

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

THIS MEMORANDUM OF UNDERSTANDING (hereinafter "MOU") is entered into by and between the FEDERAL HIGHWAY ADMINISTRATION (hereinafter "FHWA"), an administration in the UNITED STATES DEPARTMENT OF TRANSPORTATION (hereinafter "USDOT"), and the State of Texas, acting by and through its TEXAS DEPARTMENT OF TRANSPORTATION (hereinafter "TxDOT"), 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 "USDOT Secretary") to assign and States to assume the USDOT Secretary's responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321, et seq.) (hereinafter "NEPA"), and all or part of the USDOT 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 Texas 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 March 14, 2014, prior to submittal of its application to FHWA, TxDOT 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 29, 2014, the State of Texas, acting by and through the TxDOT, submitted its application to FHWA for participation in the Program with respect to highway projects; and

**Whereas**, on July 3, 2014, TxDOT submitted supplemental information making clarifications to its request based on FHWA's input on the application; and

**Whereas**, on October 10, 2014, FHWA published a notice and provided an opportunity for comment on its preliminary decision to approve TxDOT's request and solicited the views of other appropriate Federal agencies concerning TxDOT's application as required by 23 U.S.C. 327(b)(5); and

**Whereas**, the USDOT Secretary, acting by and through FHWA, has determined that TxDOT'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 TxDOT agree as follows:

## **PART 1. PURPOSE OF MEMORANDUM OF UNDERSTANDING**

### **1.1 Purpose**

- 1.1.1 This MOU officially approves TxDOT's application to participate in the Program and is the written agreement required pursuant to 23 U.S.C. 327(a)(2)(A) and (c) under which the USDOT Secretary may assign, and TxDOT may assume, the responsibilities of the USDOT Secretary for Federal environmental laws with respect to one or more highway projects within the State of Texas.
- 1.1.2 The FHWA's decision to execute this MOU is based upon the information, representations, and commitments contained in TxDOT's May 29, 2014, application and supplemental information received on July 3, 2014 (hereinafter "Application Package"). 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 final execution by both parties (hereinafter the "Effective Date").
- 1.1.4 On the Effective Date, the MOU between TxDOT and FHWA dated December 6, 2013, concerning State Assumption of Responsibility for Categorical Exclusions under 23 U.S.C. 326 will terminate, and be supplanted by this MOU. The Programmatic Agreement between TxDOT and FHWA dated November 7, 2011, concerning the processing of categorical exclusions (hereinafter "PCE agreement") will be suspended for the duration of this MOU. The PCE agreement may be reinstated upon the termination of this MOU if FHWA determines that the PCE agreement continues to be valid pursuant to applicable statutory and regulatory authorities in effect at the time of the MOU termination.
- 1.1.5 Pursuant to 23 U.S.C. 327(c)(3)(B)-(C), and subpart 4.3 of this MOU, third parties may challenge TxDOT'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 Texas, 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 TxDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the USDOT Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969

(NEPA), 42 U.S.C. 4321 et seq. with respect to the highway projects specified under subpart 3.3. This includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for Federal highway projects such as 23 U.S.C. 139, 40 CFR parts 1500-1508, DOT Order 5610.1C, and 23 CFR part 771 as applicable.

- 3.1.2 On the cover page of each environmental assessment (EA), finding of no significant impact (FONSI), environmental impact statement (EIS), and record of decision (ROD) prepared under the authority granted by this MOU, and for any memorandum corresponding to any CE determination it makes, TxDOT 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 TxDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 16, 2014, and executed by FHWA and TxDOT."

- 3.1.3 TxDOT 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 TxDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the USDOT Secretary's responsibilities for 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 in 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 et seq., with Essential Fish Habitat requirements at 16 U.S.C. 1855(b)(1)(B)

#### Historic and Cultural Resources

- National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470f, et seq.
- Archeological Resources Protection Act , 16 U.S.C. 470aa–mm
- Archeological and Historic Preservation Act of 1966, as amended, 16 U.S.C. 469 – 469c

- 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. 3921
- Wetlands Mitigation, 23 U.S.C. 119(g), 133(b)(14)
- Flood Disaster Protection Act, 42 U.S.C. 4001– 4130

#### Parklands and Other Special Land Uses

- 23 U.S.C. 138 and 49 U.S.C. 303 (Section 4(f)) and implementing regulations at 23 CFR part 774.
- Land and Water Conservation Fund (LWCF) Act, 16 U.S.C. 4601-4 – 4601-11

#### 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
- 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 TxDOT 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 TxDOT's responsibilities to comply with the requirements of any Federal environmental law that apply directly to TxDOT independent of FHWA's involvement (through Federal assistance or approval).

3.2.3 The USDOT Secretary's responsibilities for government-to-government consultation with Indian tribes as defined in 36 CFR 800.16(m) are not assigned to or assumed by TxDOT under this MOU. The FHWA remains responsible for all government-to-government consultation, including initiation of government-to-government consultation, unless otherwise agreed as described in this Part. A notice from TxDOT 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 TxDOT 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 TxDOT, 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 TxDOT, FHWA, and a tribe under which the tribe agrees to permit TxDOT 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 TxDOT's assumption of the USDOT 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, or other analyses prepared under the authority granted by this MOU, TxDOT shall insert the following language in a way that is conspicuous to the reader or include 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 TxDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 16, 2014 and executed by FHWA and TxDOT."

- 3.2.6 TxDOT shall disclose to the public and agencies, as part of agency outreach and public involvement procedures, the disclosure in stipulation 3.2.5 above.
- 3.2.7 TxDOT will continue to adhere to the original terms of Biological Opinions (BOs) coordinated between FHWA, TxDOT, and either 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 TxDOT's responsibility. TxDOT agrees to assume FHWA's environmental review role and responsibilities as identified in existing interagency agreements among TxDOT, USFWS, and FHWA, such as the Programmatic Agreement for Biological Evaluations, or negotiate new agreements with USFWS, if needed. TxDOT 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 TxDOT 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 USDOT 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 Texas. 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).

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. This assignment does not include the environmental review associated with the development and approval of the Draft EIS, Final EIS, and ROD for the following projects:

1. Trinity Parkway – This project is in the Dallas District with limits from IH 35E/SH 183 to US 175/SH 310. The project would include new location construction of a four (4) to six (6) lane tollway with a nine-mile encroachment into a USACE-regulated floodway of the Trinity River.
2. Harbor Bridge – This project is in the Corpus Christi District and would construct a new harbor bridge over the Corpus Christi Ship Channel.
3. South Padre Island Causeway 2 – This project is in the Pharr District with limits from SH 100 (mainland) to Park Road (South Padre Island). The project is to construct a new causeway at a new location.

TxDOT will be responsible for any additional environmental review of these projects after the expiration of the statute of limitations for these projects in accordance with 23 U.S.C. 139(f).

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. Upon execution of this MOU, the 23 U.S.C. §326 CE MOU will be terminated, and CE projects included under that MOU will be assumed under the Program. All CE projects formerly excluded from assignment and listed in Appendix B of the Section 326 MOU will be assumed by TxDOT upon the execution of this MOU. These projects were:

1. Frenchtown Road at Horseshoe Lake (BR), Galveston County, CSJ 0912-73-151, bridge replacement with Coast Guard Permit.
2. Isela Rubelcava from SP 276 to El Paso Community College, El Paso County, CSJ 0924-06-269; roadway on new location.
3. CS (Trammel Fresno Road) from Fort Bend Parkway to FM 521, Fort Bend County, CSJ 0912-34- 144; added capacity on existing road.
4. Kuykendahl Road from Alden Bridge to Crownridge Drive, Montgomery County, CSJ 0912-37-140; roadway on new location.
5. East 1st Street at W Fork of Trinity River, Tarrant County, CSJ 0902-48-502, replace bridge plus CSJ 0902-48-622, added capacity from Beach Street to Oakland Blvd.

6. Windhaven Pkwy from 200 feet west of Gentle Way to Spring Creek, Collin County, CSJ 0918-24-143, added capacity on existing road.
7. IH 635 from Beltline Road to 0.55 mile west of Beltline Road, Dallas County, CSJ 2374-07-058, construct frontage road.
8. IH 20 from W of Haymarket to west of US 175, Dallas County, CSJ 2374-03-077, construct frontage roads and ramps to IH 20.
9. FM 2837 from IH 35 to 0.2 mile west of IH 35, McLennan County, CSJ 3521-01-016, intersection operational improvements.
10. FM 2478 (Custer Road) from SH 121 to Stonebridge Dallas County, CSJ 2351-01-020, added capacity on existing road.
11. SH 114 at FM 156, Dallas County, CSJ 0353-02-063, construct interchange.
12. FM 106 (General Brant) from FM 1847 E&S to FM 512, Cameron County, CSJ 2243-01-009, reconstruct roadway with shoulders.
13. FM 3503 (JBS Parkway) from JBS Pkwy/FM 3503 to 0.7 mile south, Ector County, CSJ 0906-06-048, realign existing roadway on new location.
14. Eagleland Hike and Bike Trail, Bexar County, CSJ 1111-13-008, trail mitigation

- 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, TxDOT would not assume the NEPA responsibilities of other Federal agencies. However, TxDOT may use or adopt other Federal agencies' NEPA analyses consistent with 40 CFR parts 1500 – 1508, and USDOT and FHWA regulations, policies, and guidance.

3.3.2 The following are specifically excluded from the list in subpart 3.3.1 of highway projects and classes of highway projects:

- A. Any highway projects authorized under 23 U.S.C. 202, 203, and 204 unless such projects will be designed and constructed by TxDOT.
- B. 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.

### **3.4 Limitations**

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

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

### **4.1 Certifications**

4.1.1 TxDOT hereby makes the following certifications:

- A. TxDOT has the legal authority to accept all the assumptions of responsibility identified in Part 3 of this MOU;
- B. TxDOT has the legal authority to take all actions necessary to carry out all of the responsibilities it has assumed under this MOU;
- C. TxDOT has the legal authority to execute this MOU;
- D. The State of Texas currently has laws in effect that are comparable to 5 U.S.C. 552, and those laws are located at Texas Government Code § 552.001, et seq. (the Texas Public Information Act); and
- E. The Texas Public Information Act provides that any decision regarding the public availability of a document under that Act is reviewable by a Texas court of competent jurisdiction.

### **4.2 State Commitment of Resources**

4.2.1 As provided at 23 U.S.C. 327(c)(3)(D), TxDOT will maintain the financial resources necessary to carry out the responsibilities it is assuming. TxDOT believes, and FHWA agrees, that the summary of financial resources contained in TxDOT's application, dated May 29, 2014 appears to be adequate for this purpose. Should FHWA determine, after consultation with TxDOT, that TxDOT's financial resources are inadequate to carry out the USDOT Secretary's responsibilities, TxDOT will take appropriate action to obtain the additional financial resources needed to carry out these responsibilities. If TxDOT is unable to obtain the necessary additional financial resources, TxDOT shall inform FHWA, and this MOU will be amended to assign only the responsibilities that are commensurate with TxDOT's financial resources.

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

Should FHWA determine, after consultation with TxDOT, that TxDOT's organizational and staff capability is inadequate to carry out the USDOT Secretary's responsibilities, TxDOT will take appropriate action to obtain adequate organizational and staff capability to carry out these responsibilities. If TxDOT is unable to obtain adequate organizational and staff capability, TxDOT shall inform FHWA and the MOU will be amended to assign only the responsibilities that are commensurate with TxDOT's available organizational and staff capability. Should TxDOT choose

to meet these requirements, in whole or in part, with consultant services, including outside counsel, TxDOT 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, TxDOT 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). TxDOT 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 Section 201.6035 of Title 6 of the Texas Transportation Code, TxDOT hereby expressly consents, on behalf of the State of Texas, to accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary assumed by TxDOT 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 TxDOT pursuant to an assumption of responsibility under this MOU. TxDOT understands and agrees that, in accordance with 23 U.S.C. 327, this acceptance constitutes a waiver of the State of Texas's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of carrying out the USDOT 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 USDOT Secretary's responsibilities under this MOU, TxDOT shall be subject to the same procedural and substantive requirements that apply to the USDOT Secretary in carrying out these responsibilities. Such procedural and substantive requirements include Federal statutes and regulations, Executive Orders issued by the President of the United States, USDOT Orders, Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500 – 1508), FHWA Orders, official guidance and policy issued by the CEQ, USDOT, or the FHWA, 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 MOU between the USDOT and the US Coast Guard and the MOA between FHWA and the US Coast Guard].
- 5.1.2 Official USDOT 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 sent to TxDOT 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 TxDOT under this MOU are communicated to TxDOT within 10 calendar days of issuance. Delivery may be accomplished by e-mail, web posting (with email or mail to TxDOT notifying of web posting), mail, or publication in the Federal Register (with email or mail to TxDOT notifying of publication). If communicated to TxDOT by e-mail or mail, such material will be sent to TxDOT's Director of the Environmental Affairs Division. In the event that a new or revised FHWA policy or guidance is not made available to TxDOT as described in the preceding sentence, and if TxDOT had no actual knowledge of such policy or guidance, then a failure by TxDOT to comply with such Federal policy or guidance will not be a basis for termination under this MOU.

5.1.4 TxDOT 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 TxDOT, within six months after the effective date of this MOU, FHWA and TxDOT 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 TxDOT for FHWA; or

B. Negotiating with the third party to amend the interagency agreement as needed so that the interagency agreement continues but that TxDOT 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, TxDOT 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 TxDOT 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 TxDOT to assume any rulemaking authority of the USDOT Secretary. Additionally, TxDOT may not establish policy and guidance on behalf of the USDOT Secretary or FHWA for highway projects covered in this MOU. TxDOT'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 USDOT Secretary or FHWA.

## **5.3 Effect of Assumption**

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

### **PART 6. LITIGATION**

#### **6.1 Responsibility and Liability**

- 6.1.1 As provided in 23 U.S.C. 327(e), TxDOT shall be solely liable and solely responsible for carrying out the responsibilities assumed under this MOU. The FHWA and USDOT shall have no responsibility or liability for the performance of the responsibilities assumed by TxDOT, including any decision or approval made by TxDOT 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, TxDOT agrees to coordinate with DOJ in the defense of that action.
- 6.2.2 TxDOT shall defend all claims brought in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, TxDOT shall provide qualified and competent legal counsel, including outside counsel if necessary. TxDOT 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 TxDOT's counsel. TxDOT 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 TxDOT will notify the FHWA's Texas Division Office and DOJ's Assistant Attorney General for the Environment and Natural Resources Division of any Notice of Intent to sue (NOI) received pursuant to the citizen suit provisions of an applicable environmental law prior to initiation of litigation in connection with TxDOT's performance or non-performance of any responsibility assumed or discharged under this MOU. TxDOT shall provide to FHWA and DOJ a copy of any such NOI within 7 calendar days after the TxDOT's receipt. The transmission of such copy may be made by electronic or regular mail.
- 6.2.4 TxDOT shall notify the FHWA's Texas Division Office and DOJ of any service of complaint concerning its TxDOT's performance or non-performance of any responsibility assumed or discharged under this MOU within 7 calendar days of the receipt of service of process. TxDOT's notification to FHWA and DOJ shall include a copy of the complaint and be made prior to its response to the complaint. No later than 30 calendar days from the notification and transmission of the complaint (unless otherwise agreed to by the parties), TxDOT, FHWA, and DOJ will hold a conference call to discuss the merits of the complaint, potential strategies to address the matter, and to determine if the case is one of "Federal interest." The final decision that a case is of "Federal interest" will be made by FHWA and DOJ. FHWA and DOJ agree to notify TxDOT as

soon as possible if a case previously determined not to be of "Federal interest" changes to a case of "Federal interest" in the course of the litigation.

- 6.2.5 For all cases, TxDOT agrees to insert the following email addresses for FHWA at [FHWA\\_assignment\\_lit@dot.gov](mailto:FHWA_assignment_lit@dot.gov) and for DOJ at [efile\\_nrs.enrd@usdoj.gov](mailto:efile_nrs.enrd@usdoj.gov) to the distribution list in the court's electronic filing system (e.g., PACER) so that FHWA and DOJ may receive electronic copies of any motions, pleadings, briefs, and other such documents filed in any action concerning TxDOT's discharge of any responsibility assumed under this MOU. For "Federal interest" cases, TxDOT agrees to consult with FHWA and DOJ prior to filing or opposing any dispositive motion.
- 6.2.6 TxDOT agrees to notify FHWA's Division Office and DOJ prior to settling any lawsuit, in whole or in part, and shall provide FHWA and DOJ at least 30 calendar days to review and comment on the proposed settlement. TxDOT will not execute any settlement agreement until FHWA and DOJ have provided comments on the proposed settlement, indicated that they will not provide comments on the proposed settlement, or the 30-day review period has expired, whichever occurs first.
- 6.2.7 TxDOT hereby consents to intervention by FHWA in any action or proceeding arising out of, or relating to TxDOT's discharge of any responsibility assigned to the State under this MOU.
- 6.2.8 Within 7 calendar days of receipt by TxDOT, TxDOT will provide notice to FHWA's Division Office and DOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities TxDOT has assumed under this MOU. If TxDOT intends to appeal a court decision, TxDOT shall notify FHWA's Division Office and DOJ and provide FHWA and DOJ 20 calendar days to comment on TxDOT's intention to appeal. If either FHWA or DOJ objects in writing to TxDOT's intention to appeal any aspect of an adverse court decision before the 20-day deadline, then TxDOT will not file an appeal of such aspect. If neither FHWA nor DOJ objects in writing to TxDOT's intention to appeal before the 20-day deadline, then TxDOT may file the notice of appeal. However, TxDOT agrees to withdraw its appeal of any aspect of an adverse court decision if FHWA and DOJ provide a written objection to the appeal of that aspect within 30 days of the filing of the notice of appeal.
- 6.2.9 TxDOT's notification to FHWA and DOJ in subparts 6.2.3, 6.2.4, 6.2.6, and 6.2.8 shall be made by electronic mail to [FHWA\\_assignment\\_lit@dot.gov](mailto:FHWA_assignment_lit@dot.gov) and [NRSDOT.enrd@usdoj.gov](mailto:NRSDOT.enrd@usdoj.gov) unless otherwise specified by FHWA and DOJ. FHWA and DOJ's comments under subpart 6.2.6 and written objections under subpart 6.2.8 shall be made by electronic mail to [rich.oconnell@txdot.gov](mailto:rich.oconnell@txdot.gov) unless otherwise specified by TxDOT. In the event that regular mail is determined necessary, mail should be sent 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 Texas Division, 300 East 8<sup>th</sup> Street, Room 826, Austin, TX 78701.

### 6.3 Conflict Resolution

- 6.3.1 In discharging any of the USDOT Secretary's responsibilities under this MOU, TxDOT agrees to comply with any applicable requirements of USDOT and FHWA statute, regulation, guidance or

policy regarding conflict resolution. This includes the USDOT Secretary's responsibilities for issue resolution under 23 U.S.C. 139(h), with the exception of the USDOT Secretary's responsibilities under 23 U.S.C. 139(h)(6) regarding financial penalties.

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

## **PART 7. INVOLVEMENT WITH OTHER AGENCIES**

### **7.1 Coordination**

- 7.1.1 TxDOT 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 TxDOT 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 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 TxDOT 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 USDOT regulation, or interpretations of FHWA or USDOT policies or guidance.
- 8.1.3 The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving TxDOT's consultation or coordination with another Federal agency with respect to TxDOT's discharge of any of the responsibilities assumed under this MOU for any particular highway project. However, the FHWA may attend meetings between TxDOT and other Federal agencies and submit comments to TxDOT and the other Federal agency in the following extraordinary circumstances:
- A. FHWA reasonably believes that TxDOT is not in compliance with this MOU;

- B. FHWA determines that an issue between TxDOT and the other Federal agency concerns emerging national policy issues under development by the USDOT; or
- C. Upon request by either TxDOT or the other Federal agency and agreement by FHWA.

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

- 8.1.4 Other Federal agencies may raise concerns regarding the compliance with this MOU by TxDOT 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 TxDOT'S compliance, FHWA will notify TxDOT of the potential compliance issue and will work with both TxDOT 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 TxDOT's request, FHWA may assist TxDOT 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 TxDOT'S consultation, coordination, and communication with other Federal agencies.
- 8.1.6 TxDOT'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 TxDOT'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 TxDOT's participation in the Project Delivery Program, the FHWA will monitor TxDOT's compliance with the MOU, including the provision by TxDOT of financial resources to carry out the MOU. The FHWA's monitoring and oversight may also include submitting requests for information to TxDOT and other relevant Federal agencies, verifying TxDOT'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), TxDOT is responsible for providing FHWA any information FHWA considers necessary to ensure that TxDOT is adequately carrying out the responsibilities assigned. At the request of FHWA, TxDOT will promptly (within 5 business days) provide FHWA with any information FHWA considers necessary to ensure that TxDOT is adequately carrying out the responsibilities assigned to TxDOT, including 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 TxDOT 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 TxDOT's discharge of the responsibilities assumed under this MOU.

- 8.2.4 In carrying out the responsibilities assumed under this MOU, TxDOT 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, TxDOT's quality control and quality assurance 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, TxDOT and FHWA shall finalize a quality control and quality assurance (QA/QC) process that satisfies the requirements of this subpart. In developing and implementing the QA/QC process, TxDOT shall consult with the FHWA Texas Division Office. TxDOT agrees to cooperate with FHWA to incorporate recommendations FHWA may have with respect to its QA/QC process.
- 8.2.5 TxDOT 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, TxDOT shall transmit a summary of its self-assessment(s) to the FHWA Texas 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 Director of TxDOT's Environmental Affairs Division concerning whether the processes are ensuring that the responsibilities TxDOT 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 TxDOT'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, TxDOT shall conduct its self-assessments no less frequently than annually.
- 8.2.6 Every month after the Effective Date of this MOU for a period of 2 years, TxDOT will provide a report to the FHWA Texas Division Office listing any approvals and decisions TxDOT has made with respect to the responsibilities TxDOT has assumed under this MOU. After a period of two years from Effective Date of this MOU, TxDOT shall submit its approval and decision report to the FHWA no less frequently than every 6 months.

### **8.3 Record Retention**

- 8.3.1 TxDOT will retain project files and general administrative files pertaining to its discharge of the responsibilities it has assumed under this MOU in accordance with the FHWA Records Disposition Manual (Field Offices) Chapter 4, FHWA Order No. 1324.1B, issued July 29, 2013, or in accordance with any subsequent order that supersedes or replaces Order No. 1324.1B.
- 8.3.2 In addition to the period of time specified in subpart 8.3.1, TxDOT will ensure that the following retention periods are maintained for each specified type of record:
- A. **Environment Correspondence Files:** Environment correspondence files include correspondence between FHWA and TxDOT relative to the interpretation, administration, and execution of environmental aspects of the Federal-aid Highway Program. Environmental correspondence files shall be maintained by TxDOT for a period of 3 years after the resolution of the particular issue for which the file is created. After 3 years, TxDOT shall transmit environmental correspondence files to the FHWA to be stored at the Federal Records Center. When environmental correspondence files are 8

years old, the FHWA will transfer the files to the Federal Records Center for permanent storage.

- B. **Environmental Impact Statements and/or Section 4(f) Statements- FHWA:** Files containing reviews and approval of EIS's and Section 4(f) statements for which TxDOT, in assuming the FHWA's responsibilities, is the lead agency shall be maintained by TxDOT for a period of 8 years after approval of the final statement. After 8 years, TxDOT shall transmit its EIS and/or section 4(f) files to FHWA to be stored at the Federal Records Center. After a period of 13 years from the date of approval of the final statement, EIS and/or section 4(f) files will be destroyed.
- C. **Environmental Impact Statements - Other Agencies:** Files containing reviews and comments furnished by TxDOT to other Federal agencies following reviews of an EIS for which another Federal agency is the lead agency shall be maintained by TxDOT for a period of 5 years. After 5 years, TxDOT may destroy these files when no longer needed.
- D. **Fish and Wildlife Coordination:** Files containing correspondence with the fish and wildlife resource agencies early in project development may be destroyed by TxDOT when no longer needed.
- E. **Noise Barriers:** To comply with 23 CFR 772.13(f) regarding noise abatement measures reporting, files containing correspondence, publications, presentations, installation reports for wall barriers, and design of different types of wall barriers by private industry shall be maintained by TxDOT for a period of 4 years after the end of the Federal fiscal year in which the particular file is closed.

8.3.3. The periods of time stated in subpart 8.3.2 are contained in the FHWA Records Disposition Manual, FHWA Order M1324.1B. In case of any conflict in the periods of time in subpart 8.3.2 and the FHWA Records Disposition Manual, subpart 8.3.2 shall control.

8.3.4. Nothing contained in this MOU is intended to relieve TxDOT of its recordkeeping responsibilities under 49 CFR 18.42 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(j), TxDOT shall transmit such document to the FHWA's Texas Division Office and the FHWA will cause such document to be published in the *Federal Register* on behalf of TxDOT and will submit such document to the *Federal Register* within 5 calendar days of receipt of such document from TxDOT. TxDOT shall, upon request by FHWA, reimburse FHWA for the expenses associated with publishing such documents in the *Federal Register* (excluding FHWA's overhead). To the extent that the operating procedures of the Government Printing Office and the Federal Register agree, TxDOT will take over the procedures described above from the FHWA Texas Division Office.

#### **8.5 Participation in Resource Agency Reports**

8.5.1 TxDOT 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:

- 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 U.S. Fish and Wildlife Service and the National Marine Fisheries Service;
- D. NEPA Litigation Reports requested by CEQ; and
- E. 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 Texas Division Office will document the project level conformity determination. FHWA's Texas 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, prior to the execution of any Federal-aid project agreement for a physical construction contract, a design-build contract, or a contract for final design services, the Director of TxDOT's Environmental Affairs Division will submit a certification for each individual project to the FHWA Texas Division Office specifying that TxDOT has fully carried out all responsibilities assumed under this MOU in accordance with this MOU and applicable Federal laws, regulations, and policies. The Director of TxDOT's Environmental Affairs Division may delegate the authority to make the certification required under this subpart to other qualified and duly authorized TxDOT personnel.

**8.8 Enforcement**

- 8.8.1. Should FHWA determine that TxDOT is not in compliance with this MOU, then FHWA shall take appropriate action to ensure TxDOT'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 TxDOT'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 USDOT Secretary's responsibilities that have been assumed by TxDOT 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, TxDOT is not in compliance with a material term of this MOU or applicable Federal laws or policies, and TxDOT 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 TxDOT's assumption of the USDOT Secretary's responsibilities would be inappropriate; or
  - C. TxDOT 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 USDOT Secretary's responsibilities under subpart 9.1.1, FHWA will informally notify TxDOT of FHWA's determination. After informally notifying TxDOT of its determination, FHWA will provide TxDOT written notice of its determination including the reasons for its determination. Upon receipt of this notice, TxDOT may submit any comments or objections to FHWA within 30 calendar days, unless FHWA agrees to an extended period of time. Upon receipt of TxDOT's comments or objections, FHWA will make a final determination within 30 calendar days, unless extended by FHWA for cause, and notify TxDOT of its decision. In making its determination, FHWA will consider TxDOT'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 TxDOT has assumed for any highway project when the preferred alternative that is identified in the environmental assessment or final environmental impact statement 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 TxDOT-Initiated Withdrawal of Assignment of Projects**

- 9.2.1 TxDOT may, at any time, request FHWA to withdraw all or part of the USDOT Secretary's responsibilities TxDOT has assumed under this MOU for any existing or future highway project or highway projects.
- 9.2.2 Upon TxDOT's decision to request FHWA withdraw the assignment of the USDOT Secretary's responsibilities under subpart 9.2.1, TxDOT shall informally notify FHWA of its desire for FHWA to withdraw assignment of its responsibilities. After informally notifying FHWA of its desire, TxDOT 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 TxDOT 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 TxDOT have determined that it is desirable to mutually establish a set of performance measures that FHWA can take into account in its evaluation of TxDOT's administration of the responsibilities it has assumed under this MOU.

10.1.2 TxDOT'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 TxDOT shall collect and maintain all necessary and appropriate data related to the attainment of the performance measures. In collecting this data, TxDOT 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 TxDOT 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 TxDOT'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 TxDOT, 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 a total of 6 audits of TxDOT's discharge of the responsibilities it has assumed under this MOU. Audits will be the primary mechanism used by FHWA to oversee TxDOT's compliance with this MOU ensure compliance with applicable Federal laws and policies, evaluate TxDOT's progress toward achieving the performance measures identified in Part 10, and collect information needed for the USDOT Secretary's annual report to Congress.
- 11.1.2 Pursuant to 23 U.S.C. 327(c)(4), TxDOT is responsible for providing FHWA any information FHWA considers necessary to ensure that TxDOT is adequately carrying out the responsibilities assigned. TxDOT 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, TxDOT 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 TxDOT 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 USDOT 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 TxDOT and the FHWA Texas 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 TxDOT's technical competency and organizational capacity, adequacy of the financial resources committed by TxDOT to administer the responsibilities assumed, quality control and quality assurance process, attainment of performance measures, compliance with this MOU's requirements, and compliance with applicable Federal laws and policies in administering the responsibilities assumed.

### **11.2 Scheduling**

- 11.2.1 As provided at 23 U.S.C. 327(g), FHWA will conduct semiannual audits during each of the first 2 years after the Effective Date of this MOU and an annual audit during the third and fourth years after the Effective Date. After the fourth year of TxDOT's participation in the Program, FHWA will monitor TxDOT's compliance with the MOU, including the provision by TxDOT of financial resources to carry-out the MOU, but will not conduct additional audits under this Part 11.

- 11.2.2 For each semiannual and annual audit, the designated audit coordinators for FHWA and TxDOT will work to establish general audit schedules at least three months prior to the semiannual or annual 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 TxDOT will make available to FHWA during the audit. TxDOT agrees to work with FHWA to specifically identify each employee. With respect to documents and other records, TxDOT 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 TxDOT'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. TxDOT 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 two weeks prior to the scheduled audit. The specific audit schedules shall include the dates, times, and place for which FHWA will talk to TxDOT'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 TxDOT 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, TxDOT agrees to make reasonable efforts to produce such employee, document or other record on the specified dates. With respect to employees, TxDOT agrees to work with FHWA to specifically identify each employee. With respect to documents and other records, TxDOT 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 Federal 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 TxDOT is aware of the role that any such other Federal agency plays in the audit process.

### **11.4 Audit Report and Findings**

- 11.4.1 Upon completing each audit, FHWA will transmit to TxDOT a draft of the audit report and allow TxDOT a period of 14 calendar days within which to submit written comments to FHWA. The FHWA will grant any reasonable request by TxDOT 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 TxDOT 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 TxDOT available training, to the extent FHWA and TxDOT deems necessary, in all appropriate areas with respect to the environmental responsibilities that TxDOT has assumed. Such training may be provided by either FHWA or another Federal agency or other parties as may be appropriate. TxDOT agrees to have all appropriate employees (including consultants hired for the purpose of carrying out the USDOT Secretary's responsibilities) attend such training.
- 12.2 Within 90 days after the effective date of this MOU, TxDOT and FHWA, in consultation with other Federal agencies as deemed appropriate, will assess TxDOT's need for training and develop a training plan. The training plan will be updated by TxDOT and FHWA, in consultation with other Federal agencies as appropriate, annually during the term of this MOU. While TxDOT and FHWA may take other agencies' recommendations into account in determining training needs, TxDOT and FHWA will jointly determine the training required under this.

## **PART 13. TERM, TERMINATION AND RENEWAL**

### **13.1 Term**

- 13.1.1 This MOU has a term of 5 years from the Effective Date.

### **13.2 Termination by the FHWA**

- 13.2.1 As provided at 23 U.S.C. 327(j)(1), FHWA may terminate TxDOT's participation in the Program, in whole or in part, at any time subject to the procedural requirements in 23 U.S.C. 327 and subpart 13.2.2 below. 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 TxDOT is not adequately carrying out the responsibilities assigned to TxDOT, then:
  - A. The FHWA shall provide to TxDOT a written notification of its determination;

- B. The FHWA shall provide TxDOT a period of at least 30 calendar days to take such corrective action as the FHWA determines is necessary to comply with this MOU; and
- C. TxDOT, after notification and the period provided under subpart 13.2.2(B), fails to take satisfactory corrective action, FHWA shall provide notice to TxDOT of its determination whether or not to implement the FHWA-initiated termination. Any responsibilities identified to be terminated in the notice that have been assumed by TxDOT of this MOU shall transfer to FHWA.

### **13.3 Termination by TxDOT**

- 13.3.1 TxDOT 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 TxDOT seeks to terminate its participation in this program, and subject to such terms and conditions as FHWA may provide.
- 13.3.2. The Texas Legislature and Governor may, at any time, terminate TxDOT's authority granted to participate in this Program. In that event, FHWA and TxDOT shall develop a plan to transition the responsibilities that TxDOT 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 TxDOT.
- 13.3.3. Any such withdrawal of assignment which FHWA and TxDOT 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 TxDOT Actions**

- 13.4.1 Any environmental approvals made by TxDOT pursuant to the responsibilities TxDOT has assumed under this MOU shall remain valid after termination of TxDOT's participation in the Program or withdrawal of assignment by FHWA. As among the USDOT Secretary, FHWA and TxDOT, TxDOT 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 TxDOT pursuant to 23 CFR 773.113(b).

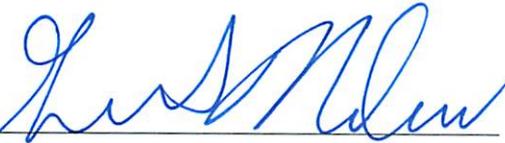
### **14.2 Additional Projects, Classes of Projects and Environmental Review Responsibilities**

- 14.2.1 The FHWA may assign, and TxDOT 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 TxDOT 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 TxDOT'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, TxDOT 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 TxDOT'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**

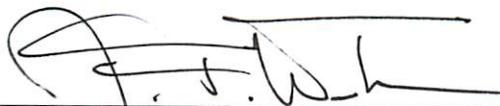
By: 

Gregory G. Nadeau  
Acting Administrator  
Federal Highway Administration

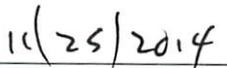
Dated: 

**STATE OF TEXAS**

Recommended by:



LtGen J.F. Weber, USMC (Ret)  
Executive Director  
Texas Department of Transportation

Dated: 

Executed for the State of Texas by the State's Chief Executive Officer in accordance with Texas Constitution, Article IV, Section 10:

By: 

Rick Perry  
Governor, State of Texas

Dated: 