply to this subpart. After the fourth year of ODOT's participation in the Program, FHWA will monitor ODOT's compliance with the MOU, including the provision by ODOT of financial resources to carry-out the MOU, but will not conduct additional audits under this Part 11.

11.2.2 For each audit, the designated audit coordinators for FHWA and ODOT will work to establish general audit schedules at least 3 months prior to the anniversary dates of the Effective Date of this MOU. The general audit schedules shall include the dates that FHWA will conduct the audit. To the maximum extent practicable, the general audit schedule will identify all employees (including consultants) and documents and other records that ODOT will make available to FHWA during the audit. ODOT agrees to work with FHWA to specifically identify each employee. With respect to documents and other records, ODOT and FHWA agree to try to be as specific as possible, although a general description of the types of documents will be acceptable.

11.2.3 ODOT's audit coordinator shall make all reasonable efforts to ensure all necessary employees (including consultants) are available to FHWA during the specified dates on the general audit schedule. ODOT will also ensure that all of its documents and records are made reasonably available to FHWA as needed during the general audit schedule.

11.2.4 After the general audit schedule is established, the audit coordinators shall work to establish specific audit schedules at least 2 weeks prior to the scheduled audit. The specific audit schedules shall include the dates, times, and place for which FHWA will talk to ODOT's employees (including consultants) and review documents and records.

11.2.5 To the maximum extent practicable, the specific audit schedule will identify all employees (including consultants) and documents and other records that ODOT will make available to FHWA during the audit. Should FHWA determine that it needs access to an employee, document or other record that is not identified in the specific audit schedule, ODOT agrees to make reasonable efforts to produce such employee, document or other record on the specified dates. With respect to employees, ODOT agrees to work with FHWA to specifically identify

each employee. With respect to documents and other records, ODOT and FHWA agree to try to be as specific as possible, although a general description of the types of documents will be acceptable.

11.3 Other Agency Involvement

11.3.1. The FHWA may invite other Federal or State agencies as deemed appropriate, including State Historic Preservation Officers (SHPO), to assist FHWA in conducting an audit under this MOU by sitting in on interviews, reviewing documents obtained by FHWA, and making recommendations to FHWA. In any case, FHWA will ensure ODOT is aware of the role that any such other agency plays in the audit process.

11.4 Audit Report and Findings

11.4.1 Upon completing each audit, FHWA will transmit to ODOT a draft of the audit report and allow ODOT a period of 14 calendar days within which to submit written comments to FHWA. The FHWA will grant any reasonable request by ODOT to extend its deadline to respond in writing to a draft audit report not to exceed a total review period of 30 days. The FHWA will review the comments and revise the draft audit report as may be appropriate. ~~The FHWA will then prepare the draft audit report for public comment.~~

11.4.2 As required at 23 U.S.C. 327(g)(2), FHWA will make the draft audit report available for public comment. In carrying out this requirement, FHWA will, after receipt and incorporation of ODOT comments as provided in subpart 11.4.1, publish the audit report in the Federal Register and allow a comment period of 30 calendar days. The FHWA will then address and respond to the public comments by incorporating the comments and response into the final audit report. The final audit report will be published in the Federal Register not later than 60 calendar days after the comment period closes.

PART 12. TRAINING

12.1 The FHWA will provide ODOT available training, to the extent FHWA and ODOT deem necessary, in all appropriate areas with respect to the environmental responsibilities that ODOT has assumed. Such training may be provided by either FHWA or another Federal agency or other parties as may be appropriate. ODOT agrees to have all appropriate employees (including consultants hired for the purpose of carrying out the DOT Secretary's responsibilities) attend such training.

12.2 Within 90 days after the effective date of this MOU, ODOT and FHWA, in consultation with other Federal agencies as deemed appropriate, will assess ODOT's need for training and develop a training plan. The training plan will be updated by ODOT and FHWA, in consultation with other Federal agencies as appropriate, annually during the term of this MOU. While ODOT and FHWA may take other agencies' recommendations into account

in determining training needs, ODOT will be responsible for the final development and implementation of the training program.

PART 13. TERM, TERMINATION AND RENEWAL

13.1 Term

13.1.1 This MOU has a term of 5 years from 12/11/15 (terminating on 12/11/2020).

13.2 Termination by the FHWA

13.2.1 As provided at 23 U.S.C. 327(i)(2), FHWA may terminate ODOT's participation in the Program, in whole or in part, at any time subject to the procedural requirements in 23 U.S.C. 327(i)(2)(B) and subpart 13.2.2 below, if FHWA determines that ODOT is failing to adequately carry out its responsibilities under this MOU. Failure to adequately carry out the responsibilities may include, but not be limited to:

- A. Persistent neglect of, or noncompliance with, any Federal laws, regulations, and policies;
- B. Failure to cooperate with FHWA in conducting an audit or any oversight or monitoring activity;
- C. Failure to secure or maintain adequate personnel and financial resources to carry out the responsibilities assumed;
- D. Substantial noncompliance with this MOU; or
- E. Persistent failure to adequately consult, coordinate, and/or take the concerns of other Federal agencies, as well as SHPOs, into account in carrying out the responsibilities assumed.

13.2.2 If FHWA determines that ODOT is not adequately carrying out the responsibilities assigned to ODOT, then:

- A. provide ODOT written notification of its non-compliance determination detailing a description of each responsibility in need of corrective action regarding an inadequacy identified; and
- B. provide ODOT a period of not less than 120 days to take such corrective action as the FHWA determines is necessary to comply with this MOU.

13.2.3 If ODOT, after notification and the 120 day period, fails to take satisfactory corrective action, as determined by FHWA, FHWA shall provide notice to ODOT of its determination of termination. Any responsibilities identified to be terminated in the notice that have been assumed by ODOT under this MOU shall transfer to FHWA.

13.3 Termination by ODOT

13.3.1 ODOT may terminate its participation in the Program, in whole or in part, at any time by providing to FHWA a notice at least ninety (90) calendar days prior to the date that ODOT seeks to terminate its participation in this program, and subject to such terms and conditions as FHWA may provide.

13.3.2. The Ohio Legislature and Governor may, at any time, terminate ODOT's authority granted to participate in this Program. In that event, FHWA and ODOT shall develop a plan to transition the responsibilities that ODOT 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. The plan shall be approved by both FHWA and ODOT.

13.3.3. Any such withdrawal of assignment which FHWA and ODOT have agreed to under a transition plan shall not be subject to the procedures or limitations provided for in Part 9 of this MOU and shall be valid as agreed to in the transition plan.

13.4 Validity of ODOT Actions

13.4.1 Any environmental approvals made by ODOT pursuant to the responsibilities ODOT has assumed under this MOU shall remain valid after termination of ODOT's participation in the Program or withdrawal of assignment by FHWA. As among the DOT Secretary, FHWA and ODOT, ODOT shall remain solely liable and solely responsible for any environmental approvals it makes pursuant to any of the responsibilities it has assumed while participating in the Program.

13.5 Renewal

This MOU is renewable in accordance with 23 U.S.C. 327 and implementing regulations, as in effect at the time of the renewal.

PART 14. AMENDMENTS

14.1 Generally

14.1.1 This MOU may be amended at any time upon mutual agreement by both the FHWA and ODOT pursuant to 23 CFR 773.113(b).

14.2 Additional Projects, Classes of Projects and Environmental Review Responsibilities

14.2.1 The FHWA may assign, and ODOT may assume, responsibility for additional projects and additional environmental review responsibilities beyond those identified in Part 3 of this MOU by executing an amendment to this MOU.

14.2.2 Should ODOT decide to request this MOU to be amended to add responsibility for additional projects or classes of projects, or additional environmental review responsibilities beyond those identified in Part 3 of this MOU, such request shall be treated as an amendment to ODOT's original application that was submitted to FHWA pursuant to 23 U.S.C. 327(b) and 23 C.F.R. part 773. In developing the application supplement, ODOT shall identify the additional projects, classes of projects, and environmental review responsibilities it wishes to assume and make any appropriate adjustments to the information contained in ODOT's original application, including the verification of personnel and financial resources.

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

FEDERAL HIGHWAY ADMINISTRATION

By: Brandy L. Hendrickson
Brandy L Hendrickson
Acting Administrator
Federal Highway Administration

Dated: 6-1-18

STATE OF OHIO

Recommended by:

Jerry Wray
Jerry Wray,
Director
Ohio Department of Transportation

Dated: 6-6-18