MEMORANDUM OF UNDERSTANDING
between
Federal Highway Administration, Alaska Division
and the
Alaska Department of Transportation and Public Facilities

State Assumption of Responsibility for Categorical Exclusions

THIS MEMORANDUM OF UNDERSTANDING ("MOU"), made and entered into this 22 day of September, 2009 by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION ("FHWA") and the STATE of ALASKA, acting by and through its DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES ("State"), hereby provides as follows:

WITNESSETH:

Whereas, Section 6004(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (P.L. 109-059) (SAFETEA-LU), codified as Section 326 of amended Chapter 3 of title 23, United States Code (23 U.S.C. 326) allows the Secretary of the United States Department of Transportation (USDOT Secretary), to assign, and a State to assume, responsibility for determining whether certain designated activities are included within classes of action that are categorically excluded from requirements for environmental assessments or environmental impact statements pursuant to regulations promulgated by the Council on Environmental Quality under part 1500 of title 40, Code of Federal Regulations (CFR) (as in effect on October 1, 2003); and

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

Whereas, on October 14, 2008, the FHWA published a notice of the availability of the proposed MOU in the Federal Register and provided a 45-day opportunity for comment; and

Whereas, on October 17, 2008, the State published a notice of the availability of the proposed MOU in the Anchorage Daily News, Fairbanks Daily News-Miner and Juneau Empire and provided a 45-day opportunity for comment; and

Whereas, the State and the FHWA have considered the comments received; and

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

Whereas, the State wishes to assume such federal agency responsibilities in accordance with this MOU and applicable law;

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

STIPULATIONS

I. CATEGORICAL EXCLUSION RESPONSIBILITIES ASSIGNED TO THE STATE BY FHWA

A. For the proposed projects covered by this MOU, the FHWA hereby assigns, and the State hereby assumes, subject to the terms and conditions set forth in 23 U.S.C. §326 and this MOU, the responsibility for determining whether a proposed federal-aid action is within a category of action that has been designated as a CE by the USDOT Secretary, as specified in Stipulation I(B), and meets the definition of a CE as provided in 40 CFR 1508.4 (as in effect on October 1, 2003) and 23 CFR 771.117(a) and (b). This assignment applies only to projects for which the Alaska Department of Transportation and Public Facilities is the direct recipient of Federal-aid Highway Program funding or is the project sponsor or co-sponsor for a project requiring approval by the FHWA - Alaska Division Office.

B. This assignment pertains only to the designated activities described in this Stipulation I(B). The assignment includes the following:

1. Activities listed in 23 CFR 771.117 (c);

2. The example activities listed in 23 CFR 771.117(d); and

3. Additional actions listed in Appendix A. None.

C. This MOU transfers to the State all responsibility for processing the CEs designated in Stipulation I(B) of this MOU, including any necessary CE approval actions. The State shall process all proposed projects that are CE candidates (CE projects), and any required reevaluations of CEs under 23 CFR 771.129 for all CE projects not completed prior to the date of this MOU, in accordance with the provisions of this MOU. With respect to matters covered by and subject to the terms of this MOU, this MOU supersedes any existing programmatic agreement that is solely between the State and the FHWA concerning CEs. Such programmatic agreement remains in effect with respect to matters not covered in this MOU until said programmatic agreement is terminated, or superseded, by subsequent agreement(s) between the State and FHWA or by law. A CE project that is excluded from this MOU, but is within the scope of a programmatic CE agreement between the FHWA and the State, may be processed pursuant to such programmatic agreement so long as that agreement remains in effect.

D. The State, when acting pursuant to 23 U.S.C. §326 and this MOU, holds assigned authority to make decisions and commitments pertaining to only the individual proposed projects and activities within the scope of §326 and this MOU. No action by the State shall bind the FHWA to future action of any kind. No determination or agreement made by the State with respect to mitigation or other activities shall constitute a precedent for future determinations, agreements, or actions in the Federal-aid Highway Program unless the FHWA consents, in writing, to such commitment.

II. OTHER FHWA RESPONSIBILITIES ASSIGNED TO THE STATE

A. For proposed projects covered by this MOU, the FHWA hereby assigns, and the State hereby assumes, the following FHWA responsibilities for environmental review, consultation, or other related actions required under federal laws and Executive Orders applicable to CE projects: see Appendix B for a description of the environmental responsibilities assigned to the State by the FHWA for proposed projects subject to this MOU. This assignment includes transfer to the State of the obligation to fulfill the assigned environmental responsibilities on any proposed projects meeting the criteria in Stipulation I(B) that were determined to be CEs prior to the effective date of this MOU but that have not been completed as of the effective date of the MOU. Such projects are included in the term "proposed projects" in this MOU.

B. The FHWA reserves responsibility for any environmental review, consultation, or other related action that is not expressly assigned under this MOU, including:

1. All government-to-government consultation with Indian tribes as defined in 36 CFR 800.16(m). Notice from the State 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 the State adequately resolves any project-specific tribal issues or concerns, then the FHWA's role in the environmental process shall be limited to carrying out the government-to-government consultation process. If FHWA determines through consultation with a tribe, or a tribe indicates to the FHWA, that the proposed resolution of tribal issues or concerns by the State is not adequate, then Stipulation III(C) applies. This MOU is not intended to abrogate, or prevent future entry into, any written agreement among the State, the FHWA, and a tribe under which the tribe agrees to permit the State to administer government-to-government consultation activities for the FHWA. However, such agreements are administrative in nature and do not relieve the FHWA of its legal responsibility for government-to-government consultation.

2. Responsibility for:

   a. Formal Consultation under Section 7 of the Endangered Species Act (ESA).
   b. Formal Consultation with the Department of Interior for actions that require use of Alaska National Interest Lands Conservation Act (ANILCA) lands where such use would require a Title XI approval.
   c. Review and approval of Individual Section 4(f) Evaluations. [See Stipulation III(D) that explains that proposed projects requiring such actions have been excluded from assignment under this MOU.]

3. In connection with the execution of their respective responsibilities under this MOU, the State and FHWA will ensure that:

   a. The State provides to FHWA any information necessary in order for the FHWA to carry out its consultation, evaluation, or decision-making for Stipulation II(B)(1)-(2) activities.
   b. The FHWA provides the State with a documented decision on any related information used for Stipulation II(B)(1)-(2) decisions and needed by the State in order for the State to evaluate the proposed project and make its decision whether the proposed project qualifies as a CE.

c. As part of any request for FHWA authorization for funding or other action, the State will provide to the FHWA evidence that the CE processing and any other environmental responsibilities assigned under this agreement have been completed in accordance with this MOU.

C. The State agrees that its execution of environmental review, reevaluation, consultation, and other related responsibilities for CE projects assigned under this MOU are subject to the same existing and future procedural and substantive requirements as if those responsibilities were carried out by the FHWA. This includes, without limitation, the responsibilities of the FHWA under interagency agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process for CE projects. This includes the interagency agreements listed in Appendix C of this MOU. If such interagency agreements are between the State and the FHWA only, then the assignment occurs automatically upon the signing of this MOU for proposed projects covered by this MOU. If the interagency agreement involves signatories other than the FHWA and the State, then the FHWA and the State will work to obtain any necessary consents or amendments. Such actions include:

1. Consulting with the other parties to obtain written consent to the continuation of the interagency agreement in its existing form, but with the substitution through assignment of the State for the FHWA with respect to interagency agreement provisions applicable to CE projects.

2. Negotiating with the other parties to amend the interagency agreement as needed so that the interagency agreement continues but that the State assumes the FHWA's responsibilities with respect to the assigned CE projects.

3. If a third party does not agree to the assignment or amendment of the interagency agreement, then to the extent permitted by applicable law and regulation, the State must carry out the assigned 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.

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

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

A. Notwithstanding any other provision of this MOU, any activity that does not satisfy the criteria for the CE categories described in Stipulation I(B) is excluded from this assignment, as is any project that involves a condition or impact specified in Stipulation III(D). Exclusion also may occur at any time during the environmental process if the State determines that the project fails to meet the CE criteria or falls within Stipulation III(D). The provisions of Stipulation IV(C) apply to such cases.

B. Because the State assumes responsibility for environmental processing of the CEs designated in this MOU, the FHWA no longer will be responsible for conducting the environmental review, consultation or other related actions assigned under this MOU (see Stipulation XI). However, in furtherance of its stewardship and oversight responsibilities, the FHWA will evaluate the State's environmental processing of any project if the FHWA has any reason to believe that the State's performance with respect to the project does not satisfy the terms and conditions of this MOU. The scope of the evaluation will be commensurate with the potential problem. If the FHWA subsequently determines that the State's performance does not satisfy the terms and conditions of this MOU, then the FHWA will take action to resolve the problem. Such action may include action to facilitate the State's compliance with the MOU, or action to exclude the project from assignment under this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.

C. If a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 CFR 800.16(m), and either the Indian tribe or the FHWA determines that the issue or concern will not be satisfactorily resolved by the State, then the FHWA shall reassume responsibility for processing the project. The FHWA shall notify the State that the project will be excluded from this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.

D. Other conditions or impacts that exclude a project from assignment to the State under this MOU are as follows:

1. The Department of Interior determines that the project will require use of Alaska National Interest Lands Conservation Act (ANILCA) designated lands where such use would require a Title XI approval.

2. The State has determined that an Individual Section 4(f) Evaluation will be required.

3. The State has determined, in consultation with the U.S. Fish and Wildlife Service (USF&WS) or National Marine Fisheries Service (NMFS), that their action is likely to adversely affect a listed endangered or threatened species or their critical habitat, such that Formal Consultation under Section 7 of the Endangered Species Act (ESA) is required; or the USF&WS or NMFS determined that the State's action is likely to jeopardize the continued existence of any proposed species or would result in the destruction or adverse modification of proposed critical habitat, such that a Conference is required.

4. The action has federal funding sources in addition to federal-aid highway funding (e.g., FTA funding).

IV. STATE PERFORMANCE REQUIREMENTS

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

1. Failure to meet the requirements of Stipulation IV(A) is grounds for a decision by the FHWA to terminate this MOU pursuant to Stipulation IX(A) if the FHWA determines, after good-faith consultation with the State, that there is an irreconcilable material conflict between a provision of State law, regulation, policy, or guidance and applicable federal law, regulation, policy, or guidance, and the FHWA reasonably determines that such conflict is preventing the State from meeting its Stipulation IV(A) obligations. The grounds for such decision may include, but are not limited to, the mere existence of the conflict (i.e., on its face) and/or the effect of the conflict on the State's decision(s) on proposed CE project(s) (i.e., as applied).

2. Official USDOT and FHWA formal guidance and policies relating to environmental review matters are posted online at FHWA's website (currently at http://www.fhwa.dot.gov/hep/legreg.htm), contained in the FHWA *Environmental Guidebook* (currently at http://environment.fhwa.dot.gov/guidebook/index.asp), or sent to the State electronically or in hard copy.

3. After the effective date of this MOU, the FHWA will use its best efforts to ensure that any new or revised FHWA policies and guidance that are final and applicable to the State's performance under this MOU are communicated to the State within 10 days of issuance. Delivery may be accomplished by e-mail, mail, by publication in the *Federal Register*, or by means of a publicly available online posting including at the sites noted above. If communicated to the State by e-mail or mail, such material may be sent either to the party specified in this MOU to receive notices, or to the Statewide Environmental Manager.

4. In the event that a new or revised FHWA policy or guidance is not made available to the State as described in the preceding paragraph, and if the State had no actual knowledge of such policy or guidance, then a failure by the State to comply with such federal policy or guidance will not be a basis for termination under this MOU.

5. The State will work with all other appropriate federal agencies concerning the laws, guidance, and policies relating to any federal laws that such other agencies administer.

6. In order to minimize the likelihood of a conflict as described in (1) above, after the effective date of this MOU the State will use its best efforts to ensure that any proposed new or revised State laws, regulations, policies, or guidance that are applicable to the State's performance under this MOU are communicated to the FHWA for review and comment before they become final. Delivery may be accomplished by e-mail, mail, or personal delivery. If communicated to the FHWA by e-mail or mail, such material may be sent to the party specified in this MOU to receive notices for the FHWA.

B. Processing proposed projects assigned under the MOU: State identification, documentation, and review of effects. For proposed projects and other activities assigned under this MOU that the State determines are included in the classes of CE assigned to the State under this MOU, the State shall:

1. Institute a process to identify and review the environmental effects of the proposed project.

2. For CEs [including those designated in 23 CFR 771.117(c)] carry out a review of proposed CE determinations, including consideration of the environmental analysis and project file documentation, prior to the State's approval of the CE determination. The process shall include at a minimum, review of the documentation and proposed determination by a competent reviewer who is not a preparer of the CE documentation. The reviewer may make a recommendation to the State's decision-maker about whether the project meets CE criteria or, if appropriately authorized, the reviewer may make the CE decision.

3. Carry out the other environmental responsibilities that are assigned under this MOU, as necessary or appropriate for the activity.

4. Document its approval of the determination, specifying the assigned CE that applies to the proposed project and including, at a minimum, the printed name, title, and date of the State official approving the determination.

5. Include the following determination statement when documenting the CE findings: *"The State has determined that this project has no significant impacts on the environment and that the project is categorically excluded from the requirements to prepare an environmental assessment or environmental impact statement under the National Environmental Policy Act. The State has been assigned, and hereby certifies that it has carried out, the responsibility to make this determination pursuant to Chapter 3 of title 23, United States Code, Section 326 and a Memorandum of Understanding dated [_____], executed between the FHWA and the State."*

6. Document in the project file the specific categorically excluded activity, the CE finding, including the determination that there are no unusual circumstances (23 CFR 771.117(b)), and completion of all applicable FHWA responsibilities assigned under Stipulations I and II.

C. Excluded projects: determination and documentation. For proposed projects that are candidates for CE classification but that the State determines should be excluded from processing under this assignment, the State shall:

1. Document the exclusion findings in the project file, including the reason for the finding;

2. Notify the FHWA; and

3. Working with the FHWA as the responsible party under NEPA, proceed with review and documentation of the project under the appropriate NEPA procedures including those under a programmatic CE agreement, if applicable.

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

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

   a. Using appropriate technical and managerial expertise to perform the functions required under this MOU and applicable laws, regulations, policy, and guidance;

   b. Devoting adequate financial and staff resources to carry out the responsibilities assumed by the State; and

   c. Demonstrating, in a consistent manner, the capacity to perform the State's responsibilities under the MOU and applicable federal law.

2. The State agrees that it shall maintain on its staff or through the use of consultant services all of the environmental and other technical expertise needed to carry out its responsibilities under this MOU and 23 U.S.C. §326. Without limiting the foregoing, when carrying out the requirements of Section 106 of the National Historic Preservation Act, as amended, the State 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 44738-44739). The State 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.

E. State quality control.

1. The State agrees to carry out regular quality control activities through the Statewide Environmental Office to ensure that its CE determinations are made in accordance with applicable laws and this MOU. To view the State's environmental procedures manual visit http://www.dot.state.ak.us/stwddes/desenviron/index.shtml .

2. At a minimum, the State shall monitor its processes relating to project determinations, environmental analysis, and project file documentation, and check for errors and omissions. The State shall take corrective action as needed. The State shall document its quality control activities and any needed corrective actions taken.

3. If the State implements training to meet the capability requirements of this MOU or as a corrective action, the State shall be responsible for the training. The State shall provide notice of the training to the FHWA.

4. Without limiting the foregoing, the State also shall implement the quality control procedures .(http://www.dot.state.ak.us/stwddes/desenviron/index.shtml) found in the State's procedures.

F. MOU performance monitoring and quality assurance. The FHWA and the State shall cooperate in monitoring performance under this MOU and each party shall modify its practices as needed to assure quality performance by the State and the FHWA. Monitoring by the FHWA and the State will include consideration of the technical competency and organizational capacity of the State, as well as the State's performance of its CE processing functions. Performance considerations will include, without limitation, the quality and consistency of the State's project determinations, adequacy and capability of the resources applied by the State, and the quality and consistency of the State's administration of its responsibilities under this MOU. In support of the monitoring efforts:

1. Within 15 business days after the end of each fiscal quarter, the State shall submit to the FHWA a list of the CE determinations that the State approved that fiscal quarter. At any time after the State's completion of the first four (4) fiscal quarters of its performance under this MOU, based on the State's satisfactory performance of this MOU during the first 12 months, the FHWA may reduce the frequency of this reporting requirement, provided that in no event will the reporting frequency be less than once each year. Such reduction in reporting frequency, and any revocation of such reduction by the FHWA, shall not be deemed an amendment under Stipulation VIII.

2. The State shall submit to the FHWA (via electronic or hard copy) a report summarizing its performance under the MOU at the conclusion of the 15th month and 30th month of the MOU and at similar intervals thereafter if the term of the MOU is renewed. The report will identify any areas where improvement is needed and what measures the State is taking to implement those measures. The report will include actions taken by the State as part of its quality control efforts under Stipulation IV. Following submission of a report, the State shall schedule a follow-up meeting with the FHWA at which the parties will discuss the report, the State's performance of the MOU, and the FHWA's monitoring activities. If the MOU is renewed, the reports will be due at the conclusion of the 15th and 30th months unless otherwise provided by the parties in the renewed MOU.

3. The State shall maintain paper or electronic project records and general administrative records (as soon as practicable the State will establish an electronic records system), pertaining to its MOU responsibilities for proposed projects processed hereunder. The records shall be available for inspection by the FHWA at any time during normal business hours. The State shall provide the FHWA with copies of any documents the FHWA may request. The State shall retain those records, including all letters and comments received from governmental agencies, the public, and others about the performance of activities delegated under this MOU, for a period of no less than three (3) years after completion of project construction. This 3-year retention provision does not relieve the State of its project or program recordkeeping responsibilities under 49 CFR 18.42 or any other applicable laws, regulations, or policies.

4. The State shall ensure that project records are available to the public consistent with requirements applicable to federal agencies under 5 U.S.C. 552 (the Freedom of Information Act, as amended in 2002) and NEPA.

5. The FHWA periodically shall review the State's records and may interview State staff or others to evaluate the State's performance under this MOU. Such reviews will occur no less than every 12 months, and may be coordinated with the review of the State's report under Stipulation IV(F)(2). The FHWA anticipates that under normal circumstances, its evaluation of the State's performance will be based on a modified version of a typical FHWA CE process review (to view FHWA guidance on how monitoring should occur visit http://www.fhwa.dot.gov/hep/6004stateassumpt.htm). Modifications to the CE process review will include incorporation of measures specific to the responsibilities assigned to the State pursuant to 23 U.S.C. §326, and will include performance measurements of quality and time. However, the FHWA reserves the right to determine in its sole discretion the frequency, scope, and procedures used for monitoring activities. The State, by its execution of this MOU acknowledges that it is familiar with the FHWA CE Process Review procedures and with the expected modifications that will be adopted for the purpose of monitoring the State's MOU performance.

6. Nothing in this Stipulation shall prevent the FHWA from undertaking other monitoring actions, including audits, with respect to the State's performance of the MOU. The FHWA, in its sole discretion, may require the State to perform such other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with this MOU, 23 U.S.C. §326, and other applicable federal laws and regulations. Such requirement shall not be deemed an amendment under Stipulation VIII.

7. The State agrees to cooperate with the FHWA in all quality assurance activities.

G. State liability. The State agrees that it is solely responsible and solely liable for complying with and carrying out this MOU, for the performance of all assigned responsibilities as provided by applicable law and for any decisions, actions, or approvals by the State. The FHWA shall have no responsibility or liability for the performance of responsibilities assigned to the State, including without limitation any decision or approval made by the State. Where a State exercises any assigned authority on a proposed project which FHWA determined to be a CE prior to the effective date of this MOU, the State assumes sole responsibility and liability for NEPA on that project (this includes, for example, NEPA re-evaluation prior to FHWA approval of construction funding).

H. Litigation. This section assumes that the FHWA will not be named as a party in litigation brought in connection with the State's discharge of its responsibilities under this MOU. If either the FHWA or another agency of the United States is named in such litigation, however, nothing in this MOU affects the United States Department of Justice's authority to litigate such claims, including the authority to approve a settlement, on behalf of the United States.

1. The State shall defend, at its own expense, all claims brought in connection with its discharge of any responsibility assigned to the State.

2. The State shall notify the FHWA of any notice of claim the State receives prior to initiation of litigation, which notice is given in connection with the State's acts or omissions pursuant to this MOU. The State shall provide the FHWA with a copy of any such notice of claim within 7 calendar days after the State's receipt of the notice.

3. In the event of litigation, the State shall provide qualified legal counsel, including outside counsel if necessary. The State will notify the FHWA's Division Office and the U.S. Department of Justice, through its Office of the Assistant Attorney General, Environment and Natural Resources Division, ("DOJ"), within 7 calendar days of the receipt of service of process, of any complaint concerning its discharge of any responsibility assumed under this MOU. The State's notification to the FHWA and DOJ shall be made prior to its response to the complaint. The State agrees to provide the FHWA's Division Office and DOJ with copies of the complaint and any motions, pleadings, briefs, and other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. The State will deliver such copies to the FHWA and DOJ via express mail or delivery service within 7 calendar days of the service or receipt of any document or, in the case of any documents filed by or on behalf of the State, within 7 calendar days of the date of filing.

4. The State agrees to notify FHWA's Division Office and DOJ of the State's decision to settle any lawsuit concerning its discharge of any responsibility assumed under this MOU prior to settling the case, and shall provide the FHWA and DOJ with a reasonable amount of time to review, and comment on, the proposed settlement. The State agrees not to enter into any litigation settlement agreement that affects the interpretation or application of any federal law without FHWA and DOJ consent.

5. For either litigation or pre-litigation settlement agreements, the lack of FHWA approval of such settlement is grounds for FHWA denial of federal-aid eligibility for any State claims for reimbursement of costs arising out of or relating to the settlement agreement.

6. The State hereby consents to intervention by the FHWA in any action or proceeding arising out of, or relating to the State's discharge of any responsibility assigned to the State under this MOU

7. If the FHWA re-assumes responsibility for processing a project and makes the final CE determination for the project, then the FHWA shall be responsible for defending that CE determination in the event of a challenge to actions the FHWA takes after re-assumption. This shall include the final CE determination. Nothing in this paragraph shall relieve the State of its liability for acts or omissions prior to the FHWA's re-assumption of responsibility for processing the project.

I. Federal Register. While the MOU is in effect, if any CE project or program documents are required to be published in the *Federal Register*, such as a notice of final agency action under 23 U.S.C. §139(l), the State shall transmit such document to the FHWA's Division Office and the FHWA will publish such document in the *Federal Register* on behalf of the State. The State is responsible for the expenses associated with the publishing of such documents in the *Federal Register*, in accordance with guidance issued by the FHWA.

V. STATE CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

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

1. Accept the assignment under this MOU;

2. Carry out all of the responsibilities assigned to the State; and

3. Agree to and perform all terms and conditions of the assignment as contained in this MOU and in 23 U.S.C. §326.

B. The State consents to and accepts the jurisdiction of the federal courts for the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary that the State assumes under this MOU pursuant to 23 U.S.C. §326. The State understands and agrees that this consent constitutes a waiver of the State's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of addressing the compliance, discharge, and enforcement of the USDOT Secretary's responsibilities that the State assumes under this MOU pursuant to 23 U.S.C. §326. This consent to federal court jurisdiction shall remain valid after termination of the MOU, or re-assumption of the USDOT Secretary's responsibilities by the FHWA, for any act or omission by the State in its compliance, discharge, or enforcement of any responsibility under this MOU pursuant to 23 U.S.C. §326.

1. Alaska Statute 44.42.300 authorizes the State's assumption of the assignment responsibilities. If at any time the State ceases to have the necessary legal authority under State law to carry out this assignment, then this MOU terminates automatically, subject to applicable survival and transitional provisions of this MOU.

2. Alaska represents that all conditions precedent to the waiver of its sovereign immunity have been satisfied. Alaska Statute 44.23.020(g), authorizes the Attorney General of Alaska to waive the State's sovereign immunity. By his execution of this MOU, the Attorney General exercises that authority for the purposes stated in this MOU and certifies that the waiver is valid and meets the requirements of this MOU and 23 U.S.C. §326. If this waiver is terminated, or determined by a court of competent jurisdiction to be invalid with respect to performance of any aspect of this MOU, then the State's authority to participate in this MOU terminates under federal law and this MOU terminates automatically, subject to applicable survival and transitional provisions of this MOU.

C. In accordance with 23 U.S.C. §326(e), the State agrees that it shall be deemed to be a federal agency for the purposes of the federal law(s) under which the State exercises any responsibilities pursuant to this MOU and 23 U.S.C. §326.

D. The State may not assign or delegate its rights or responsibilities under this MOU to any other agency, political subdivision, or entity, or to any private individual or entity. Without limiting the foregoing, the State understands and agrees that it must retain the environmental decision-making responsibilities assigned to it under this MOU and may not assign or delegate such decision-making responsibilities to consultants or others.

E. With respect to the public availability of any document or record under the terms of this MOU or the State's open records law, Alaska Statute 40.25.100-220, the State certifies that the laws of the State provide that any decision regarding the release or public availability of a document or record may be legally challenged or reviewed in the courts of the State.

F. The State certifies that the persons signing this MOU are each duly authorized to do so and have the respective legal authority between them to:

1. Consent to federal court jurisdiction as specified above;

2. Enter into this MOU on behalf of the State;

3. Make the certifications set forth in this MOU; and

4. Bind the State to the terms and conditions contained in this MOU.

The State's Attorney General, by signing this MOU certifies that the foregoing is true and that upon execution of this MOU the certifications, terms, and conditions of the MOU will be legally binding and enforceable obligations of the State.

VI. PUBLIC NOTICE AND COMMENT

A. The execution of this MOU, and of any amendment or renewal, requires prior public notice and an opportunity for comment.

B. The State shall publish notice of the availability of the initial MOU, and any proposed amendment or renewal, for public review and comment in one or more newspapers of statewide circulation.

C. The FHWA Division Office shall publish in the *Federal Register* a notice of availability of the initial proposed MOU, and any proposed amendment or renewal, for public review and a 45-day comment period. If this MOU, or any amendment or renewal, includes assignment of CE authority in Stipulation I(B)(3), the notice will expressly request comments on any types of activities proposed for the assignment under Stipulation I(B)(3), and will include a description of the public availability of supporting documentation for any assignment under Stipulation I(B)(3). The notice must advise the public about how to learn about FHWA's final decision on the proposed MOU, including how to obtain a copy of any resulting final MOU. The FHWA established a docket in the federal docket system to receive comments.

D. The State and the FHWA shall consider comments provided by the respondents to the public notices before finalizing the MOU, or any proposed amendment or renewal agreement. Upon completion of the decision-making process, the FHWA shall publish a notice in the *Federal Register* that announces the agency's decision and the execution of the MOU. The notice also will inform the public of the availability in the federal docket system of a brief summary of the results of the decision-making process and a copy of any final MOU executed by the State and FHWA, whether initial, amended, or renewed. The notice also will advise where the final MOU is available on the State's Web site.

E. The State agrees that at all times that this MOU is in effect, the State will post on its Web site (http://www.dot.state.ak.us/stwddes/desenviron/index.shtml) and make available to the public upon request, copies of the State's quarterly reports of the CE determinations under Stipulation IV(F)(1), the State's performance reports under Stipulation IV(F)(2), and FHWA performance monitoring reports pursuant to Stipulation IV(F)(5). The FHWA will arrange for the posting of a similar notice on the FHWA's web site or create a link from the FHWA's site to the State's site.

VII. INITIAL TERM AND RENEWAL

A. This MOU shall have an initial term of three (3) years, beginning on the date of the last signature.

B. This MOU is renewable for additional terms of three (3) years each if the State requests renewal and the FHWA determines that the State has satisfactorily carried out the provisions of this MOU. In considering any renewal of this MOU, the FHWA will evaluate the effectiveness of the MOU and its overall impact on the environmental review process. The FHWA may decide not to renew the MOU if the FHWA determines that the operation of the MOU has substantial adverse effects on the environmental review process. Such evaluation may include consideration of any effects from the assumption by the State of only some, but less than all, of the FHWA's environmental review, consultation, or other related responsibilities as listed in Stipulation II.

At least six (6) months prior to the end of the initial term and of any renewed term of this MOU, the State and the FHWA shall meet to discuss the results of the monitoring and consider any amendments to this MOU. This meeting may be combined with a meeting to discuss performance under the monitoring provisions in Stipulation IV(F)(2) and (F)(5) of this MOU.

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

VIII. AMENDMENTS

A. Any party to this MOU may request that it be amended, whereupon the parties shall consult to consider such an amendment.

B. If, after the required public notice and comment, the parties agree to amend the MOU, then the FHWA and the State may execute an amendment with new signatures and dates of the signatures. The term of the MOU shall remain unchanged unless otherwise expressly stated in the amended MOU. Any amendment that extends the term of the MOU shall be treated as a renewal and the FHWA must make the determinations required for a renewal under Stipulation VII.

IX. TERMINATION

A. Entire MOU. The State, or the State and FHWA by mutual agreement, may terminate this MOU in its entirety. The FHWA may terminate this MOU without the agreement of the State if the FHWA determines that the State has failed to adequately meet MOU requirements. The procedures in Stipulation X apply.

B. Part of MOU. By mutual agreement, the FHWA and the State may terminate the State's responsibilities with respect to particular designated activities under Stipulation I, or with respect to one or more responsibilities assigned under Stipulation II. The FHWA may exercise such partial termination without the agreement of the State if the FHWA determines that the State has failed to adequately meet MOU requirements for the responsibilities in question, but that termination of the entire MOU is not warranted. The procedures in Stipulation X apply.

X. PROCEDURES FOR TERMINATION AND FHWA-INITIATED PROJECT EXCLUSIONS

A. Except as provided in Stipulation X(B) below, the process for termination under Stipulation IX(A)-IX(B), and for exclusion of a project from the MOU assignment by the FHWA under Stipulation III(B)-III(C), is as follows:

1. The party wishing to initiate the termination or exclusion shall provide to the other party a written notice of intent. The notice should identify the proposed action and explain the reason(s) for the proposed action.

2. Following the notice, the parties shall have a 30-day period during which the FHWA and the State shall consult on amendments or other actions that would avoid termination or exclusion. By agreement, the parties may extend this consultation period, provided that such extension may not exceed the term of the MOU.

3. Following the consultation period, any termination or exclusion shall be effective as of a date thirty (30) days after the date of either a post-consultation agreement between the State and FHWA, or the date of the State's receipt of a FHWA notice of final determination of termination or exclusion. All responsibilities covered by the termination or exclusion shall revert to the FHWA as of that effective date.

4. In the event of termination or exclusion, the State and the FHWA agree to cooperate to make the transfer of responsibilities back to the FHWA effective in as orderly and administratively efficient manner as possible. The State will promptly provide to FHWA any documents, records and other project-related material needed for FHWA to proceed with processing any affected project. Appropriate NEPA procedures, including those under any applicable programmatic CE agreement, shall apply to the subsequent processing of projects.

B. The FHWA, in its sole discretion, may exclude a project from this MOU pursuant to Stipulation III(B)-III(C), or terminate this MOU pursuant to Stipulation IX(A)-IX(B), without the 30-day consultation or final notice periods, if the FHWA determines that:

1. The State is not performing in accordance with this assignment; and

2. Extreme conditions exist that justify immediate exclusion or termination and transfer back to the FHWA of the responsibilities covered by the exclusion or termination.

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

C. The State's liability for its acts and omissions under this MOU, and the provisions of Stipulation V, shall survive the MOU. This survival clause includes, without limitation, the provisions of Stipulations IV(G)-IV(H) relating to liability and litigation.

D. Termination and exclusion actions, and any decision not to renew, do not require public notice and comment.

E. Termination or other action by the FHWA in accordance with the provisions of this MOU does not limit or otherwise affect the FHWA's ability to seek any other remedy or to take action under other provisions of applicable law, including without limitation any appropriate remedies as provided in 23 CFR 1.36.

XI. STATE EXECUTION OF ASSIGNED RESPONSIBILITIES WITHOUT FHWA INVOLVEMENT

A. The FHWA will not provide any project-level assistance to the State in carrying out any of the responsibilities assigned under this MOU. "Project-level assistance" includes advice, consultation, or document review with respect to the discharge of such responsibility for a particular highway project. However, project-level assistance does not include discussions concerning issues addressed in prior projects, legal interpretations of any applicable law contained in titles 23 or 49 of the United States Code, legal interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance. If a need for project-level assistance is identified as a result of the government-to-government consultation process described in Stipulation II(B)(1), then the FHWA shall reassume responsibility for the project as provided in Stipulation III(C).

B. The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving the State's consultation or coordination with another federal, State, or local agency with respect to the State's discharge of any of the responsibilities the State has assumed under this MOU for any particular highway project. However, the FHWA holds both monitoring and quality assurance obligations under this MOU and general oversight and stewardship obligations under the Federal-aid Highway Program. In furtherance of those obligations, the FHWA occasionally may elect to attend meetings between the State and other federal agencies. Based on its observations, the FHWA may submit comments to the State and the other federal agency if the FHWA determines such comment is necessitated by rare or extreme circumstances including:

1. The FHWA reasonably believes that the State is not in compliance with this MOU; or,

2. The FHWA determines that an issue between the State and the other federal agency has broad or unique policy implications for the administration of the national Federal-aid Highway Program.

XII. NOTICES

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

State of Alaska:
Commissioner
Department of Transportation and Public Facilities
P.O. Box 112500
Juneau, Alaska 99811-2500

Federal Highway Administration:
Division Administrator
Federal Highway Administration, Alaska Division
P.O. Box 21648
Juneau, Alaska 99801-1648

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

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

STATE OF ALASKA

Aug 31, 2009

Leo von Scheben, P.E., L.S., M.B.A.
Commissioner
Department of Transportation and Public Facilities

Date

9/8/09

Daniel S. Sullivan
Attorney General
Department of Law

Date

FEDERAL HIGHWAY ADMINISTRATION

22 Sept 2009

David C. Miller
Division Administrator

Date

APPENDIX A

23CFR 771.117(d) Determinations the USDOT Secretary Assigns to the State Pursuant to Stipulation I (B)(3)

1. NONE.

Appendix B
List of FHWA Responsibilities Assigned

Air Quality
Clean Air Act (CAA), 42 U.S.C. 7401–7671q. *Determinations for project-level conformity if required for the project.*

Noise
Compliance with the noise regulations in 23 CFR 772

Wildlife
Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531–1544, and Section 1536[2]

Marine Mammal Protection Act, 16 U.S.C. 1361

Anadromous Fish Conservation Act, 16 U.S.C. 757a–757g

Fish and Wildlife Coordination Act, 16 U.S.C. 661–667d

Migratory Bird Treaty Act, 16 U.S.C. 703–712

Bald and Golden Eagle Protection Act, as amended, 16 U.S.C. 668-668c,

Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801 et seq.

Historic and Cultural Resources
Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470(f) et seq.[1]

Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. 138 and 49 U.S.C. 303[2]

Archeological and Historic Preservation Act of 1966, as amended, 16 U.S.C. 469–469(c)

Social and Economic Impacts
American Indian Religious Freedom Act, 42 U.S.C. 1996[1]

Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201–4209

Water Resources and Wetlands
Clean Water Act, 33 U.S.C. 1251–1377
- Section 404
- Section 401
- Section 319

Coastal Barrier Resources Act, 16 U.S.C. 3501–3510

Coastal Zone Management Act, 16 U.S.C. 1451–1465

Safe Drinking Water Act (SDWA), 42 U.S.C. 300f–300j–6

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, 3931

TEA-21 Wetlands Mitigation, 23 U.S.C. 103(b)(6)(m), 133 (b)(11)

Flood Disaster Protection Act, 42 U.S.C. 4001–4128

Parklands
Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. 138 and 49 U.S.C. 303[2]

Land and Water Conservation Fund (LWCF), 16 U.S.C. 4601-4 (known as Section 6(f))

Hazardous Materials
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601–9675

Superfund Amendments and Reauthorization Act of 1986 (SARA)

Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901–6992k

Land
Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C. 319

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. 11593, Protection and Enhancement of the Cultural Environment

E.O. 13007, Indian Sacred Sites[1]

E.O. 13175, Consultation and Coordination with Indian Tribal Governments[1]

E.O. 13112, Invasive Species

Note:
1. Under these laws and Executive Orders, FHWA will retain responsibility for conducting formal government-to-government consultations with federally recognized Indian tribes. The State will continue to handle routine consultations with the tribes and understands that a tribe has the right to direct consultation with FHWA upon request. The State may also assist FHWA with formal consultations, with the consent of a tribe, but FHWA remains responsible that this consultation occurs. FHWA's retention of formal consultation responsibilities under NAGPRA will not limit State's existing activities under this law.
2. Except as specified in Stipulation II.B.2 of this Section 6004 MOU.

APPENDIX C
Statewide Agreements

Alaska Interagency Consultation and Coordination Agreement for FHWA/DOT&PF Transportation Projects
Signatories to Agreement: FHWA, DOT&PF, U.S. Environmental Protection Agency, US Fish and Wildlife Service, National Marine Fisheries Service, U.S. Army Corps of Engineers, Alaska Department of Environmental Conservation, Alaska Department of Natural Resources, Alaska Department of Fish and Game
Effective Date: April 21, 2005