

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

THIS MEMORANDUM OF UNDERSTANDING (hereinafter "Project Delivery Program MOU"), made and entered into by and between the FEDERAL HIGHWAY ADMINISTRATION (hereinafter "FHWA"), an administration in the UNITED STATES DEPARTMENT OF TRANSPORTATION (hereinafter "USDOT"), and the CALIFORNIA DEPARTMENT OF TRANSPORTATION (hereinafter "Caltrans"), a department of the State of California, hereby provides as follows:

WITNESSETH:

Whereas, Section 6005(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59 [Aug. 10, 2005]) (hereinafter "SAFETEA-LU"), codified as Section 327 of amended Chapter 3 of Title 23, United States Code (23 U.S.C. 327), established a Surface Transportation Project Delivery Pilot Program (hereinafter "Pilot Program") that allowed the Secretary of the United States Department of Transportation (hereinafter "USDOT Secretary"), to assign, and a limited number of States, including California, 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 one or more highway projects within the State; and

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

Whereas, on February 12, 2007, the FHWA published a final rule in the *Federal Register*, 72 Fed. Reg. 6464 (codified at 23 C.F.R. Part 773), establishing the requirements relating to the information a State is required to provide to the USDOT Secretary in its application to participate in the Pilot Program; and

Whereas, on May 21, 2007, Caltrans submitted its application to the FHWA for participation in the Pilot Program; and

Whereas, the FHWA solicited the views of other appropriate Federal agencies concerning Caltrans' application as required by 23 U.S.C. 327(b)(5); and

Whereas, the USDOT Secretary, acting by and through the FHWA, approved Caltrans' application, finding that Caltrans met all of the requirements of 23 U.S.C. 327 and 23 C.F.R. Part 773; and

Whereas, following FHWA's approval of Caltrans' application, on July 1, 2007, FHWA and

Caltrans entered into a Memorandum of Understanding (hereinafter "Original MOU") under which Caltrans assumed and carried out the assigned duties and responsibilities of the USDOT Secretary under NEPA and other Federal environmental laws under the auspices of the Pilot Program; and

Whereas, Section 13.1.1 of the Original MOU established an August 10, 2011 termination date, which was six years after the enactment of SAFETEA-LU; and

Whereas, Section 2203(c) of the Continuing Appropriations and Surface Transportation Extensions Act of 2011 (Pub. L. 111-322 [Dec. 22, 2010]) extended the Pilot Program's termination date to August 10, 2012, which was seven years after the enactment of SAFETEA-LU; and

Whereas, on August 10, 2011, FHWA and Caltrans entered into Amendment 1 to the Original MOU (hereinafter "Amended MOU1"); and

Whereas, Section 5.D. of the Amended MOU1 provided that should Congress enact legislation extending the termination date of the Pilot Program, the August 10, 2012 termination date would automatically be replaced with the appropriate termination date of the Pilot Program as specified in Federal law; and

Whereas, Section 7 of the Amended MOU1 provided that as soon as practicable following the potential reauthorization of SAFETEA-LU by Congress, the FHWA and Caltrans shall review the Original MOU, the Amended MOU1, and other applicable MOU amendments, to determine if any further changes are required or desirable as a result of changes in legislation; and

Whereas, Section 101(e) of the Temporary Surface Transportation Extension Act of 2012 (Pub. L. 112-140 [June 29, 2012]) extended the duration of the Pilot Program until September 30, 2012; and

Whereas, on July 6, 2012, President Obama signed into law Pub. L. 112-141, the Moving Ahead for Progress in the 21st Century Act (hereafter, "MAP-21"); and

Whereas, MAP 21 becomes effective on October 1, 2012; and

Whereas, Section 1313 of MAP-21 amends 23 U.S.C. 327, making the Pilot Program permanent as the Surface Transportation Project Delivery Program (hereinafter, "Project Delivery Program"), allowing the participation therein of any State, and allowing a State to renew its participation in the program; and

Whereas, the USDOT Secretary, acting by and through the FHWA, has performed multiple audits of Caltrans' performance under the Pilot Program since 2008 and determined that Caltrans has met the requirements of 23 U.S.C. 327, the terms of the Original MOU, as amended, and remains in good standing; and

Whereas, MAP-21 amends 23 U.S.C. 327(g) to require auditing of a State's compliance only

during the first four years of the assignment; and

Whereas, MAP-21 amends 23 U.S.C. 327(h) to require, after the fourth year of a State's participation in the program, the USDOT Secretary to monitor that State's compliance with any written agreement under which that State has assumed the responsibilities of the USDOT Secretary under NEPA and other Federal environmental laws; and

Whereas, the USDOT Secretary, acting by and through the FHWA, has taken into consideration Caltrans' original application for the program and that agency's program performance since July 1, 2007; and

Whereas, MAP-21 amends 23 U.S.C. 327(b)(2) to require the USDOT Secretary to amend the program application regulations; and

Whereas, the FHWA and Caltrans understand that a new Project Delivery Program MOU must be executed after the adoption of amended program regulations for the application and approval of assignment responsibilities for surface transportation projects;

Now, therefore, the FHWA and Caltrans agree as follows:

PART 1. PURPOSE OF MEMORANDUM OF UNDERSTANDING

1.1 Purpose

1.1.1 This Project Delivery Program MOU approves Caltrans' participation in the Surface Transportation Projected Delivery Program as set forth in 23 U.S.C. 327, and constitutes the written agreement required pursuant to 23 U.S.C. 327(a)(2)(A), (C), and (c) under which the USDOT Secretary may assign, and Caltrans may assume, the responsibilities of the USDOT Secretary for Federal environmental laws with respect to one or more highway projects within the State of California.

1.1.2 The FHWA's decision to execute this Project Delivery Program MOU is based upon the information, representations, and commitments contained in Caltrans' May 21, 2007, application to participate in the Pilot Program, as well as Caltrans' performance in the program since July 1, 2007. It also is based on the continuing waiver of sovereign immunity, required in 23 U.S.C. Section 327(c)(3)(B), as evidenced in California Street and Highways Code Section 820.1. As such, this Project Delivery Program MOU incorporates the May 21, 2007, application by reference. However, this Project Delivery Program MOU shall control to the extent there is any conflict between this Project Delivery Program MOU and the May 21, 2007, application.

2.1 Terms and Conditions

2.1.1 Except as provided in Section 2.1.2, 2.1.3 and 3.1.2, this Project Delivery Program MOU hereby incorporates by reference the terms and conditions contained in the Original MOU, as amended by the Amended MOU1. However, the provisions of 23 U.S.C. 327, as

amended by MAP-21, shall control to the extent there is any conflict between this Project Delivery Program MOU and the statute.

2.1.2. Notwithstanding the provisions of Part 11, Sections 11.1 through 11.4, of the Original MOU, for purposes of the Project Delivery Program Caltrans shall be subject to the monitoring requirements of 23 U.S.C. 327(h), as amended by MAP-21.

2.1.3 Section 13.2 of the Original MOU, as amended, shall be modified by:

A. replacing the date "January 1, 2012" with the date "January 1, 2017" in the two places it appears;

B. replacing the date "July 1, 2011" with "July 1, 2016";

C. replacing the date "September 30, 2011" with "September 30, 2016."

3.1 Effective Date and Duration

3.1.1. This Project Delivery Program MOU shall take effect on October 1, 2012, or the date of the last signature below, whichever is later (hereinafter "Effective Date"). This Project Delivery Program MOU shall remain in effect until replaced by a subsequent FHWA-Caltrans MOU entered into under the terms of regulations promulgated by FHWA for implementing the Project Delivery Program pursuant to the provisions of 23 U.S.C. 327(b)(2), as amended by MAP-21. Provided, however, that this Project Delivery Program MOU shall have a term not to exceed eighteen months from the effective date of the final regulations promulgated pursuant to 23 U.S.C. 327(b)(2).


3.1.2 All references in the Original MOU, as amended, to the Pilot Program termination date shall be replaced with "eighteen months from the effective date of the final regulations promulgated pursuant to 23 U.S.C. 327(b)(2)."

4.1 Termination at Will

4.1.1. In addition to the Termination by Operation of Law and Termination for Cause provisions in the Original MOU, as amended, and consistent with 23 U.S.C. 327(j)(2), as amended by MAP-21, Caltrans may terminate its participation in the Project Delivery Program at any time by providing a written notice to FHWA no later than ninety (90) calendar days before the date of termination, subject to applicable terms and conditions as the Secretary, acting by and through the FHWA, may provide.

IN WITNESS THEREOF, the parties hereto have caused this Project Delivery Program MOU to be duly executed in duplicate as of the date of the last signature below. This Project Delivery Program MOU is effective on the Effective Date as specified in section 3.1.1.

Federal Highway Administration



Victor M. Mendez
Administrator
Federal Highway Administration

Date: 09/25/2012

California Department of Transportation



Malcolm Dougherty
Director
California Department of Transportation

Date: 9/21/2012



Ronald Beals
Chief Counsel
California Department of Transportation

Date: 9/14/12

Signing only as to the continuing waiver of sovereign immunity contained in Section 1.1.2 of this MOU and as to form.