



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

[Docket No. FHWA-2016-0007]

Proposed Third Renewed Memorandum of Understanding (MOU) Revision Assigning Certain Federal Environmental Responsibilities to the State of California, Including National Environmental Policy Act (NEPA) Authority for Certain Categorical Exclusions (CEs)

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed renewed MOU, request for comments.

SUMMARY: The FHWA and the State of California acting by and through its Department of Transportation (Caltrans), propose a renewal of the State's participation in the 23 U.S.C. 326 program. This program allows FHWA to assign to States its authority and responsibility for determining whether certain designated activities within the geographic boundaries of the State, as specified in the proposed Memorandum of Understanding (MOU), are categorically excluded from preparation of an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act. An amended MOU would renew the State's participation in the program. The MOU will be amended by incorporating the following change: FHWA may terminate the State's participation in this program if FHWA provides the State a notification of non-compliance, and a period of not less than 120 days to take corrective action as FHWA determines necessary, and if the State fails to take satisfactory corrective action as determined by FHWA.

DATES: Comments must be received on or before (**Insert date 30 days after publication in the Federal Register**).

ADDRESSES: You may submit comments by any of the methods described below. To ensure that you do not duplicate your submissions, please submit them by only one of the means below.

Electronic or facsimile comments are preferred because Federal offices experience intermittent mail delays due to security screening.

Federal eRulemaking Portal: Go to Web Site: <http://www.regulations.gov/>. Follow the instructions for submitting comments on the DOT electronic docket site (FHWA-2016-0007).

Facsimile (Fax): 1-202-493-2251.

Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

Hand Delivery: 1200 New Jersey Avenue SE, Washington, DC 20590 between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

For access to the docket to view a complete copy of the proposed MOU, or to read background documents or comments received, go to <http://www.regulations.gov/> at any time or to 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except for Federal holidays.

Instructions: You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to http://www.regulations.gov, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: For FHWA: Shawn Oliver; by email at shawn.oliver@dot.gov or by telephone at 916-498-5048. The FHWA California Division Office's normal business hours are 8 a.m. to 4:30 p.m. (Pacific Time), Monday-Friday, except for Federal holidays. For the State of California: Tammy Massengale; by email at tammy.massengale@dot.ca.gov or by telephone at 916-653-5157. State business hours are the same as above although State holidays may not completely coincide with Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

Internet users may reach the Office of the Federal Register's home page at:

<http://www.archives.gov/> and the Government Printing Office's database:

<http://www.fdsys.gov/>. An electronic version of the proposed MOU may be downloaded by accessing the DOT DMS docket, as described above, at <http://www.regulations.gov/>.

Background

Section 326 of Title 23 U.S. Code, creates a program that allows the Secretary of the DOT (Secretary) to assign, and a State to assume, responsibility for determining whether certain Federal highway projects are included within classes of action that are categorically excluded (CE) from requirements for Environmental Assessments or Environmental Impact Statements pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq. In addition, this program allows the assignment of other environmental review requirements applicable to Federal highway projects. The Secretary delegated his authority to FHWA, which acts on behalf of the Secretary with respect to these matters. Through an amended Memorandum of Understanding (MOU), FHWA would renew California's participation in this program for a third time. The original MOU became effective on June 7, 2007, for an initial term of three (3) years. The first renewal followed on June 7, 2010, and the second renewal followed on June 7, 2013. The proposed third MOU renewal would supersede the second renewed MOU prior to its expiration date on June 7, 2016. Stipulation I(B) of the MOU describes the types of actions for which the State would assume project-level responsibility for determining whether the criteria for a CE are met. The FHWA would assign statewide decision-making responsibility for all activities within the categories listed in 23 CFR 771.117(c) and those listed as examples in 23 CFR 771.117(d), in addition to other CEs identified in associated Appendix A. In addition to the

NEPA CE determination responsibilities, the MOU would assign to the State the following FHWA responsibilities for environmental review, consultation, or other related actions required under Federal laws and Executive Orders applicable to CE projects:

Air Quality

- Clean Air Act, 42 U.S.C. §§ 7401-7671q. Determinations for project-level conformity if required for the project.

Noise

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

Wildlife

- Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544
- Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1423h
- Anadromous Fish Conservation Act, 16 U.S.C. §§ 757a-757f
- Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667d
- Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712
- Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. §§ 1801-1891d

Historic and Cultural Resources

- National Historic Preservation Act of 1966, as amended, 54 U.S.C. §§ 300101 et seq.
- Archeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm
- Archeological and Historic Preservation Act, 16 U.S.C. §§ 469-469c
- Native American Grave Protection and Repatriation Act, 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, 7 U.S.C. §§ 4201-4209

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. §§ 1251-1387: (Sections 319, 401, and 404)
- 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
- Rivers and Harbors Act of 1899, 33 U.S.C. § 403
- 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 at 23 CFR part 777
- Flood Disaster Protection Act, 42 U.S.C. §§ 4001-4130

Parklands and Other Special Land Uses

- Section 4(f), 23 U.S.C. § 138 and 49 U.S.C. § 303
- FHWA/FTA Section 4(f) Regulations at 23 CFR Part 774
- Land and Water Conservation Fund, 16 U.S.C. §§ 4601-4-4601-11

Hazardous Materials

- Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675
- Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9671-9675
- Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k

Executive Orders Relating to Highway Projects

- E.O. 11990 - Protection of Wetlands
- E.O. 11988 - Floodplain Management, as amended by E.O. 13690 – Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input
- E.O. 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13112 - Invasive Species

FHWA-Specific

- Planning and Environmental Linkages, 23 U.S.C. § 168, with the exception of those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135.
- Programmatic Mitigation Plans, 23 U.S.C. § 169 with the exception of those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135.

The MOU allows the State to act in the place of FHWA in carrying out the functions described above, except with respect to government-to-government consultations with federally recognized Indian tribes. The FHWA will retain responsibility for conducting formal government-to-government consultation with federally recognized Indian tribes, which is required under some of the above-listed laws and Executive Orders. The State may assist FHWA with formal consultations, with consent of a tribe, but FHWA remains responsible for the consultation.

This assignment includes transfer to the State of California the obligation to fulfill the assigned environmental responsibilities on any proposed project meeting the criteria in

Stipulation I(B) of the MOU that were determined to be CEs prior to the effective date of the proposed MOU but that have not been completed as of the effective date of the MOU.

This is the proposed third renewal of the State's participation in the program and incorporates changes in the termination process from the Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94, 129 Stat. 1312 (Dec. 4, 2015). Section 1307 of the FAST Act amended 23 U.S.C. 326 to allow FHWA to terminate the State's participation in this program if FHWA provides the State a notification of non-compliance and a period of not less than 120 days to take corrective action as FHWA determines necessary, and if the State fails to take satisfactory corrective action as determined by FHWA. In previous versions of the MOU the period for the State to take corrective action was 30 days.

The FHWA will consider the comments submitted on the proposed MOU when making its decision on whether to execute this renewal MOU. The FHWA will make the final, executed MOU publicly available.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 326; 42 U.S.C. 4331, 4332; 23 CFR 771.117; 49 CFR 1.85; 40 CFR 1507.3, 1508.4.

Mike Duman

California Chief Operating Officer

Federal Highway Administration

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