

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

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

WITNESSETH

**Whereas**, Section 327 of Title 23 of the U.S. Code (U.S.C.) establishes the Surface Transportation Project Delivery Program (hereinafter "Program") that allows the Secretary of the United States Department of Transportation (hereinafter "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 apply to participate in the Program; and

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

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

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

**Whereas**, on October 15, 2015, FHWA published a notice and provided an opportunity for comment on its preliminary decision to approve ODOT's request and solicited the views of other appropriate Federal agencies concerning ODOT's application as required by 23 U.S.C. 327(b)(5); and

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

identified in this MOU; and

**Whereas**, on December 11, 2015 (Effective December 28, 2015, Amended June 6, 2018), following FHWA's approval of ODOT's application, FHWA and ODOT entered into a Memorandum of Understanding (hereinafter "Original MOU") under which ODOT assumed and carried out the assigned duties and responsibilities of the USDOT Secretary under NEPA and other Federal environmental laws; and

**Whereas**, Section 13.1.1 of the Original MOU established a December 28, 2020, expiration date; and

**Whereas**, FHWA conducted audits as required by the Original MOU and 23 U.S.C. 327(g)(1)(B) during the State's participation in the Program; and

**Whereas**, FHWA has made the audit reports available to the public for comment through publication of notices in the Federal Register; and

**Whereas**, ODOT has also conducted self-assessments and monthly reports on its performance on the Program; and

**Whereas**, FHWA's audit reports are publicly available for inspection at [https://www.environment.fhwa.dot.gov/nepa/program\\_assignment.aspx](https://www.environment.fhwa.dot.gov/nepa/program_assignment.aspx); and

**Whereas**, on September 18, 2018, ODOT notified FHWA of its intent to renew participation in the Program with respect to highway projects, and the State of Ohio's legislature has enacted laws to allow the State to participate in the Program; and

**Whereas**, pursuant to 23 CFR 773.115(b), ODOT coordinated with FHWA to determine if significant changes have occurred or new assignment responsibilities would be sought that would warrant a statewide notice and comment opportunity prior to the State's submission of its application for renewal and supplemental information (hereinafter "Renewal Package"); and

**Whereas**, on April 19, 2019, after coordination between the agencies, FHWA determined that a statewide notice and comment opportunity was unnecessary prior to the State's submission of the Renewal Package; and

**Whereas**, pursuant to 23 U.S.C. 773.115(d), ODOT submitted its Renewal Package to FHWA on December 6, 2019, for approval to continue the assigned duties and responsibilities for highway projects pursuant to the Program; and

**Whereas**, on [date], FHWA published a Federal Register; Notice and provided an opportunity for comment on ODOT's renewal request and solicited the views of the public and other Federal agencies concerning ODOT's renewal request as required by 23 CFR 773.115(f); and

**Whereas**, the USDOT Secretary, acting by and through FHWA, has considered the Renewal Package, comments received because of the Federal Register Notice, auditing reports, and the State's overall performance in the Program as required by 23 C.F.R. 773.115(g) and has determined that ODOT's Renewal Package meets all the requirements of 23 CFR part 773 and 23 U.S.C. 327; and

**Now, therefore**, FHWA and ODOT agree as follows:

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

### **1.1 Purpose**

- 1.1.1 This MOU officially approves ODOT's application to renew participation in the Program and is the written agreement required pursuant to 23 U.S.C. 327(a)(2)(A) and 327(c) under which the USDOT Secretary may assign, and ODOT may assume, the responsibilities of the USDOT Secretary for Federal environmental laws with respect to one or more highway projects within the State of Ohio. For purposes of this MOU, "highway project" is defined in 23 CFR 773.103.
- 1.1.2 The FHWA's decision to execute this MOU is based upon the information, representations, and commitments contained in ODOT's application received on December 6, 2019 (hereinafter "Renewal Package"). As such, this MOU incorporates the Renewal Package. However, this MOU shall control to the extent there is any conflict between this MOU and the Renewal Package.
- 1.1.3 This MOU shall be effective upon expiration of the Original MOU (hereinafter the "Effective Date").
- 1.1.4 [Reserved]
- 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 ODOT's actions in carrying out environmental review responsibilities assigned under this MOU. Otherwise, this MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the State of Ohio, its departments, agencies, or entities, its officers, employees, or agents. This MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the United States, its departments, agencies, or entities, its officers, employees, or agents.

## **PART 2. [RESERVED]**

## **PART 3. ASSIGNMENTS AND ASSUMPTIONS OF RESPONSIBILITY**

### **3.1 Assignments and Assumptions of NEPA Responsibilities**

- 3.1.1 Pursuant to 23 U.S.C. 327(a)(2)(A), on the Effective Date, FHWA assigns, and ODOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the 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 assignment includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for Federal highway projects such as 23 U.S.C. 139, 40 CFR parts 1500-1508, DOT Order 5610.1 C, and 23 CFR part 771 as applicable.

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

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

- 3.1.3 ODOT shall disclose to the public and agencies, as part of agency outreach and public involvement procedures, including any notice of intent or scoping meeting notice, the disclosure in subpart 3.1.2 above.

### **3.2 Assignments and Assumptions of Responsibilities to Comply with Federal Environmental Laws Other Than NEPA**

- 3.2.1 Pursuant to 23 U.S.C. 327(a)(2)(B), on the Effective Date, FHWA assigns and ODOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the 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 at 23 CFR part 772

#### **Wildlife**

- Endangered Species Act of 1973, 16 U.S.C. 1531-1544
- Fish and Wildlife Coordination Act, 16 U.S.C. 661-667d
- Anadromous Fish Conservation Act, 16 U.S.C. 757a -757f
- Migratory Bird Treaty Act, 16 U.S.C. 703-712

#### **Hazardous Materials Management**

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

#### **Historic and Cultural Resources**

- National Historic Preservation Act of 1966, as amended, 54 U.S.C. 306101 et seq.
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm

- Title 54, Chapter 3125—Preservation of Historical and Archeological Data, 54 U.S.C. 312501-312508.
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001-3013; 18 U.S.C. 1170

#### **Social and Economic Impacts**

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

#### **Water Resources and Wetlands**

- Clean Water Act, 33 U.S.C. 1251-1387 (Section 401, 402, 404, 408, and Section 319)
- Coastal Barrier Resources Act, 16 U.S.C. 3501-3510
- Coastal Zone Management Act, 16 U.S.C. 1451-1466
- Safe Drinking Water Act (SDWA), 42 U.S.C. 300f - 300j-26
- General Bridge Act of 1946, 33 U.S.C. 525 – 533
- Rivers and Harbors Act of 1899, 33 U.S.C. 401-406
- Wild and Scenic Rivers Act, 16 U.S.C. 1271-1287
- Emergency Wetlands Resources Act, 16 U.S.C. 3901 and 3921
- Wetlands Mitigation, 23 U.S.C. 119(g) and 133(b) (14)
- FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777
- Flood Disaster Protection Act, 42 U.S.C. 4001-4130

#### **Parklands**

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

#### **FHWA-Specific**

- Planning and Environmental Linkages, 23 U.S.C. 168, except for those FHWA responsibilities associated with 23 U.S.C. 134 and 135.
- Programmatic Mitigation Plans, 23 U.S.C. 169 except for those FHWA responsibilities associated with 23 U.S.C. 134 and 135

#### **Executive Orders Relating to Highway Projects**

- E.O. 11990, Protection of Wetlands
- E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 C.F.R. sections 650.113 and 650.115)
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13112, Invasive Species
- E.O. 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects. (aka “One Federal Decision”)

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

the responsibility of FHWA unless the responsibility is added by written agreement of the parties through the amendment process established in Part 13 and pursuant to 23 CFR 773.113(b). This provision shall not be interpreted to abrogate ODOT's responsibilities to comply with the requirements of any Federal environmental law that apply directly to ODOT independent of FHWA's involvement (through Federal assistance or approval).

- 3.2.3 The 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 ODOT under this MOU. The FHWA remains responsible for all government-to-government consultation, including initiation of government-to-government consultation consistent with E.O. 13175 - Consultation and Coordination with Tribal Governments, unless otherwise agreed as described in this Part. A notice from ODOT to an Indian tribe advising the tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 CFR 800.16(m), and is related to NEPA or another Federal environmental law for which ODOT has assumed responsibilities under this MOU, and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by ODOT, then FHWA may withdraw the assignment of all or part of the responsibilities for processing the project. In this case, the provisions of subpart 9.1 concerning FHWA initiated withdrawal of assignment shall apply. This MOU is not intended to abrogate, or prevent future entry into, any agreement among ODOT, FHWA, and a tribe under which the tribe agrees to permit ODOT to administer government-to-government consultation activities for FHWA. However, such agreements are administrative in nature and do not relieve the FHWA of its legal responsibility for government-to-government consultation.
- 3.2.4 Nothing in this MOU shall be construed to permit ODOT's assumption of the 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, feasibility study, underserved populations impact analysis report, alternative evaluation report, or other decision-making document made available to the public, ODOT shall insert the following language in a way that is conspicuous to the reader or include in the project record:
- "The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried-out by ODOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated June 6, 2018, and executed by FHWA and ODOT."
- 3.2.6 ODOT shall disclose to the public and agencies, as part of the NEPA approval document (CE, EA, EIS), the disclosure in stipulation 3.2.5 above.
- 3.2.7 ODOT will continue to adhere to the original terms of Biological Opinions (BOs) issued by the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) or both USFWS and NMFS prior to

the effective date of the original 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 the original MOU would be ODOT's responsibility. ODOT agrees to assume FHWA's environmental review role and responsibilities as identified in existing interagency agreements among ODOT, USFWS, and FHWA, such as the Programmatic Agreement for Biological Evaluations, or negotiate new agreements with USFWS, if needed. ODOT agrees to assume FHWA's ESA Section 7 responsibilities of consultations (formal and informal) ongoing as of the date of the MOU execution.

- 3.2.8 ODOT will not make any determination that an action constitutes a constructive use of a publicly owned park, public recreation area, wildlife refuge, waterfowl refuge, or historic site under 49 U.S.C. 303/ 23 U.S.C. 138 (Section 4(f)) without first consulting with FHWA and obtaining FHWA's approval of such determination.

### **3.3 Highway Projects**

- 3.3.1 Except as provided by subpart 3.3.2 below or otherwise specified in this subpart, the assignments and assumptions of the 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 Ohio. The definition of "highway project" is found at 23 CFR 773.103, and for purposes of this MOU, "highway project" includes eligible preventative maintenance activities. The State shall conduct any reevaluations required under 23 CFR 771.129 for projects for which construction was not completed prior to the date of the Original MOU, in accordance with the provisions of this and the Original 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.
  - B. Projects qualifying for CEs, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals.
  - C. Projects requiring EAs, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals.
  - D. Projects funded by other Federal agencies [or projects without any Federal funding] that also require FHWA approvals. For these projects, ODOT would not assume the NEPA responsibilities of other Federal agencies. However, ODOT may use or adopt other Federal agencies' NEPA analyses consistent with 40 CFR parts 1500 -1508, and 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 and 203, and 204 unless such projects will be designed and constructed by ODOT
- 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.
- C. Projects under the Recreational Trails program (23 U.S.C. 206).
- D. Programs and projects advanced by direct recipients of Federal-aid Highway Program funds other than ODOT, including but not limited to:
  - i. BUILD, INFRA and/or subsequent similar funding source discretionary grants;
  - ii. National Significant Freight and Highway Project Program.

### **3.4 Limitations**

- 3.4.1 As provided at 23 U.S.C. 327(e), ODOT shall be solely responsible and solely liable for carrying out all 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 ODOT under subpart 3.3.1 in this MOU remains the responsibility of the USDOT Secretary or FHWA, as applicable.

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

### **4.1 Certifications**

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



document under that Act is reviewable by an Ohio court of competent jurisdiction.

## **4.2 State Commitment of Resources**

4.2.1 As provided at 23 U.S.C. 327(c)(3)(D), ODOT will maintain the financial resources necessary to carry out the responsibilities it is assuming. ODOT's substantial compliance with the Original MOU demonstrates that ODOT's financial resources are adequate for the purpose of fulfilling the terms of this MOU. Should FHWA determine, after consultation with ODOT, that ODOT's financial resources are inadequate to carry out the USDOT Secretary's responsibilities, ODOT will take appropriate action to obtain the additional financial resources needed to carry out these responsibilities. If ODOT is unable to obtain the necessary additional financial resources, ODOT shall inform FHWA, and this MOU will be amended to assign only the responsibilities that are commensurate with ODOT's financial resources.

4.2.2 ODOT will maintain adequate organizational and staff capability, including competent and qualified consultants where necessary or desirable, to effectively carry out the responsibilities it has assumed under this MOU. This includes, without limitation:

A. Using appropriate environmental, technical, legal, and managerial expertise;

B. Devoting adequate staff resources; and

C. Demonstrating, in a consistent manner, the capacity to perform ODOT's assumed responsibilities under this MOU and applicable Federal laws.

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

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

### **4.3 Federal Court Jurisdiction**

- 4.3.1 As provided at 23 U.S.C. 327(c)(3)(B), and pursuant to Ohio Revised Code Section 5531.30(B), ODOT hereby expressly consents, on behalf of the State of Ohio, to accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary assumed by ODOT under this MOU. This consent to Federal court jurisdiction shall remain valid after termination of this MOU, or FHWA's withdrawal of assignment of the USDOT Secretary's responsibilities for any decision or approval made by ODOT pursuant to an assumption of responsibility under this MOU. ODOT understands and agrees that, in accordance with 23 U.S.C. 327, this acceptance constitutes a waiver of the State of Ohio's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of carrying out the 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, ODOT 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, but are not limited to, 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, Office of Management and Budget (OMB), USDOT, or the FHWA (e.g. Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects), and any applicable Federal court decisions, and, subject to subpart 5.1.4 below, interagency agreements such as programmatic agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process [e.g., the 2015 Red Book – Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects, or the MOU between the USDOT and the US Coast Guard and the MOA between FHWA and the US Coast Guard, etc.].
- 5.1.2 USDOT Orders, FHWA Orders, official guidance and policy issued by the CEQ, USDOT, or the FHWA, and any applicable Federal court decisions apply equally to ODOT as they would to the USDOT secretary. Official USDOT and FHWA formal guidance and policies relating to environmental review are posted on the FHWA's website, contained in the FHWA Environmental Toolkit, published in the Federal Register, or may be sent to ODOT electronically or in hard copy.
- 5.1.3 After the Effective Date of this MOU, FHWA will use its best efforts to ensure that any new or revised Federal policies and guidance that are final and applicable to FHWA's responsibilities under NEPA and other environmental laws that are assumed by ODOT under this MOU are communicated to ODOT within 10 calendar days of issuance. Delivery may be accomplished by e-mail, web posting (with email or mail to ODOT notifying of web posting), mail, or publication in the Federal Register (with email or mail to ODOT

notifying of publication). If communicated to ODOT by e-mail or mail, such material will be sent to ODOT's Administrator of Environmental Services. If a new or revised FHWA policy or guidance is not made available to ODOT as described in the preceding sentence, and if ODOT had no actual knowledge of such policy or guidance, then a failure by ODOT to comply with such Federal policy or guidance will not be a basis for termination under this MOU.

- 5.1.4 ODOT will work with all other appropriate Federal agencies concerning the laws, guidance, and policies that such other Federal agencies are responsible for administering.
- 5.1.5 Upon termination of this MOU, FHWA and ODOT shall contact the relevant third party to any interagency agreement and determine whether the interagency agreement should be amended or reinstated as it was on the effective date of this MOU.

## **5.2 Rulemaking**

- 5.2.1 As provided at 23 U.S.C. 327(f), nothing in this MOU permits ODOT to assume any rulemaking authority of the USDOT Secretary. Additionally, ODOT may not establish policy and guidance on behalf of the USDOT Secretary or FHWA for highway projects covered in this MOU. ODOT's authority to establish State regulations, policy, and guidance concerning the State environmental review of State highway projects shall not supersede applicable Federal environmental review regulations, policy, or guidance established by or applicable to the 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, ODOT shall be deemed to be acting as FHWA or the USDOT Secretary, as applicable, 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), ODOT shall be solely liable and solely responsible for carrying out the responsibilities assumed under this MOU, in lieu of and without further approval of the USDOT Secretary. The FHWA and USDOT shall have no responsibility or liability for the performance of the responsibilities

assumed by ODOT, including any decision or approval made by ODOT while participating in the Program.

## **6.2 Litigation**

- 6.2.1 Nothing in this MOU affects the United States Department of Justice's (hereinafter "DOJ") authority to litigate claims, including the authority to approve a settlement on behalf of the United States if either FHWA or another agency of the United States is named in such litigation or if the United States intervenes pursuant to 23 U.S.C. 327(d)(3). In the event FHWA or any other Federal agency is named in litigation related to matters under this MOU or the United States intervenes in the litigation, ODOT agrees to coordinate with DOJ in the defense of that action.
- 6.2.2 ODOT shall defend all claims brought in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, ODOT shall provide qualified and competent legal counsel, including outside counsel if necessary. ODOT shall provide the defense at its own expense, subject to 23 U.S.C. 327(a)(2)(G) concerning Federal-aid participation in attorney's fees for ODOT's counsel. ODOT shall be responsible for opposing party's attorney's fees and court costs if a court awards those costs to an opposing party, or in the event those costs are part of a settlement agreement.
- 6.2.3 ODOT will notify the FHWA's Ohio Division Office and DOJ's Assistant Attorney General for the Environment and Natural Resources Division, within seven (7) calendar days of ODOT's receipt of service of process of any complaint, concerning discharge of any responsibility assumed under this MOU. ODOT's notification to the FHWA and USDOJ shall be made prior to its response to the complaint. In addition, ODOT shall notify FHWA's Ohio Division Office within seven (7) calendar days of receipt of any notice of intent to sue concerning its discharge of any responsibility assumed under this MOU.
- 6.2.4 ODOT will provide FHWA's Ohio Division Office and USDOJ copies of any motions, pleadings briefs, or other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. ODOT will provide such copies to the FHWA and DOJ within seven (7) calendar days of service of any document, or in the case of any documents filed by or on behalf of ODOT, within seven (7) calendar days of the date of filing.
- 6.2.5 ODOT will notify the FHWA's Ohio Division Office and USDOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and USDOJ with a reasonable amount of time of at least ten (10) calendar days, to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. ODOT will not execute any settlement agreement until: (1) FHWA and USDOJ have provided comments on the proposed settlement; (2) FHWA and USDOJ have indicated that they will not provide comments on the proposed settlement; or (3) the review period has expired, whichever occurs first.
- 6.2.6 Within seven (7) calendar days of receipt by ODOT, ODOT will provide notice to FHWA's Ohio Division Office and USDOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the

responsibilities ODOT has assumed under this MOU. ODOT shall notify FHWA's Ohio Division Office and USDOJ within five (5) days of filing a notice of appeal of a court decision. ODOT shall confer with FHWA and USDOJ regarding the appeal at least forty-five (45) days before filing an appeal brief in the case.

- 6.2.7 ODOT's notification to FHWA and USDOJ in subparts 6.2.3, 6.2.4, 6.2.5, and 6.2.6, shall be made by electronic mail to FHWA\_assignment\_lit@dot.gov and NRSDOT.enrd@doj.gov, unless otherwise specified by FHWA and USDOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in subpart 6.2.4, ODOT may opt to either send the materials to the email addresses identified above, send hardcopies to the mail address below, or add to the distribution list in the court's electronic filing system (e.g., PACER) the following two email addresses: FHWA\_assignment\_lit@dot.gov and efile\_nrs.enrd@usdoj.gov. FHWA and USDOJ's comments under subpart 6.2.5 and 6.2.6 shall be made by electronic mail to Tim.Hill@dot.ohio.gov unless otherwise specified by ODOT. If regular mail is determined necessary, mail should be sent by overnight mail service to:

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

For FHWA: Division Administrator, FHWA Ohio Division, 200 North High Street, Rm 328, Columbus, OH 43215.

### **6.3 Conflict Resolution**

- 6.3.1 In discharging any of the USDOT Secretary's responsibilities under this MOU, ODOT 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), except for the USDOT Secretary's responsibilities under 23 U.S.C. 139(h)(6) regarding financial penalties.
- 6.3.2 ODOT agrees to follow 40 CFR part 1504 in the event of pre-decision referrals to CEQ for Federal actions determined to be environmentally unsatisfactory. ODOT also agrees to coordinate and work with CEQ on matters brought to CEQ with regards the environmental review responsibilities for Federal highway projects ODOT has assumed.

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

### **7.1 Coordination**

- 7.1.1 ODOT agrees to seek early and appropriate coordination with all appropriate Federal, State, and local agencies in carrying out any of the responsibilities for highway projects assumed under this MOU.

### **7.2 Processes and Procedures**

- 7.2.1 ODOT will ensure that it has appropriate processes and procedures in place that provide for proactive and timely consultation, coordination, and communication with all appropriate Federal agencies in order to carry out any of the responsibilities assumed under this MOU, including the submission of all environmental impact statements together with comments and responses to the Environmental Protection Agency 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**

- 8.1.1 Except as specifically provided otherwise in this MOU, FHWA will not provide any project-level assistance to ODOT in carrying out any of the responsibilities it has assumed under this MOU. Project-level assistance shall include any advice, consultation, or document review with respect to the discharge of such responsibility for a 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.
- 8.1.2 The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving ODOT's consultation or coordination with another Federal agency with respect to ODOT's discharge of any of the responsibilities assumed under this MOU for any highway project. However, the FHWA may attend meetings between ODOT and other Federal agencies. Further, FHWA may submit comments to ODOT and the other Federal agency in the following extraordinary circumstances:
- A. FHWA reasonably believes that ODOT is not in compliance with this MOU;
  - B. FHWA determines that an issue between ODOT and the other Federal agency concerns emerging national policy issues under development by the USDOT; or
  - C. Upon request by either ODOT or the Federal agency and agreement by FHWA.

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

- 8.1.3 Other Federal agencies may raise concerns regarding the compliance with this MOU by ODOT and may communicate these concerns to the FHWA. The FHWA will review the concerns and any information provided to FHWA by such other Federal agency. If, after reviewing these concerns, FHWA and such other Federal agency still have concerns regarding ODOT'S compliance, FHWA will notify ODOT of the potential compliance issue and will work with both ODOT and the relevant Federal agency to resolve the issue and, if

necessary, take appropriate action to ensure compliance with this MOU.

- 8.1.4 At ODOT's request, FHWA may assist ODOT in evaluating its environmental program and developing or modifying any of its processes or procedures to carry out the responsibilities it has assumed under this MOU, including, but not limited to, those processes and procedures concerning ODOT'S consultation, coordination, and communication with other Federal agencies.
- 8.1.5 ODOT's obligations and responsibilities under 23 CFR 1.5 are not altered in any way by executing this MOU.

## **8.2 MOU Monitoring and Oversight**

- 8.2.1 Pursuant to 23 U.S.C. 327(h), the FHWA shall monitor and provide oversight over ODOT's performance in order to ensure ODOT's compliance with the MOU and all applicable Federal laws and policies, and to evaluate whether ODOT is meeting performance measures established pursuant to Part 10 of the MOU. The FHWA's monitoring program will consist of monitoring reviews, which will be coordinated with ODOT and take into account the FHWA Ohio Division's annual risk assessments. FHWA shall provide its draft and final annual risk assessments to ODOT for review and comment on matters pertaining to ODOT's performance under this MOU.
- 8.2.2 In order to minimize the impact of the monitoring reviews on ODOT's day-to-day project delivery workload, the FHWA and ODOT will coordinate when scheduling joint monitoring reviews. The FHWA will complete two monitoring reviews during the term of the MOU, although the FHWA may conduct additional reviews, if deemed necessary by both ODOT and FHWA. ODOT and the FHWA Ohio Division Office will each designate a point of contact, who will be responsible for coordinating monitoring review schedules, requests for information and organizing meetings.
- 8.2.3 In order for FHWA to provide oversight and evaluate whether ODOT is meeting performance measures established pursuant to Part 10 of this MOU, ODOT shall make available for inspection by the FHWA any project files, general administrative files, and letters or comments received from governmental agencies and the public which pertain to ODOT's discharge of the responsibilities it has assumed under this MOU. ODOT will work with the FHWA to provide documents electronically to the extent it does not create an undue burden. ODOT environmental staff will be available for interviews as part of the monitoring reviews.
- 8.2.4 Pursuant to 23 U.S.C. 327(c)(4), ODOT is responsible for providing to the FHWA any information the FHWA reasonably considers necessary to ensure that ODOT is adequately carrying out the responsibilities assigned. At the request of the FHWA, ODOT will (within five business days or a mutually agreeable time frame) provide the FHWA with any information the FHWA considers necessary to ensure that ODOT is adequately carrying out the responsibilities assigned to ODOT.
- 8.2.5 ODOT will provide FHWA Ohio Division Office with access to its electronic system for environmental documentation and a query report of real time data, the listing of any approvals and decisions ODOT has made with respect to the responsibilities ODOT has assumed under this MOU.

- 8.2.6 ODOT agrees to perform regular quality assurance and quality control (QA/QC) activities to ensure responsibilities assumed under Part 3 of this MOU are being conducted in accordance with applicable laws and this MOU, to identify areas needing improvements in the process, and to timely take any corrective actions necessary to address the areas needing improvement. At a minimum, ODOT's QA/QC activities will include the review and monitoring of its processes relating to project decisions, environmental analysis, project file documentation, checking for errors and omissions, and legal sufficiency reviews. ODOT will provide documentation of this data and any identified trends to FHWA on an annual basis.
- 8.2.7 [Reserved]
- 8.2.8 Monitoring review reports, whether prepared by the FHWA or ODOT, shall include a description of the scope of the monitoring reviews, the compliance areas reviewed, a description of the monitoring process, and a list of areas identified as needing improvement. The joint reports shall identify findings that require corrective actions and shall discuss corrective actions that have been or will be implemented.
- 8.2.9 Prior to making any monitoring review report available to the public, the FHWA will transmit to ODOT a draft of the report and allow ODOT at least 14 calendar days to respond in writing. The FHWA will grant any reasonable request by ODOT to extend this response period up to a total of 30 calendar days. The FHWA will review the comments and revise the draft monitoring report, as appropriate.
- 8.2.10 ODOT agrees to post all FHWA monitoring reports on the ODOT Environmental Services NEPA Assignment website in order to make them available to the public.

### **8.3 Record Retention**

- 8.3.1 ODOT will retain project files, and files pertaining to the discharge of its responsibilities under this MOU in perpetuity, in accordance with the ODOT State Records Retention and Disposition Schedule Series Authorization No. 770-2385, or as amended, which meets or exceeds requirements established in FHWA Records Disposition Manual (Field Offices) Chapter 4, FHWA Order No. 1324.1 B, issued July 29, 2013, or in accordance with any subsequent order that supersedes or replaces Order No. 1324.1 B. Capital project files of historical significance (NEPA decision documents including CE, EA and EIS) will be retained permanently. To the extent that FHWA's Records Disposition Manual is amended to provide for a longer retention period, ODOT will meet such requirement. ODOT will permanently store records for Significant Transportation Projects as they are defined in FHWA Order No. 1324.1B.
- 8.3.2 In addition to the period specified in 2 CFR 200.333, ODOT will ensure that the following retention periods are maintained for each specified type of record:
- A. **Environment Correspondence Files:** Correspondence between FHWA and ODOT relative to the interpretation, administration, and execution of this MOU and the environmental aspects of the



Federal-aid Highway Program, as established in 8.1.2 and 8.1.5, shall be maintained by ODOT for a period of six (6) years after the resolution of the particular issue or after the guidance has been superseded. After six (6) years ODOT may follow the State records disposition process for these records.

- B. **Environmental Impact Statements and/or Section 4(f) Statements – FHWA:** For a period of 8 years after approval of the final construction voucher ODOT shall maintain Final NEPA Documents (Draft EISs, Final EISs, Supplemental EISs, RODs, EAs, FONSI, CE documentation and determinations), Supporting Materials (documentation supporting the Sec. 139 environmental review process [i.e., coordination plans that include project schedules, evidence for opportunities for public/agency input in purpose and need, alternatives], scoping, public and agency comments; meeting minutes; NOI, Public Involvement Plans, public meeting summaries, public hearing certifications and transcripts, mitigation reports/tracking, technical reports; correspondence; studies and reports; references; errata sheets; and reevaluation documents); NEPA Reference Documents (written statements and supporting documents needed for reference); and official documents and correspondence related to reviews under other environmental requirements (e.g., ESA, CWA, Section 4(f), Section 106). After 8 years ODOT may follow the State records disposition process for these records except that ODOT will permanently store the above referenced records for Significant Transportation Projects as they are defined in Order No. 1224.1B.

Drafts and working copies of paper or electronic documents should be kept until the final version of a document is completed. For long or complex documents, several earlier drafts and the current draft may be retained to ensure document integrity until the final draft is approved. Then, previous revisions may be erased or destroyed and only the final text and the requisite back-up copies will be kept as identified above.

- C. **Environmental Impact Statements - Other Agencies:** Environmental Impact Statements - Other Agencies: Files containing reviews and comments furnished by ODOT to other Federal agencies following reviews of an EIS for which another Federal agency is the lead agency shall be maintained by ODOT for a period of 5 years. After 5 years, ODOT may destroy these files when no longer needed.
- D. **Noise Barriers:** ODOT agrees to maintain an inventory of all constructed noise abatement measures containing the information required to comply with 23 CFR 772.13(f). ODOT will retain the required information for a period of four (4) years after the end of the Federal fiscal year in which construction of the particular noise abatement measure is completed.

- 8.3.3. Nothing contained in this MOU is intended to relieve ODOT of its recordkeeping responsibilities under 2 CFR 200.333 - 200.337 (Record Retention and Access) or other applicable laws.

#### 8.4 Federal Register

- 8.4.1 For any documents that are required to be published in the *Federal Register*, such as the Notice of Intent under 23 CFR 771.123(a) and Notice of Final Agency Action under 23 U.S.C. 139(l)(2), ODOT shall transmit such document to the FHWA's Ohio Division Office and the FHWA will cause such document to be published in the *Federal Register* on behalf of ODOT and will submit such document to the *Federal Register* within 5 calendar days of receipt of such document from ODOT. ODOT shall, upon request by FHWA, reimburse FHWA for the expenses associated with publishing such documents in the *Federal Register* (excluding FHWA's overhead).

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

- 8.5.1 ODOT agrees to provide data and information requested by the FHWA and resource agencies for the preparation of national reports to the extent that the information relates to determinations, findings, and proceedings associated with projects processed under this MOU. Such reports include but are not limited to:
- A. Information on the completion of and duration to complete environmental documentation of all NEPA types (EIS, EA, CE);
  - B. Archeology Reports requested by the National Park Service;
  - C. Endangered Species Act Expenditure Reports requested by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service;
  - D. NEPA Litigation Reports requested by CEQ;
  - E. Environmental Conflict Resolution reports requested by the Office of Management and Budget and CEQ. Project schedules and other project information for nationwide infrastructure transparency initiatives; and,
  - F. Project status and information for EAs and EISs for use on the searchable website maintained under Section 41003(b) of the FAST Act [Fixing America's Surface Transportation Act, 42 U.S.C. 4370m-2(b) and 23 U.S.C. 139(o)] (Federal Permitting Dashboard) to be submitted in accordance with current and any future reporting standard issued by U.S. DOT pursuant to such provisions.

## **8.6 Conformity Determinations**

- 8.6.1 Pursuant to 23 U.S.C. 327(a)(2)(B)(iv)(II), for any project requiring a project-level conformity determination under the Federal Clean Air Act and its implementing regulations, the FHWA's Ohio Division Office will document the project level conformity determination. FHWA's Ohio Division Office will restrict its review to only that data, analyses, applicable comments and responses, and other relevant documentation that enable FHWA to make the project-level conformity determination.

## **8.7 Certification of NEPA Compliance**

- 8.7.1 For projects funded by FHWA, ODOT shall ensure that a certification is included with each NEPA approval specifying that ODOT has fully carried out all responsibilities assumed under this MOU in accordance with this MOU and all applicable Federal laws, regulations, executive orders, and policies. ODOT shall ensure that this certification is made prior to the execution of any future Federal-aid approval or action. ODOT agrees to provide FHWA access to NEPA approvals and certifications.

## **8.8 Enforcement**

- 8.8.1. Should FHWA determine that ODOT is not in compliance with this MOU, then FHWA shall take appropriate action to ensure ODOT's compliance, including appropriate remedies provided at 23 CFR 1.36 for violations of or failure to comply with Federal law or the regulations at 23 CFR with respect to a project, withdrawing assignment of any responsibilities that have been assumed as provided in Part 9 of this MOU, or terminating ODOT's participation in the Project Delivery Program as provided in Part 12 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 ODOT under this MOU for any highway project or highway projects upon FHWA's determination that:
- A. With respect to that particular highway project or those particular highway projects, ODOT is not in compliance with a material term of this MOU or applicable Federal laws or policies, and ODOT has not taken sufficient corrective action to the satisfaction of FHWA;
  - B. The highway project or highway projects involve significant or unique national policy interests for which ODOT's assumption of the USDOT Secretary's responsibilities would be inappropriate; or
  - C. ODOT cannot satisfactorily resolve an issue or concern raised in a government-to-government consultation process, as provided in subpart 3.2.3.
- 9.1.2 Upon the FHWA's determination to withdraw assignment of the USDOT Secretary's responsibilities under subpart 9.1.1, FHWA will informally notify ODOT of FHWA's determination. After informally notifying ODOT of its determination, FHWA will provide ODOT written notice of its determination including the reasons for its determination. Upon receipt of this notice, ODOT may submit any comments or objections to FHWA within 30 calendar days, unless FHWA agrees to an extended period. Upon receipt of ODOT's comments or objections, FHWA will make a final determination within 30 calendar days, unless extended by FHWA for cause, and notify ODOT of its decision. In making its determination, FHWA will consider ODOT's comments

or objections, the effect the withdrawal of assignment will have on the Program, the amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.

- 9.1.3 The FHWA shall withdraw assignment of the responsibilities ODOT has assumed for any highway project when the preferred alternative that is identified in the categorical exclusions, 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 ODOT-Initiated Withdrawal of Assignment of Projects**

- 9.2.1 ODOT may, at any time, request FHWA to withdraw all or part of the USDOT Secretary's responsibilities ODOT has assumed under this MOU for any existing or future highway project or highway projects.
- 9.2.2 Upon ODOT's decision to request FHWA withdraw the assignment of the USDOT Secretary's responsibilities under subpart 9.2.1, ODOT shall informally notify FHWA of its desire for FHWA to withdraw assignment of its responsibilities. After informally notifying FHWA of its desire, ODOT will provide FHWA written notice of its desire, including the reasons for wanting FHWA to withdraw assignment of the responsibilities. Upon receipt of this notice, the FHWA will have 30 calendar days, unless extended by FHWA for cause, to determine whether it will withdraw assignment of the responsibilities requested. In making its determination, FHWA will consider the reasons ODOT desires FHWA to withdraw assignment of the responsibilities, the effect the withdrawal of assignment will have on the Program, amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.

## **PART 10. PERFORMANCE MEASURES**

### **10.1 General**

- 10.1.1 FHWA and ODOT will continue to utilize a mutually established set of performance measures to evaluate ODOT's administration of its responsibilities under this MOU. The agreed-upon performance measures will be available on ODOT's website. With FHWA's review and consultation, ODOT may modify the performance measures, as needed. The agreed-upon performance measure categories are:

- Project Development Process Activities/Section 4(f)/Environmental Justice
- Ecological/Wetland
- Cultural Resources
- Agency Funding Agreements, Interagency Cooperation
- Legal Sufficiency Determinations

- Compliance with ODOT's Environmental Document Content Standards and Procedures
- Compliance with NEPA Assignment MOU

10.1.2 ODOT, in consultation with FHWA, shall collect, maintain, and enhance all necessary and appropriate data related to the attainment of the performance measures.

## **PART 11. TRAINING**

### **11.1 FHWA Training**

- 11.1 The FHWA will provide ODOT available training, to the extent FHWA and ODOT deem necessary, in all appropriate areas with respect to the environmental responsibilities that ODOT has assumed. Such training may be provided by either FHWA or another Federal agency or other parties as may be appropriate. ODOT agrees to have all appropriate employees (including consultants hired for the purpose of carrying out the USDOT Secretary's responsibilities) attend such training.
- 11.2 ODOT will continue to implement training necessary to meet its environmental obligations under this Renewal Package. In developing the training plan, ODOT will consult with FHWA and other Federal agencies on an ongoing basis and will update its training plan annually. FHWA will remain available to aid in the training needs and development of training program elements. ODOT will be responsible for the final development and implementation of its training program.

## **PART 12. TERM, TERMINATION AND RENEWAL**

### **12.1 Term**

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

### **12.2 Termination by the FHWA**

- 12.2.1 As provided at 23 U.S.C. 327(j)(1), FHWA may terminate ODOT's participation in the Program, in whole or in part, at any time subject to the procedural requirements in 23 U.S.C. 327 and subpart 13.2.2 below, if FHWA determines that ODOT is failing to adequately carry out its responsibilities under this MOU. Failure to adequately carry out the responsibilities may include, but not be limited to:
- A. Persistent neglect of, or noncompliance with, any Federal laws, regulations, and policies;
  - B. Failure to cooperate with FHWA in conducting monitoring 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.

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

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

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

### **12.3 Termination by ODOT**

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

12.3.2. The Ohio Legislature and Governor may, at any time, terminate ODOT's authority granted to participate in this Program. In that event, FHWA and ODOT shall develop a plan to transition the responsibilities that ODOT has assumed back to FHWA so as to minimize disruption to projects, minimize confusion to the public, and minimize burdens to other affected Federal, State, and local agencies. The plan shall be approved by both FHWA and ODOT.

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

### **12.4 Validity of ODOT Actions**

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

## **12.5 Renewal**

- 12.5.1 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 13. AMENDMENTS**

### **13.1 Generally**

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

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

- 13.2.1 The FHWA may assign, and ODOT may assume, responsibility for additional projects and additional environmental review responsibilities beyond those identified in Part 3 of this MOU by executing an amendment to this MOU.
- 13.2.2 Should ODOT decide to request this MOU to be amended to add responsibility for additional projects or classes of projects, or additional environmental review responsibilities beyond those identified in Part 3 of this MOU, such request shall be treated as an amendment to ODOT's Renewal Package that was submitted to FHWA pursuant to 23 U.S.C. 327(b) and 23 CFR part 773. In developing the amendment, ODOT shall identify the additional projects, classes of projects, and environmental review responsibilities it wishes to assume and make any appropriate adjustments to the information contained in ODOT's Renewal Package, 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**

\_\_\_\_\_  
Nicole R. Nason  
Administrator  
Federal Highway Administration

Dated: \_\_\_\_\_

**STATE OF OHIO**

\_\_\_\_\_  
Jack Marchbanks, Ph.D.  
Director  
Ohio Department of Transportation

Dated: \_\_\_\_\_