

**23 U.S.C. § 326 CE Assignment MOU
FHWA, Georgia Division, and the Georgia Department of Transportation**

**MEMORANDUM OF UNDERSTANDING
between
Federal Highway Administration, Georgia Division
and the
Georgia Department of Transportation**

**State Assumption of Responsibility for Categorical Exclusions
23 U.S.C. § 326**

THIS MEMORANDUM OF UNDERSTANDING (hereinafter “MOU”), made and entered into on [REDACTED], by and between the FEDERAL HIGHWAY ADMINISTRATION (hereinafter “FHWA”), UNITED STATES DEPARTMENT OF TRANSPORTATION (hereinafter “USDOT”) and the GEORGIA DEPARTMENT OF TRANSPORTATION (hereinafter “GDOT”), hereby provides as follows:

WITNESSETH:

Whereas, 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 Code of Federal Regulations (CFR), specifically 23 CFR 771.117 ; and

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

Whereas, Section 1312 of the Moving Ahead for Progress in the 21st Century Act (P.L. 112-141) amended 23 U.S.C. § 326 to (1) preserve the ability of States assuming responsibility to engage in project delivery methods that are otherwise permissible for highway projects, (2) allow States to terminate their participation in the Program at any time by providing the USDOT Secretary with a notice no later than 90 calendar days before such termination, and (3) allow States that assume USDOT responsibilities to use funds apportioned to GDOT under section 23 U.S.C. § 104(b)(2) for reasonable attorney's fees directly attributable to eligible activities associated with the project; and

Whereas, on XXXX, FHWA published a notice of the availability of the proposed Section 326 MOU in the *Federal Register* and provided a thirty (30) day opportunity for comment in the Federal Docket Management System FHWA-XXXX; and

Whereas, on XXXX, GDOT the proposed notice of availability of the proposed Section 326 MOU on its website at XXXX and provided a thirty (30) day opportunity for comment; and

Whereas, GDOT and FHWA have considered the comments received on the Section 326 MOU; and

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

Whereas, GDOT wishes to assume such Federal agency responsibilities in accordance with this MOU and applicable law; and

Whereas, FHWA and GDOT commit to work together to achieve a successful assignment program through GDOT implementation, including proactively identifying and correcting deficiencies, and FHWA assisting GDOT through training and by providing Section 326 program assistance; and

Now, therefore, FHWA and GDOT agree as follows:

STIPULATIONS

I. CATEGORICAL EXCLUSION RESPONSIBILITIES ASSIGNED TO GDOT BY FHWA

- A. In this memorandum of understanding, per 23 USC 326 (c)(4), the State shall consent to accept the jurisdiction of the Federal Courts for the compliance, discharge, and enforcement of any responsibility of the Secretary that the State assumes. Per 23 USC 326 (e), GDOT has been identified by the Governor as the exclusive State agency that is assigned these responsibilities and is deemed to be a Federal agency for the purposes of the Federal law under which the responsibility is exercised. For the projects covered by this MOU, FHWA hereby assigns, and GDOT 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 FHWA 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 23 CFR 771.117(a) and (b). This assignment applies only to

projects for which the GDOT is the direct recipient of Title 23 program funding and this MOU for a project requiring approval by the FHWA -Georgia Division Office. This assignment does not apply to responsibilities carried out by other modal administrations of the USDOT Secretary, or other Federal agencies.

- B. This assignment pertains only to the designated activities described in this Stipulation I(B).
 - 1. The assignment includes the following:
 - a. Activities listed in 23 CFR 771.117(c); and
 - b. The example activities listed in 23 CFR 771.117(d).
 - 2. Any activities added through FHWA rulemaking to those listed in 23 CFR 771.117(c) or example activities listed in 23 CFR 771.117(d) after the date of the execution of this MOU.
- C. This MOU transfers to GDOT all responsibility for processing the CEs designated in Stipulation I(B) of this MOU, including any necessary CE approval actions. GDOT 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 GDOT and 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 GDOT 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 FHWA and GDOT, may be processed pursuant to such programmatic agreement so long as that agreement remains in effect and does not conflict with the terms of this MOU.
- D. GDOT when acting pursuant to 23 U.S.C. § 326 and this MOU, holds assigned authority to make environmental decisions and commitments pertaining to only the individual proposed projects and activities within the scope of 23 U.S.C. § 326 and this MOU. No action by GDOT shall bind FHWA to future action of any kind. No determination or agreement made by GDOT with respect to mitigation or other activities shall constitute a precedent for future determinations,

agreements, or actions in the Federal-aid highway program unless FHWA consents, in writing, to such commitment.

- E. Prior to approving any CE determination, GDOT shall ensure and document that for any proposed project the design concept, scope, and funding, the project must be consistent with the applicable regional transportation plan, and the next subsequent phase of the project (e.g., final design) must be included in the TIP / STIP.

II. OTHER FHWA RESPONSIBILITIES ASSIGNED TO GDOT AND RESPONSIBILITIES RESERVED BY FHWA

- A. For projects covered by this MOU, FHWA hereby assigns, and GDOT 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 A for a list of FHWA responsibilities assigned. This assignment includes the transfer to GDOT of the obligation to fulfill the assigned environmental responsibilities associated with 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 the project has not been completed. Such projects are included in the term “proposed projects” in this MOU.
- B. FHWA reserves any 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 GDOT to an Indian tribe advising the Indian tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If GDOT adequately resolves any project-specific Indian tribe issues or concerns, then FHWA's role in the environmental process shall be limited to carrying out the government-to-government consultation process. FHWA, according to the terms of this MOU, shall initiate government-to-government consultation for an assigned project with any Indian tribe who directly contacts FHWA or GDOT (via written or oral communication) to make such a request and identifies one or more highway projects in that request. If FHWA determines through consultation with an Indian tribe, or an Indian tribe indicates to FHWA, that the proposed resolution of tribal issues or concerns by GDOT is not adequate, then Stipulation III(C)

applies. This MOU is not intended to abrogate, or prevent future entry into, any written agreement among GDOT, FHWA, and an Indian tribe under which the tribe agrees to permit GDOT to administer government-to-government consultation activities for FHWA. However, such agreements are administrative in nature and do not relieve FHWA of its legal responsibility for government-to-government consultation.

2. GDOT and FHWA will develop and document procedures for carrying out FHWA responsibilities retained by FHWA under Stipulation II(B)(1), including how any FHWA decisions will be communicated to GDOT for inclusion in GDOT's decision-making under Stipulations I and II(A). The procedures will ensure that:

- a. GDOT provides to FHWA any information necessary in order for FHWA to carry out its consultation, evaluation, or decision-making for Stipulation II(B) activities;
- b. FHWA provides GDOT with a documented decision and any related information used for Stipulation II(B) decisions and needed by GDOT in order for GDOT to evaluate the project and make its decision whether the project qualifies as a CE; and
- c. As part of any request for FHWA authorization for funding or other action, GDOT will provide to FHWA evidence that the CE processing and any other environmental responsibilities assigned under this agreement have been completed in accordance with this MOU. This evidence demonstrates that (1) all NEPA review and compliance requirements have been met (2) that the CE determination remains valid, and (3) that the scope of work of the project has not changed and that the project incorporates all environmental commitments, 23 CFR 77 I .109(d).

C. GDOT agrees that its execution of environmental review, reevaluation, consultation, and other related responsibilities for CEs assigned under this MOU are subject to the same existing and future procedural and substantive requirements as if those responsibilities were carried out by FHWA. This includes, but is not limited to, the responsibilities of FHWA under interagency agreements such as programmatic agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process for CE projects. If such interagency agreements are

between GDOT and FHWA only, then the assignment occurs automatically upon the signing of this MOU for projects covered by this MOU. If the interagency agreement involves signatories other than FHWA and GDOT, then FHWA and GDOT will work to obtain any necessary consents or amendments (see Appendix B for a list of such agreements). 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 GDOT for 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 GDOT assumes FHWA's Responsibilities with respect to CE projects; and
 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, GDOT 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. GDOT shall carry out the assigned consultation, review, and coordination activities in a timely and proactive manner. GDOT 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. Exclusion also may occur at any time during the environmental process if GDOT determines that the project fails to meet the CE criteria. The provisions of Stipulation IV(C) apply to such cases.
- B. Because GDOT assumes responsibility for the environmental processing of the CEs designated in this MOU, 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, FHWA will evaluate GDOT's environmental processing of any project if FHWA has any reason to believe that GDOT'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 FHWA subsequently determines that GDOT's performance does not satisfy the terms and conditions of this MOU, then FHWA will take action to resolve the problem. Such action may include action to facilitate GDOT'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 the coordination of project review with an Indian tribe, as defined in 36 CFR 800.16(m), and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by GDOT, then FHWA may resume responsibility for or processing the project or an individual responsibility assumed by GDOT. FHWA shall notify GDOT 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 programs that exclude a project from assignment to the State under this MOU are:
 - 1. Any Federal Lands Highway projects authorized under 23 U.S.C. § 202 ("Tribal transportation program"), 203 ("Federal lands transportation program"), or 204 ("Federal lands access program"), unless such projects will be designed and constructed by GDOT.
 - 2. Any project that crosses State boundaries and any project that crosses or is adjacent to international boundaries (23 CFR 773.105(c)). For the purpose of this MOU, a project is considered "adjacent to international boundaries" if it requires issuance of a new, or the modification of an existing, Presidential Permit by the U.S. Department of State.
 - 3. Recreational Trails projects under 23 U.S.C. § 206.
 - 4. Programs and projects advanced by direct recipients of Federal Aid highway funds other than GDOT, including:
 - a. Competitive grant programs;
 - b. Direct recipient tribal project; and

- c. Transportation Infrastructure Finance and Innovation Act Credit Program.

IV. GDOT PERFORMANCE REQUIREMENTS

- A. Compliance with governing laws, regulations, and MOU. GDOT shall make all determinations under this MOU in accordance with 23 CFR 771.117(a) and (b) and succeeding regulations. All actions by GDOT 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, Executive Orders, policies, and guidance. GDOT also shall comply with State laws to the extent applicable.
 - 1. Failure to meet the requirements of Stipulation IV(A) is grounds for a decision by FHWA to terminate this MOU pursuant to Stipulation IX(A) if FHWA determines, after good-faith consultation with GDOT, 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 FHWA reasonably determines that such conflict is preventing GDOT 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 GDOT's decision(s) on proposed CE project(s) (i.e., as applied).
 - 2. Official USDOT and FHWA guidance and policies relating to environmental review matters of nationwide application are posted online at FHWA's website or sent in writing to GDOT electronically or in hard copy.
 - 3. FHWA will use its best efforts to notify GDOT within five (5) business days of any Indian tribe requesting government-to-government consultation and GDOT shall provide FHWA any information pursuant to stipulation II(B)(3)(a).
 - 4. After the effective date of this MOU, FHWA will use its best efforts to ensure that it communicates to GDOT any new or revised FHWA policies and guidance that are final and applicable to GDOT's performance under this MOU within ten (10) calendar days of issuance. Delivery may be accomplished by email, mail, by publication in the *Federal Register*, or by

means of a publicly available online posting. If communicated to GDOT by email or mail, FHWA may send such material to the party specified in this MOU to receive notices, or to the GDOT State Environmental Administrator.

5. In the event that a new or revised FHWA policy or guidance is not made available to GDOT as described in the preceding paragraph, and if GDOT had no actual knowledge of such policy or guidance, then a failure by GDOT to comply with such Federal policy or guidance will not be a basis for termination under this MOU.
6. GDOT will work with all other appropriate Federal agencies concerning the laws, guidance, and policies relating to any Federal laws that such other agencies administer applicable to GDOT's performance under this MOU.
7. In order to minimize the likelihood of a conflict as described in Stipulation IV(A)(1) above, after the effective date of this MOU, GDOT will use its best efforts to ensure that it communicates to FHWA any proposed new or revised State laws, regulations, policies, guidance, or written internal standard operating procedures that are applicable to GDOT's performance under this MOU so that FHWA may review and comment before they become final. Delivery may be accomplished by e-mail, mail, or personal delivery. If communicated to FHWA by e-mail or mail, such material may be sent to the party specified in this MOU to receive notices for FHWA. If GDOT had no actual advance knowledge of such new or revised Georgia laws, then a failure by GDOT to provide FHWA with advanced notice of the proposed new or revised law will not be a basis for termination under this MOU.

B. Processing projects assigned under the MOU: GDOT identification, documentation, and review of effects. For projects and other activities assigned under Stipulations I(A)-(B) that GDOT determines are included in the classes of CE assigned to GDOT under this MOU, GDOT shall:

1. Institute and maintain a process to identify and review the environmental effects of the proposed project.
2. Carry out the other environmental responsibilities that are assigned under this MOU, as necessary or appropriate for the activity.

3. Document in the project file the CE findings and completion of all applicable FHWA responsibilities assigned under Stipulations 1 and II.
4. For CEs other than 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 GDOT'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.
5. Document its approval of the determination using, at a minimum, the printed name, title, and date of GDOT official approving the determination.
6. Include the following determination statement when documenting the CE findings:

"GDOT has determined that this project has no significant impact(s) on the environment and that there are no unusual circumstances as described in 23 CFR 771.117(b). As such, the project is categorically excluded from the requirements to prepare an environmental assessment or environmental impact statement under NEPA. GDOT has been assigned, and hereby certifies that it has carried out, the responsibility to make this determination pursuant to 23 U.S.C. § 326 and a Memorandum of Understanding dated XXXX, executed between FHWA and GDOT."

7. Document in the project file the specific categorically excluded activity, the CE finding, including the determination that the project has no significant impact(s) on the environment, 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 projects that are candidates for CE classification, but that GDOT determines should be excluded from processing under this assignment, GDOT shall:

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

2. Notify FHWA; and
3. Work with FHWA as the responsible party under NEPA to proceed with documentation and review of the project under the appropriate NEPA procedures (including those under a programmatic CE agreement, if applicable).

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

1. GDOT 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 GDOT; and
 - c. Demonstrating, in a consistent manner, the capacity to perform GDOT's responsibilities under the MOU and applicable Federal law.
2. GDOT agrees that it shall maintain on its staff or through consultant services all 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, GDOT shall comply with 36 CFR 800.2(a)(1). All Section 106 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 the Interior's Professional Qualifications Standards (published at 48 FR 44738- 44739). GDOT shall ensure that a staff member who meets the Professional Qualifications Standards reviews and approves all documentation required under 36 CFR 800.11.

E. State quality control

1. GDOT agrees to carry out regular quality control activities to ensure that its CE determinations are made in accordance with applicable laws and this MOU.
2. At a minimum, GDOT shall monitor its processes relating to project determinations, environmental analysis, and project file documentation, and check for errors and omissions. GDOT shall take corrective action as needed. GDOT shall document its quality control activities and any needed corrective actions taken.
3. If GDOT implements training to meet the capability requirements of this MOU or as a connective action, GDOT shall be responsible for the training. GDOT shall provide notice of formal training to FHWA.

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

1. GDOT shall submit to FHWA a list of the CE determinations and Section 4(I) determinations that GDOT approved during the previous six (6) months (January 1 through June 30, July 1 through December 31), within 15 business days after the end of each semi-annual reporting period. Reporting shall be every six months unless reduced by FHWA, but in no event will the reporting frequency be less than once each year. Reduction in reporting frequency and any revocation of such reduction by FHWA, shall not be deemed an amendment under Stipulation VIII. For each report, GDOT shall include the following information: 1) Project Number, 2) District 3) Scope 4) NEPA CE Category, and 5) NEPA CE Approval Date. For projects with Section 4(f) determinations, the following information would also be included: 1) Property Name, 2) Property Type,

3) Determination (including determinations made under 23 CFR 774.13),
4) Approval Date, and 5) Legal Sufficiency Review Date (individual
Section 4(f) only).

2. No less than once every 12 months, GDOT shall submit to FHWA (via electronic or hard copy) a report summarizing its performance under this 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 GDOT is taking to undertake those improvements. The report will include actions taken by GDOT as part of its quality control efforts under stipulation IV. After GDOT submits the report to the FHWA Georgia Division (electronic or in hard copy), GDOT shall schedule a follow-up meeting with FHWA Georgia Division within 30 calendar days, at which the parties will discuss the report, GDOT's performance of this MOU, and FHWA's monitoring activities.
3. GDOT shall maintain electronic project records and general administrative records pertaining to its MOU responsibilities and the projects processed hereunder. The records shall be available for inspection by FHWA at any time during normal business hours. GDOT shall provide FHWA with electronic copies of any documents FHWA requests. GDOT shall retain those records, including all letters and comments received from governmental agencies, the public, and others about the performance of activities assigned 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 GDOT of its project or program recordkeeping responsibilities under 2 CFR 200.334 or any other applicable laws, regulations, or policies.
4. GDOT 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 (FOIA), as amended in 2002) and NEPA. GDOT will also comply with the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq).
5. FHWA periodically shall review GDOT's records and may interview GDOT staff to evaluate GDOT's performance under this MOU. These reviews may be coordinated with the review of GDOT's report under Stipulation IV(F)(2). Modifications to the CE process review will include incorporation of measures specific to the responsibilities assigned to

GDOT pursuant to 23 U.S.C. § 326 and will include performance measurements of compliance and timeliness. However, FHWA reserves the right to determine in its sole discretion the frequency, scope, and procedures used for monitoring activities. GDOT, by execution of this MOU, acknowledges that it is familiar with the FHWA review process and with the expected modifications that will be adopted for the purpose of monitoring GDOT's MOU performance.

6. Nothing in this Stipulation shall prevent FHWA from undertaking other monitoring actions, including audits, with respect to GDOT's performance of the MOU. FHWA, in its sole discretion, may require GDOT 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. GDOT agrees to cooperate with FHWA in all quality assurance activities.

G. Certification of NEPA Compliance. Before executing any Federal-aid project agreement for a physical construction contract, a design-build contract, or a contract for final design services, GDOT will continue to provide to FHWA's Georgia Division Office, as part of the Federal Project Authorization and Agreement process, the NEPA classification and clearance date for the project as recorded in the Financial Management and Information System. This will serve as GDOT's certification that GDOT has fulfilled all responsibilities under this MOU in accordance with relevant Federal laws, regulations, and policies.

H. State liability. GDOT 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 GDOT, per 23 U.S.C. § 326(b)(2). FHWA shall have no responsibility or liability for the performance of responsibilities assigned to GDOT, including without limitation any decision of approval made by GDOT. Where GDOT exercises any assigned authority on a proposed project which FHWA determined to be a CE prior to the execution of this MOU on XXXX, GDOT assumes sole environmental review responsibility and liability for any subsequent substantive environmental review action it takes on that project.

I. Litigation.

1. Nothing in this MOU affects the United States Department of Justice's (hereinafter "USDOJ") 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. 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, GDOT agrees to coordinate with FHWA and USDOJ or any involved Federal agency in the defense of that action.
2. GDOT shall defend all claims brought against GDOT in connection with its discharge of any responsibility assigned under this MOU. In the event of litigation, GDOT shall provide qualified and competent legal counsel, including outside counsel, if necessary, as approved by the Georgia Attorney General. GDOT shall provide the defense at its own expense, subject to 23 U.S.C. § 326(f) Legal Fees. - GDOT shall be responsible for the 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.
3. GDOT will notify the FHWA's Georgia Division Office and USDOJ's Assistant Attorney General for the Environment and Natural Resources Division, within seven (7) calendar days of GDOT's receipt of service of process of any complaint, concerning discharge of any responsibility assumed under this MOU. GDOT shall notify FHWA and USDOJ prior to its response to the complaint. In addition, GDOT shall notify FHWA's Georgia 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.
4. GDOT will provide FHWA's Georgia 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. GDOT 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 GDOT, within seven (7) calendar days of the date of filing.

5. GDOT will notify the FHWA's Georgia Division Office and USDOJ prior to settling any lawsuit, in whole or in part, and shall provide 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. GDOT 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 ten-day or otherwise agreed upon review period has expired, whichever occurs first.
6. Within seven (7) calendar days of receipt by GDOT, GDOT will provide notice to FHWA's Georgia Division Office and USDOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities GDOT has assumed under this MOU. GDOT shall notify FHWA's Georgia Division Office and USDOJ within five (5) calendar days of filing a notice of appeal of a court decision. To the extent that a court's scheduling order does not provide a shorter time for filing an appeal brief, GDOT shall coordinate with FHWA and USDOJ regarding the appeal at least forty-five (45) calendar days before filing an appeal brief in the case. GDOT's notification to FHWA and USDOJ in subparts IV(H)(3)-(6) shall be made by electronic mail to FHWA_assignment_lit@dot.gov, NRSDOT.enrd@doj.gov, and Georgia.FHWA@fhwa.dot.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 IV(H)(4), GDOT 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 subparts IV(H)(5)-(6) shall be made by electronic mail to legalservices@dot.ga.gov unless otherwise specified by GDOT. In the event that regular mail is determined necessary, mail should be sent by overnight mail service to:

For USDOJ:

Assistant Attorney General for the Environment and Natural Resources
Division at 950 Pennsylvania Avenue, N.W., Washington, DC 20530-
0001

For FHWA:

FHWA Georgia Division
75 Ted Turner Drive
Suite 1000
Atlanta, GA 30303

For GDOT:

General Counsel,
Georgia Department of Transportation
600 West Peachtree Street NW
Atlanta, GA 30324

- J. 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), GDOT shall transmit such document to the FHWA Georgia Division Office and FHWA will publish such document in the *Federal Register* on behalf of GDOT. GDOT is responsible for the expenses associated with the publishing of such documents in the Federal Register, in accordance with guidance issued by FHWA.
- K. Participation in Resource Agency Reports. GDOT agrees to provide data and information requested by the FHWA Office of Project Development and Environmental Review and resource agencies, with a copy to the FHWA Georgia Division, 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.

V. STATE CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

- A. GDOT hereby certifies that it has the necessary legal authority and the capacity to:
1. Accept the assignment under this MOU;
 2. Carry out all the responsibilities assigned to GDOT; 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. GDOT consents to and accepts the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary that GDOT assumes under this MOU and 23 U.S.C. § 326. GDOT understands and agrees that this consent constitutes a waiver of GDOT's immunity under the Eleventh Amendment to the United States Constitution for the limited purposes of addressing the compliance, discharge, and enforcement of matters arising out of this MOU and carrying out the USDOT Secretary's responsibilities that GDOT assumes pursuant to this MOU and 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 FHWA, for any act or omission by GDOT relating to its compliance, discharge, or enforcement of any responsibility under this MOU or 23 U.S.C. § 326. A valid, binding, and sufficient waiver of GDOT's sovereign immunity must be in effect at all times that GDOT acts under the authority of this MOU.

Congress has expressly conditioned participation in the Program upon GDOT's waiver of its immunity under the Eleventh Amendment of the United States Constitution. As noted by the Georgia Attorney General, GDOT is participating in this MOU and agrees to waive such immunity pursuant to GDOT's authority in O.C.G.A. § 32-2-2(a)(7), O.C.G.A. § 32-8-6(b) and relevant case law. If this waiver is withdrawn, then GDOT's authority to participate in this MOU will end and this MOU will terminate automatically subject to applicable survival and transitional provisions of this MOU.

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

D. GDOT 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, GDOT 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 Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.), GDOT 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 Georgia Superior courts.

- F. GDOT certifies that the persons signing this MOU and providing certifications are duly authorized to do so and have the legal authority to:
 - 1. Accept all conditions imposed by Congress to participate in the Program, including the waiver of GDOT's 11th Amendment immunity pursuant to the authority its authority in O.C.G.A. §§ 32-2-2(a)(7) and 32-8-6(b);
 - 2. Consent to Federal court jurisdiction as specified above;
 - 3. Enter into this MOU on behalf of GDOT;
 - 4. Make the certifications set forth in this MOU; and
 - 5. Bind GDOT to the terms and conditions contained in this MOU.
- G. The State's Attorney General, by issuing opinion letters that are addressed to the FHWA Administrator and attached to this MOU as Appendix C, has made the requisite certifications as the State's Chief Legal Officer.

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. GDOT shall publish notice of the availability of this MOU, and any proposed amendment or renewal, for public review and comment in one or more newspapers of statewide circulation and information regarding access to the Federal Docket Management System on its website.
- C. The FHWA Georgia Division Office shall publish in the *Federal Register* a notice of availability of this MOU and any proposed amendment or renewal of this MOU, for public review and a thirty (30) calendar day comment period. This notice will expressly request comments on any types of activities proposed for assignment under Stipulation I(B), will include a statement of the public availability of supporting documentation for any assignment under Stipulation I(B), and 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.

FHWA will establish a docket in the Federal Docket Management System at <http://www.regulations.gov> to receive comments.

- D. GDOT and FHWA shall consider comments provided by the respondents to the public notices before finalizing the MOU, or any proposed amendment or renewal agreement.
- E. GDOT agrees that at all times that this MOU is in effect, GDOT will post on its website (www.dot.ga.gov) a notice of the availability to the public and make available, upon request, copies of GDOT's biannual reports of CE determinations prepared pursuant to Stipulation IV(F)(I), GDOT's performance reports prepared pursuant to Stipulation IV(F)(2), and FHWA performance monitoring reports prepared pursuant to Stipulation IV(F)(5). FHWA will create a link from FHWA's website to GDOT's website.

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 GDOT requests renewal and FHWA determines that GDOT has satisfactorily carried out the provisions of this MOU. In considering any renewal of this MOU, FHWA will evaluate the effectiveness of the MOU and its overall impact on the environmental review process. FHWA may decide not to renew the MOU if 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 GDOT of only some, but less than all, of FHWA's environmental review, consultation, or other related responsibilities as listed in Stipulation II.
- C. At least six (6) months prior to the end of the initial term and of any renewed term of this MOU, GDOT and 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)(5) of this MOU.
- D. 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, or administratively modified to reflect non-substantive changes, whereupon the parties shall consult to consider such an amendment. Public notice and comment are not required for the parties to agree to a technical non-substantive change.
- B. If, after the required public notice and comment, the parties agree to amend the MOU, then FHWA and GDOT 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 FHWA must make the determinations required for a renewal under Stipulation VII.

IX. TERMINATION

- A. Termination by FHWA
 - 1. As provided at 23 U.S.C. § 326(d)(1), FHWA may terminate GDOT's participation in the Program, in whole or in part, at any time subject to the procedural requirements in 23 U.S.C. § 326 and subpart IX(A)(2) below, if:
 - a. FHWA determines that GDOT is not adequately carrying out the responsibilities assigned to GDOT under this MOU;
 - b. FHWA provides to GDOT a written notification of its determination;
 - c. FHWA provides GDOT a period of at least one-hundred twenty (120) calendar days to take corrective action to comply with this MOU;
 - d. If requested by the Governor of Georgia or Commissioner of GDOT, FHWA provides a detailed description of each responsibility in need of corrective action regarding any inadequacy identified by FHWA; and
 - e. After the notification and after the expiration of the 120-day period provided under this provision, GDOT fails to take satisfactory corrective action as determined by FHWA.
 - 2. Failure to adequately carry out the responsibilities may include, but not be limited to:

- a. Persistent neglect of, or noncompliance with, any Federal laws, regulations, and policies;
 - b. Failure to cooperate with FHWA in conducting an audit or any oversight or monitoring activity;
 - c. Failure to secure or maintain adequate personnel and financial resources to carry out the responsibilities assumed;
 - d. Substantial noncompliance with this MOU; or
 - e. Persistent failure to adequately consult, coordinate, and/or take the concerns of other Federal agencies and Indian Tribes, as well as SHPOs/THPOs, into account in carrying out the responsibilities assumed.
3. If FHWA terminates one or more of GDOT's responsibilities under this MOU in accordance with 23 U.S.C. § 326, FHWA shall provide written notice of that termination to GDOT, and such notice shall specify the date on which the termination becomes effective. Upon that effective date, any responsibilities identified to be terminated in the notice that have been assumed by GDOT of this MOU will immediately transfer to FHWA.

B. Termination by GDOT

1. GDOT 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 GDOT seeks to terminate its participation in this Program, and subject to such terms and conditions as FHWA may provide.

The Georgia Legislature through properly enacted legislation may, at any time, terminate GDOT's authority granted to participate in this Program. In that event, FHWA and GDOT will develop a plan to transition the responsibilities that GDOT 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 will be approved by both FHWA and GDOT. Any such withdrawal of assignment which FHWA and GDOT have agreed to under a transition plan will not be subject to the procedures of limitations provided for in subpart IX of this MOU and will be valid as agreed to in the transition plan.

2. In the event of termination of the program, GDOT and FHWA agree to cooperate to make the transfer of responsibilities back to FHWA effective in as orderly and administratively efficient manner as possible. GDOT

promptly will 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.

C. Validity of GDOT Actions

1. Any environmental approvals made by GDOT pursuant to the responsibilities GDOT has assumed under this MOU will remain valid after termination of GDOT's participation in the MOU or withdrawal of assignment by FHWA. As among USDOT Secretary, FHWA, and GDOT, GDOT will 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.

X. PROCEDURES FOR TERMINATION OF SPECIFIC RESPONSIBILITIES OR 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 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 thirty (30) calendar-day period during which FHWA and GDOT 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 by FHWA shall be effective as of a date thirty (30) calendar days after the date of either a post-consultation agreement between GDOT and FHWA or the date of GDOT's receipt of a FHWA notice of final determination of termination or exclusion. In the event of termination initiated by GDOT, the termination shall be effective ninety (90) calendar days after the date of FHWA's receipt of GDOT's termination notice. All responsibilities

covered by the termination or exclusion shall revert to FHWA as of that effective date.

4. In the event of termination or exclusion, GDOT and FHWA agree to cooperate to make the transfer of responsibilities back to FHWA effective in as orderly and administratively efficient manner as possible. GDOT will promptly provide 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. 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 thirty (30) calendar day consultation or final notice periods, if FHWA determines that:
1. GDOT is not performing in accordance with this assignment; and
 2. Extreme conditions exist that justify immediate exclusion or termination and transfer back to FHWA of the responsibilities covered by the exclusion or termination. In such cases, FHWA shall notify GDOT in writing of its determination and action, and specify the reason for the action.
- C. GDOT'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. Exclusion actions, and any decision not to renew, do not require public notice and comment.
- E. Termination or other action by FHWA in accordance with the provisions of this MOU does not limit or otherwise affect 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. FHWA will not provide any project-level assistance to GDOT 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 process or program-level assistance, 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)(I), then FHWA shall reassume responsibility for the project as provided in Stipulation III(C).
- B. FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving GDOT's consultation or coordination with another Federal, State, or local agency with respect to GDOT's discharge of any of the responsibilities GDOT has assumed under this MOU for any particular highway project. However, 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, FHWA may elect to attend meetings between GDOT and other Federal agencies. Prior to attending such meetings, FHWA will make a reasonable and diligent effort to give GDOT notice.

In rare or extreme circumstances and based on its observations, FHWA may submit comments to GDOT and the other Federal agency if FHWA determines such comment is necessary and in the Federal interest because:

1. FHWA reasonably believes that GDOT is not in compliance with this MOU; or
2. FHWA determines that an issue between GDOT and the other Federal agency has broad or unique national policy implications for the administration of the 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.

A. Paper notices shall be delivered as follows:

Georgia Department of Transportation:

Georgia Department of Transportation
One Georgia Center
600 West Peachtree Street NW
Atlanta GA 30308

Federal Highway Administration:

Federal Highway Administration, Georgia Division
75 Ted Turner Drive
Suite 1000
Atlanta, GA 30303

U S. Department of Justice:

U.S. Department of Justice
Office of Assistant Attorney
General Environment and Natural Resources Division
Law and Policy Section
950 Pennsylvania Avenue NW
Washington D.C. 20530-0001

B. Electronic notices shall be provided as follows, unless an alternative means is agreed upon by the parties (for example, an agreed upon ftp site):

Georgia Department of Transportation:

Program_Assignment@dot.ga.gov

Federal Highway Administration:

Georgia.FHWA@fhwa.dot.gov

U S. Department of Justice

NRSDOT.enrd@usdoj.gov

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

FEDERAL HIGHWAY ADMINISTRATION

Division DA

Dated:

GEORGIA DEPARTMENT OF TRANSPORTATION STATE

Russell R. McMurry, P.E.
Commissioner
Georgia Department of Transportation

Dated:

Appendix A
List of FHWA Responsibilities Assigned

Air Quality

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

Noise

- Noise Control Act of 1972, 42 U.S.C. 4901-4918
- FHWA noise regulations in 23 CFR Part 772

Fisheries and Wildlife

- Endangered Species Act of 1973, 16 U.S.C. 1531–1544
- Marine Mammal Protection Act, 16 U.S.C. 1361-1423h
- Anadromous Fish Conservation Act, 16 U.S.C. 757a–757f
- Fish and Wildlife Coordination Act, 16 U.S.C. 661–667d
- Migratory Bird Treaty Act, 16 U.S.C. 703–712
- Bald and Golden Eagle Protection Act, 16 U.S.C. 668-668d
- Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801-1891d, with Essential Fish Habitat requirements at 16 U.S.C. 1855(b)(2)

Historic and Cultural Resources

- National Historic Preservation Act of 1966 (NHPA), as amended, 54 U.S.C. 300101 et seq.
- Section 4(f) of the Department of Transportation Act of 1966 [Section 4(f)], 23 U.S.C. 138, 49 U.S.C. 303 and implementing regulations at 23 CFR Part 774
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470(aa)–470(mm)
- Native American Grave Protection and Repatriation Act, 25 U.S.C. 3001–3013; 18 U.S.C. 1170
- Archeological and Historic Preservation Act, 54 U.S.C. 312501-312508

Social and Economic Impacts

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

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. 1251–1387 Coastal Barrier Resources Act, 16 U.S.C. 3501–3510
- Coastal Zone Management Act, 16 U.S.C. 1451–1466
- Safe Drinking Water Act, 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), 133(b)(14)
- Flood Disaster Protection Act, 42 U.S.C. 4001–4130
- FHWA wetland and natural habitat mitigation regulations, 23 CFR Part 777

Parklands and Other Special Uses

- Section 4(f) of the Department of Transportation Act of 1966 [Section 4(f)], 23 U.S.C. 138, 49 U.S.C. 303 and implementing regulations at 23 CFR Part 774
- Land and Water Conservation Fund Act, 54 U.S.C. 200302–200310

FHWA-Specific

- Planning and Environmental Linkages, 23 U.S.C. 168, with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135
- Efficient Environmental Reviews for Project Decision-making and One Federal Decision, 23 U.S.C. 139
- Programmatic Mitigation Plans, 23 U.S.C. 169 with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135

Note:

1. Under these laws and Executive Orders, FHWA will retain responsibility for conducting formal government-to-government consultations with Federally recognized tribal governments. GDOT will continue to handle routine consultations with the tribal governments and understands that a tribal government has the right to direct consultation with FHWA upon request. GDOT may also assist FHWA with formal consultations, with the consent of a tribal government, but FHWA remains responsible to ensure this consultation occurs. FHWA's retention of formal consultation responsibilities under NAGPRA will not limit GDOT's existing activities under this law.

Appendix B

List of GDOT Programmatic Agreements/Memoranda of Understanding/Statewide Agreements

Agreement	Parties	Signed	Expires
Ecology			
2025 LCP Agreement 1-25-2025	FHWA, GDOT, USACE	1-27-2025	1-27-2030
EIS_GT_PG_Programmatic AOE Addendum_2025.11.04	FHWA, GDOT, FWS, GA DNR	11-4-2025	11-4-2030
FHWA - EFH Delegation Letter and SOP_22Aug23.pdf	FHWA, GDOT, NMFS	8-22-2023	8-22-2028
GDOT Bats Collaborative Programmatic Agreement 2023_Fianl(1)	FHWA, GDOT, USACE, GA DNR	12-21-2023	12-21-2028
Joint Coordination Procedures_2025.12.03_ForSignature	FHWA, GDOT, USACE, GA DNR	3-4-2026	3-4-2031
Cultural			
GDOT Historic Streetcar PA	FHWA, GDOT, SHPO	7-27-2015	Does not expire
2018 Signal Upgrade MOU	FHWA, GDOT, SHPO	10-25-2018	10-25-2028
2019 Section 106 Cultural Resource Manual	106 PA signatories	Mirrors PA dates	Mirrors PA dates
Archaeology Survey Agreement	SHPO, FHWA, GDOT	2011	No expiration
Section 106 PA 2nd Amendment (for time) Ratified	FHWA, GDOT, USACE, SHPO, Advisory Council, Muscogee Nation, Catawba Indian Nation, Alabama-Coushatta Tribe of Texas	12-01-2025 (continue use) new agreement currently underway	12-13-2026 (or when new PA is ratified)
Section 106 PA Amendment 1 (for time) Executed	FHWA, GDOT, USACE, SHPO, Advisory Council, Muscogee Nation, Catawba Indian Nation, Alabama-Coushatta Tribe of Texas	12-13-2024	12-13-2025
MMIP MOU Final Signed	FHWA, GDOT, SHPO	5-31-2018	No Date was for a specific list of projects, some still underway
MMIP MOU Memo	FHWA, GDOT, SHPO	10-25-2018	No Date
Programmatic 4(f) Evaluation for Bridge Replacements with Historic Districts	FHWA, GDOT, SHPO	4-7-2020	No Date, agreement on Approach
Air-Noise			
GDOT Highway Traffic Noise Abatement Policy_2024.08.01	FHWA, GDOT	7-24-2024	7-24-2029
FHWA-GDOT Agreement - Qualitative Project-Level Analyses for Carbon Monoxide - SIGNED_2020.04.17	FHWA, GDOT	4-16-2020	No Date, agreement on Approach
GDOT CO PA_2020.02.19	FHWA, GDOT	2-19-2020	NA

GDOT_Programmatic Agreement for Carbon Monoxide_2017.04.06	FHWA, GDOT	4-6-2017	NA
Signed 3.08.18 - Amendment (1) to the April 2017 FHWA-GDOT PA - Addition of July 2017 CO Categorical Finding	FHWA, GDOT	3-8-2018	NA
NEPA			
2023-2028 Signed PCE Agreement	GDOT/FHWA	8-2-2023	Expires upon receiving NEPA Assignment
GDOT GDNR IGA_BoatRamps_2020.03.30	GDOT/DNR	3-30-2020	no expiration just a 5 year check in
GDOT_GDNR IGA 2023	GDOT/DNR	5-11-2023	no expiration just a 2 year check in
Georgia -SO Agreement_083024 (stewardship and oversight Agreement)	GDOT/FHWA	8-30-2024	N/A
Reevaluation_Agreement_2016	GDOT/FHWA	7-19-2016 - extended 5 years in 2021 to 7-19-2026	Expires upon receiving NEPA Assignment (will move information on reevaluation process to guidebooks

Appendix C
State of Georgia Law Department Letters of Opinion

DRAFT



GEORGIA DEPARTMENT OF LAW

CHRISTOPHER M. CARR
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June 10, 2026

The Honorable Sean P. Duffy
Secretary
United States Department of Transportation
1200 New Jersey Ave., S.E.
Washington, DC 20590

The Honorable Sean McMaster
Administrator
Federal Highway Administration
1200 New Jersey Ave., S.E.
Washington, D.C. 20590

Re: GDOT's supplemental certification in support of its application for NEPA
delegation of responsibility

Dear Secretary Duffy and Administrator McMaster,

I write to provide this supplement to our office's letter dated October 17, 2025. As I understand it, you are seeking confirmation that the Georgia Department of Transportation has the authority to enter memoranda of understanding that waive Eleventh Amendment immunity, particularly in light of Article I, Section II, Paragraph IX of the Georgia Constitution. Given that GDOT is fully informed and voluntarily choosing to participate in the Program, I have concluded that GDOT has the statutory authority to enter into such agreements and accept Congress's requirement that GDOT "accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the Secretary assumed by the State." 23 U.S.C. § 327(c)(3)(B).

The starting point is that GDOT is a department of the State of Georgia. *See generally* O.C.G.A. § 32-2-1 *et seq.* As such, its authority is limited to those actions expressly delegated to it by the General Assembly or those that are necessarily implied. *See Republican National Committee v. Eternal Vigilance Action Inc.*, 321 Ga. 771, 795 (2025). In the context of transportation and the state highway system, GDOT has considerable powers.

In pertinent part, GDOT "shall have the authority . . . to enter into any contracts or agreements with the United States or its agencies or subdivision relating to the planning, financing,

construction, improvement, operation, and maintenance of any public road or other mode or system of transportation; *and to do all things necessary, proper, or expedient to achieve compliance with the provisions and requirements of all applicable federal-aid acts and programs.*” O.C.G.A. § 32-2-2(a)(7) (emphasis added). Further, GDOT is fully capable of suing and being sued as a department of the State of Georgia. O.C.G.A. § 32-2-5.

Article I, Section II, Paragraph IX(f) of the Georgia Constitution does not compel a different result. That subparagraph provides that “[n]o waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution.” But that provision stands for the unremarkable proposition that an otherwise valid waiver of the State’s *sovereign immunity* does not, by itself, amount to waiver of *Eleventh Amendment* immunity. For example, State agencies routinely waive sovereign immunity through execution of a written contract without waiving Eleventh Amendment immunity. *See generally Barnes v. Zaccari*, 669 F.3d 1295, 1308 (11th Cir. 2012).

Obviously, Congress has required that State agencies participating in the Surface Transportation Project Delivery Program “accept the jurisdiction of the Federal courts of the compliance, discharge, and enforcement of any responsibility of the Secretary assumed by the State.” 23 U.S.C. § 327. The Eleventh Circuit in *Garrett v. University of Alabama at Birmingham Board of Trustees*, 344 F.3d 1288 (11th Cir. 2003) held that “where Congress has unambiguously conditioned the receipt of federal funds on a waiver of immunity, [it] does not leave open the possibility that a state can continue to accept federal funds without knowingly waiving its immunity.” Thus here, as in *Garrett*, Congress has unambiguously conditioned participation in the Program on GDOT’s waiver of Eleventh Amendment immunity. And because GDOT has the statutory authority “to achieve compliance with the provisions and requirements of all applicable federal-aid acts and programs,” that necessarily includes the authority to waive its Eleventh Amendment immunity if doing so is a requirement of the program. *See generally Kendall v. Griffin-Spalding County Hosp. Authority*, 242 Ga. App. 821, 822 (2000) (government agency has authority that is “necessarily implied from the express grant of other powers”); *see also Miller v. Texas Tech University Health Sciences Center*, 421 F.3d 342 (5th Cir. 2005) (holding that state agencies waived their state’s Eleventh Amendment immunity even though agencies lacked express statutory authority to waive such immunity because authority to accept federal funds conditioned on such waiver necessarily includes the authority to accept the waiver condition itself).

Thus, neither GDOT nor any other State agency waives Eleventh Amendment immunity simply by virtue of waiving sovereign immunity through a written contract. Ga. Const. Art. I, Sec. II, Para. IX(f). But GDOT has the additional and express statutory authority to enter contracts with federal agencies and “do all things necessary, proper, or expedient” to comply with federal requirements. O.C.G.A. § 32-2-2(a)(7). Here, Congress has expressly conditioned participation in the Program on GDOT’s waiver of Eleventh Amendment immunity, and GDOT voluntarily elects to participate in the Program with full knowledge of the waiver requirement. I conclude that GDOT has the statutory authority to participate in the Program and all accompanying conditions, including the obligation to waive its Eleventh Amendment immunity.

I trust this addresses your remaining questions.

A handwritten signature in blue ink, appearing to read "C. Carr", with a long horizontal flourish extending to the right.

Christopher M. Carr
Georgia Attorney General



GEORGIA DEPARTMENT OF LAW

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October 17, 2025

The Honorable Sean P. Duffy
Secretary
United States Department of Transportation
1200 New Jersey Ave., SE
Washington, DC 20590

The Honorable Sean McMaster
Administrator
Federal Highway Administration
1200 New Jersey Ave., S.E.
Washington, D.C. 20590

Re: State of Georgia's application for NEPA delegation of responsibility

Dear Secretary Duffy and Administrator McMaster,

I represent the Georgia Department of Transportation ("GDOT"), which seeks your approval to participate in the Surface Transportation Project Delivery Program (the "Program"). GDOT further requests that you assign GDOT responsibility under the National Environmental Policy Act of 1969 ("NEPA") under 23 U.S.C. § 327. As part of that application process, I am providing the information required by the regulations at 23 C.F.R. § 773.109(a)(6)-(7).

The Georgia Attorney General is the legal advisor to the executive branch. GA. CONST. ART. V. SEC. III, PARA. IV. The Department of Law, which he leads, "is vested with complete and exclusive authority and jurisdiction in all matters of law relating to the executive branch of the government and every department . . . thereof." O.C.G.A. § 45-15-34. With that background, I provide the following as required by 23 C.F.R. § 773.109(a).

First, with respect to subpart (a)(6), GDOT has the statutory authority to assume the responsibilities of the Secretary for the Federal environmental laws and projects requested. Under Georgia law, GDOT has the “authority to accept and use federal funds; *to enter into any contracts or agreements with the United States . . . relating to the planning, financing, construction, improvement, operation, and maintenance of any public road or other mode or system of transportation; and to do all things necessary, proper, or expedient to achieve compliance with the provisions and requirements of all applicable federal-aid acts and programs.*” O.C.G.A. § 32-2-2(a)(7).

Additionally, under O.C.G.A. § 32-8-6(b), GDOT is “authorized to take necessary steps to secure the full benefits of any federal-aid program and to meet any contingencies not provided for in this chapter, abiding at all times by a fundamental purpose to plan, construct, reconstruct, and maintain, as economically as possible, the public roads and other major transportation facilities of Georgia which will best promote the interest, welfare, and progress of the citizens of Georgia.” GDOT has determined that the assumption of responsibility of the NEPA delegation is in the best interest of the State and citizens of Georgia, and it has the authority to enter a contract for the assumption of such responsibilities as set forth in 23 U.S.C. § 327(c).

Consistent with the Congressional requirements for participating in the Program, GDOT further agrees that any such written agreement will require GDOT to “accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the Secretary assumed by the State.” *See* 23 U.S.C. § 327(c)(3)(A); 23 C.F.R. § 773.109(a)(6). GDOT recognizes and accepts that this is an express condition imposed by Congress for allowing GDOT to participate in the Program. *See Garrett v. University of Alabama at Birmingham*, 344 F.3d 1288, 1293 (11th Cir. 2003) (state university waives Eleventh Amendment immunity where grant of federal funds is expressly conditioned on such waiver); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 33 (1st Cir. 2006) (noting that state agency can waive Eleventh Amendment immunity where Congress expressly conditions participation on such waiver).

Second, with respect to 23 C.F.R. § 773.109(a)(7), the Georgia Open Records Act, O.C.G.A. § 50-18-70 *et seq.*, is comparable to FOIA. Among other things, the Georgia Open Records Act provides that “[a]ll public records shall be open for personal inspection and copying . . .” O.C.G.A. § 50-18-71(a)(1). Additionally, any person seeking public records under the Open Records Act is permitted to challenge decisions regarding the availability of such records or documents in Georgia courts. O.C.G.A. § 50-18-73. The Georgia Supreme Court has expressly held that the Open Records Act “creates a private right of action to enforce the obligations imposed on persons or agencies having custody of records open to the public under the Act.” *Blalock v. Cartwright*, 300 Ga. 884, 887-88 (2017). Thus, the Georgia Open Records Act is comparable to FOIA and provides adequate legal remedy for anyone challenging a decision to withhold public records.

I trust this satisfies the requirements contained in 23 C.F.R. § 773.109(a)(6) and (7).

Sincerely,

A handwritten signature in blue ink, consisting of a stylized 'L' followed by a long, sweeping horizontal line.

Logan B. Winkles
Deputy Attorney General