



DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA-2022-0013]

Revision of Stewardship and Oversight Agreement Template

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: This final notice announces the availability of a revised Stewardship and Oversight (S&O) Agreement template. The S&O Agreement defines the roles and responsibilities of FHWA and each State department of transportation (State DOT) with respect to project approvals and related responsibilities under title 23, United States Code (U.S.C.), and title 23, Code of Federal Regulations (CFR), and documents methods that will be used for Federal-aid highway program (FAHP) oversight activities. This template will be used by each of the 52 FHWA Division Offices and their respective State DOTs to develop and execute a new S&O Agreement within 1 year of the date this notice is published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Steve Mills, Office of Infrastructure, (502) 682-3534, or via email at Steve.Mills@dot.gov. For legal questions, please contact Mr. David Serody, FHWA Office of Chief Counsel, (202) 366-4241, or via email at David.Serody@dot.gov. Office hours for FHWA are from 8:00 a.m. to 4:30 p.m. ET, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

In enacting 23 U.S.C. 106(c), as amended, Congress established authority for States to enter into agreements with FHWA under which the States carry out certain

project responsibilities traditionally handled by FHWA. Congress also recognized the importance of a risk-based approach to FHWA oversight of the FAHP by establishing requirements in 23 U.S.C. 106(g). The S&O Agreement is a key element of FHWA's risk-based S&O approach. The S&O Agreements are formal instruments executed between each FHWA Division Office and its corresponding State DOT. The S&O Agreement defines the roles and responsibilities of FHWA and the State DOT with respect to title 23, U.S.C. project approvals and related responsibilities, and documents methods that will be used for FAHP oversight activities.

In response to DOT Office of Inspector General (OIG) recommendations,¹ FHWA revised its national S&O procedures to require use of a uniform template for developing an S&O Agreement. In 2015, FHWA issued the template currently in use. Each of the 52 FHWA Division Offices and their respective State DOTs executed a new S&O Agreement based on the 2015 S&O Agreement template.

The FHWA began initiating updates to the 2015 S&O Agreement template due to changes to applicable statutes and regulations and after identifying improvements to the template. In addition, section 11307 of the Bipartisan Infrastructure Law (BIL) (Public Law 117-58) directed the Secretary of Transportation to publish a template created by the Secretary for Federal-State S&O Agreements in the Federal Register along with a notice requesting public comment on ways to improve the template. In accordance with this requirement, FHWA published a notice and request for comments regarding FHWA's revised S&O Agreement template on December 21, 2022, at 87 FR 78193.

Section 11307(c)(1) of BIL requires FHWA to consider comments received in response to the Federal Register notice and publish a notice in the Federal Register that (A) describes any proposed changes to be made to the template, and any alternatives to

¹ "Improvements to Stewardship and Oversight Agreements Are Needed to Enhance Federal-aid Highway Program Management," OIG, DOT, Report Number MH-2013-001 (October 1, 2012), available at: <https://www.oig.dot.gov/library-item/28742>.

such changes; (B) addresses comments in response to which changes were not made to the template; and (C) prescribes a schedule and a plan to execute a process for implementing the changes to the template. In accordance with section 11307(c)(3) of BIL, FHWA will modify the template as stated in this notice and will update existing agreements with State DOTs according to this template by no later than [INSERT DATE 1 YEAR AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Discussion of Comments

I. Summary

The FHWA received 10 comments in response to the notice and request for comments from the American Association of State Highway and Transportation Officials (AASHTO); 7 separate comments from 7 State DOTs; Georgia (GDOT), New York (NYSDOT), Oklahoma (ODOT), South Carolina (SCDOT), Maryland (MDOT), Texas (TxDOT), and Pennsylvania (PennDOT); 1 joint comment from 5 State DOTs (Idaho, Montana, North Dakota, South Dakota, and Wyoming) (“Joint States”); and 3 comments from 1 individual. The FHWA considered each comment in publishing this notice. The following discussion describes changes made to the proposed template and addresses comments that did not lead to changes, in accordance with BIL, section 11307(c)(1)(A)-(B).

II. Analysis and Response to Comments

Comments and responses are listed by section of the proposed template. General comments are listed after the section comments.

Section I. Background and Information

Comment: The SCDOT commented on a proposed change to the first sentence of section I. In the 2015 template, the FAHP was described as “a federally-assisted program of State-selected projects.” The FHWA proposed changing this language to read: “The Federal-aid Highway Program (FAHP) provides for a Federally-assisted State program.”

The SCDOT commented that the proposed revision could be misconstrued and recommended that the language used in the 2015 template be restored.

The FHWA Response: The language in the 2015 template did not account for other entities that are involved in the selection of projects, such as metropolitan planning organizations, and FHWA does not believe that defining the FAHP as a “federally-assisted program of State-selected projects,” as stated in the 2015 template, is completely accurate. The FHWA, however, agrees with SCDOT that the proposed language could still be misconstrued and is deleting the sentence “The Federal-aid Highway Program (FAHP) provides for a Federally-assisted State program” from the proposed template entirely. A general description of the FAHP is not necessary for S&O agreements.

Section II. Intent and Purpose of Agreement

No comments were received related to section II.

Section III. Permissible Areas of Assumption Under 23 U.S.C. 106(c)

Comment: The MDOT recommended revising the description of “design” used in section III.A of the template to be consistent with what MDOT claimed was the latest guidance from FHWA on design. Instead of stating that design “includes preliminary engineering, engineering, and design-related services directly relating to the construction of a FAHP-funded project, including engineering, design, project development and management, construction project management and inspection, surveying, mapping (including the establishment of temporary and permanent geodetic control in accordance with specifications of the National Oceanic and Atmospheric Administration), and architectural-related services,” MDOT suggested that the template state that design “includes preliminary design, final design, and design-related services directly relating to the construction of a FAHP-funded project, including design, project development and management, construction project management and inspection, surveying, mapping (including the establishment of temporary and permanent geodetic control in accordance

with specifications of the National Oceanic and Atmospheric Administration), and architectural/engineering-related services.”

The FHWA Response: The FHWA does not agree with this comment. The description of design used in section III.A of the proposed template closely matches the description of activities under the definition of “construction” in 23 U.S.C. 101(a)(4)(A). The FHWA notes that some changes are needed to align the definition of “design” in section III.A of the template with the definition used in 23 U.S.C. 101(a)(4)(A), which was revised by BIL, section 11103(1)(A) to include “assessing resilience.” Accordingly, FHWA has modified section III.A of the proposed template to add the phrase “assessing resilience” to the list of design activities.

Comment: The AASHTO, NYSDOT, and ODOT commented on the statement in the last paragraph of section III of the proposed template: “The [State DOT] is to exercise any and all assumptions of the FHWA’s responsibilities in accordance with the Federal laws, regulations, policies, Executive Orders, and procedures that would apply if the responsibilities were carried out by FHWA. For all projects and programs carried out under Title 23, the [State DOT] will comply with Title 23 and all applicable non-Title 23 Federal-aid program requirements.” These commenters objected to State DOTs being required to follow Executive Orders, claiming that before FHWA implements an Executive Order, FHWA must implement the Executive Order through a directive or policy; that some Executive Orders require further analysis before implementation; and that specifically including mention of Executive Orders is unnecessary because these Orders will be covered by FHWA policies. The ODOT commented that including “procedures” was unnecessary because it claimed that FHWA policies are already covered by the template’s mention of “regulations” and “policies.” The ODOT further claimed that requiring the assumption of responsibilities in accordance with FHWA internal procedures is inconsistent with the requirement in section 11307(e)(1) of BIL

that FHWA “shall not enforce or otherwise require a State to comply with approval requirements that are not required by Federal law (including regulations) in a Federal-State stewardship and oversight agreement.”² Finally, AASHTO suggested removing mention that a State DOT is to exercise assumed responsibilities in accordance with all applicable non-Title 23 Federal-aid program requirements, as AASHTO claimed that S&O Agreements are only executed under Title 23, U.S.C.

The FHWA Response: The FHWA does not agree with these comments. When a State DOT performs an assumed FHWA responsibility, they perform the responsibility as though it was performed by FHWA. This includes following applicable Executive Orders (EO), FHWA procedures, and non-Title 23 Federal-aid program requirements. An alternative interpretation would mean that different requirements would apply to projects based on whether a State DOT assumes a responsibility from FHWA or whether FHWA takes on that responsibility itself, which FHWA does not believe is the intent of 23 U.S.C. 106(c).

In addition, FHWA disagrees with several assumptions made by these commenters. In terms of EOs, FHWA is not always required to issue a directive or policy to implement an EO. The EOs may, in certain cases, have the force of law, with agencies then implementing those EOs. *See Ass’n for Women in Science v. Califano*, 566 F.2d 339, 344 (D.C. Cir. 1977). In addition, FHWA does not believe it is accurate to assume that all future EOs will inherently be covered by other FHWA policies. The FHWA also disagrees with ODOT’s comment that including a requirement to comply with “procedures” in addition to Federal regulations and policies in section III is unnecessary. This comment relies on specific, legally significant definitions that ODOT

² The ODOT’s comment refers to “Section 11306(c)(3)(e)” of BIL. ODOT, Comment Letter on Notice of Revision of Stewardship and Oversight Template (Feb. 21, 2023), at 3, https://downloads.regulations.gov/FHWA-2022-0013-0010/attachment_1.pdf. Because BIL does not contain a section 11306(c)(3)(e) and the statutory language ODOT quotes is from BIL section 11307(e)(1), FHWA assumes that ODOT intended to cite section 11307(e)(1) in its comment.

ascribes to the words “policies” and “procedures,” but these definitions do not have a basis in Federal law. The language at issue reflects FHWA’s intent that when a State DOT assumes an FHWA responsibility that is described in an FHWA policy, procedure, or regulation, the same requirements that would apply if FHWA maintained that responsibility will apply to the State DOT. Finally, FHWA disagrees with ODOT that requiring the assumption of responsibilities in accordance with FHWA procedures is inconsistent with section 11307(e)(1) of BIL. That section refers to “approval requirements,” and carrying out assumptions of FHWA responsibilities in accordance with FHWA policies does not necessarily involve FHWA approvals.

Section IV. Assumption of Responsibilities for Federal-aid Projects on the NHS

Comment: The AASHTO and ODOT commented that stewardship and oversight plans for specific projects, which are mentioned in sections IV, V, and VI, are not well defined in the template and the template does not provide any limits on the scope, content, or frequency with which these plans might be used. These commenters stated that these plans could allow the relevant FHWA Division Office, at its sole discretion, to supersede the delegation of responsibilities to the State for specific projects or even entire programs. Commenters recommended that more detail be provided on these plans, including why and how often a FHWA Division Office would supersede the delegation of responsibilities to the State, the scope of these plans, and their content. These commenters further argued that the State DOT should have input into the development of these plans.

The FHWA Response: The FHWA agrees that clarification is needed on when these plans may be used, their scope, and content. To address concerns around why and how often these plans might be implemented, FHWA is adding a statement to section VI stating that projects will be selected for risk-based FHWA project involvement and S&O activities “based on a risk assessment and the responses to identified threats and

opportunities.” In response to concerns over the ambiguous scope of these S&O plans, FHWA is including language in section VI.D that these plans may, in some instances such as responses to elevated risks, supersede responsibilities a State DOT would otherwise assume from FHWA on a project-by-project basis. In terms of content, as now described in section VI.D, the plan will include documented actions that the FHWA Division Office will undertake to respond to identified risks.

In addition, in terms of allowing States to have input into the development of these project specific S&O plans, FHWA agrees that good communication between FHWA and State DOTs is important, and FHWA Division Offices will continue to seek and consider State DOT input in the process. However, FHWA does not believe that adding language to the template that requires State DOT input in the development of these plans would be appropriate. The FHWA intends for project specific S&O plans to apply an additional layer of oversight over State DOTs when needed. The FHWA does not believe it appropriate to have the State DOTs, who are the subject of such oversight, to play a substantial role in determining how FHWA exercises its oversight duties. To make this point clear, FHWA is revising language in sections IV.B and V.B to state that S&O plans are “developed by” the FHWA rather than merely being “adopted by” the FHWA, as was stated in the proposed template.

Comment: The Joint States suggested that FHWA clarify that a State’s assumption of FHWA responsibilities is superseded “when and only to the extent” that it is superseded by provisions of a stewardship and oversight plan.

The FHWA Response: The FHWA agrees that clarification is needed. The FHWA modified sections IV, V, and VI to clarify that program wide assumptions are superseded by S&O plans for specific projects only on a “project-by-project basis” by provisions contained in the S&O plan.

Comment: The Joint States also commented that the proposed provision regarding high-risk categories that are designated in accordance with 23 U.S.C. 106(c)(4) should be revised to clarify the applicability of such a designation and that FHWA should better define the extent that a high-risk designation supersedes a State's general assumption of FHWA's responsibilities.

The FHWA Response: The FHWA agrees that clarification is needed. The FHWA modified section IV.C to clarify the applicability of high-risk categories. A State DOT may not assume responsibilities for Interstate projects in a designated high-risk category, as laid out in 23 U.S.C. 106(c)(4). While FHWA has not designated any high-risk categories to date, if FHWA makes a future high-risk designation that applies to a State, that designation will immediately supersede the assumptions of responsibilities in that State's S&O Agreement only to the extent of that high-risk designation.

Section V. Assumption of Responsibilities for Federal-Aid Projects Off the NHS

Comment: As stated above when discussing comments made regarding section IV, several commenters raised concerns related to the stewardship and oversight plans mentioned in sections IV, V, and VI.

The FHWA Response: The FHWA repeats the response made above when discussing comments made regarding section IV. As section IV and section V contain the same language, FHWA is making the same changes described above in section IV to section V.B.

Comment: The MDOT noted that the proposed template stated that State DOTs would be required to exercise any and all assumptions of the FHWA's responsibilities in accordance with the Federal laws, regulations, policies, Executive Orders, and procedures that would apply if the responsibilities were carried out by FHWA, and asked if FHWA would provide the State DOTs a list of the most current Federal laws, regulations, policies, Executive Orders, and procedures that FHWA is responsible to carry out.

The FHWA Response: To clarify, FHWA intended this statement to mean that when a State DOT assumes an FHWA responsibility, the same requirements that would apply if FHWA maintained that responsibility apply to the State DOT. This statement only reflects that applicable laws will apply when a State DOT assumes responsibility. The FHWA does not intend to provide a list of the current Federal laws, regulations, policies, EOs, and procedures that may apply, which may be different for different projects and may change from time to time.

Section VI. FHWA Oversight Program Under 23 U.S.C. 106(g)

Comment: As stated above when discussing comments made regarding section IV, several commenters raised concerns related to the stewardship and oversight plans mentioned in sections IV, V, and VI.

The FHWA Response: The FHWA repeats the response made above when discussing comments regarding section IV. In section VI, FHWA is clarifying that FHWA Division Offices select projects for a S&O plan based on a risk assessment and the responses to identified threats and opportunities. The FHWA Division Office then documents actions that it will undertake to respond to the risks in the S&O plan. In section VI.D FHWA is also clarifying that for the selected projects, the plan supersedes the assumption of project approval actions under Attachment A.

Comment: The AASHTO, MDOT, ODOT, an individual, and the Joint States commented on Attachment B and the description of Attachment B included in section VI.B. Commenters recommended that a list of documents required by regulation or statute be provided and that clarification is needed regarding: a) the documents that are intended for inclusion in Attachment B; b) FHWA approval of documents included in Attachment B; and c) how to handle updating documents included in Attachment B.

The FHWA Response: Attachment B is intended to list manuals, agreements and other control, monitoring, and reporting documents the State DOT uses on Federal-aid

projects. The FHWA intends to provide a listing of documents that are required to be submitted to or approved by FHWA based on statute or regulation, with instructions to aid State DOTs and FHWA Divisions in developing Attachment B. Each Attachment B must include, at a minimum, the list of documents identified by FHWA that are required to be submitted to or approved by FHWA based on statute or regulation, and, based upon an agreement between the State DOT and FHWA Division Office, any other documents used on Federal-aid projects. The FHWA is adding language to this effect in section VI.B and to the instructions in Attachment B.

Finally, with respect to updating documents included in Attachment B, the format of Attachment B is optional and there are several acceptable ways of handling updated documents. Attachment B can be updated as a “minor revision” in accordance with section VIII.B.2 to indicate an updated document. Alternatively, the documents can be listed as “current version” without indicating an approval date or version. The format should be agreed to by the State DOT and its respective FHWA Division Office.

Comment: The PennDOT commented that the language describing the two options related to Stewardship and Oversight Indicators in section VI.C is unclear and questioned the need for Stewardship and Oversight Indicators.

The FHWA Response: Individual States and their respective FHWA Division Offices have the option of establishing S&O Indicators to help monitor performance of responsibilities assumed under this S&O Agreement. These indicators are not required, as Option 2 demonstrates; however, if the FHWA Division Office and the State wish to use them to monitor performance, Option 1 gives them that ability.

Section VII. State DOT Oversight Responsibilities

Comment: The AASHTO, MDOT, NYSDOT, ODOT, and the Joint States all raised concerns over the proposed template’s statement that the State DOT “will provide information” to the FHWA Division Office “upon request.” These commenters

expressed concern that this language could lead to a large volume of requests, the request of irrelevant information, and that this language did not specify any timeframe for the State DOT to provide the information. Commenters suggested placing boundaries to frame the potential extent of information requests and that the template state that the timeframe for the State DOT to provide the information will be agreed to by the State DOT and FHWA Division Office.

The FHWA Response: By requiring States to provide information upon request, FHWA is not instituting any new requirements. The FHWA has the authority to request any and all information deemed desirable in administering the FAHP program pursuant to 23 CFR 1.5. The FHWA will continue to take into consideration the burden and workload associated with requests for information and the time required to fulfill requests, but FHWA will not add language to the template limiting requests for information that it deems necessary for the S&O of the FAHP or to stipulate that timeframes for requests will be agreed to by the respective State DOT.

Comment: Many commenters expressed concerns over the paragraph in section VII titled “Subrecipient Oversight.” The AASHTO, NYSDOT, and ODOT commented that the paragraph describing State DOT responsibility for oversight of subrecipients does not provide for a State DOT to use a risk-based approach in monitoring subrecipients. In addition, an individual commenter stated that the proposed language, unlike language from the 2015 template which stated that a State DOT is responsible and accountable for local public agency compliance with all applicable Federal laws and requirements, would encourage State DOTs to shirk their responsibilities under the S&O Agreement.

The FHWA Response: The FHWA agrees with the commenters suggesting that State DOTs should be allowed to use a risk-based approach to monitor subrecipients, and FHWA modified the paragraph describing SDOT responsibility for oversight of subrecipients to clarify that, consistent with the uniform administrative requirements for

Federal awards in 2 CFR part 200, State DOTs are able to use a risk-based approach in monitoring subrecipients, so long as the State DOT ensures that its subrecipients meet all applicable Federal requirements. As this paragraph makes clear that a State DOT remains responsible for ensuring that subrecipients meet all applicable Federal requirements, FHWA disagrees with the individual commenter that this language should be further modified.

Comment: The GDOT commented that a Stewardship and Oversight Indicators sub-section like that included in section VI with similar options should also be included in section VII.

The FHWA Response: The FHWA disagrees with this suggestion. The description of S&O Indicators in section VI is sufficient and does not need to be repeated in section VII.

For readability, FHWA is also modifying the organization of section VII to better mirror that of other sections. The FHWA is also refining the citations in section VII.C to better convey the precise source of the information.

Section VIII. Agreement Execution and Modifications

Comment: The AASHTO, the Joint States, and NYSDOT all stated that future updates to the S&O Agreement template should be prohibited without notice and comment to be consistent with section 11307 of BIL.

The FHWA Response: The FHWA acknowledges that BIL, section 11307 requires that an update to the S&O Agreement template be published in the *Federal Register*, for FHWA to provide for a comment period, and for FHWA to publish a notice laying out a final template after consideration of these comments. The FHWA complied with this requirement by issuing a notice, along with the proposed S&O Agreement template, for public comments on December 21, 2022 (87 FR 78193), and by publishing this notice. The FHWA does not agree, however, that the intent of Congress in passing

section 11307 was to require any future change to the S&O Agreement template to go through that same process. The notice and comment process in section 11307(b)-(c) describes singular events that are tied to specific dates after the enactment of BIL. The FHWA does not believe that the carefully crafted process in section 11307(b)-(c) describing how the template should be updated after the enactment of BIL reflects Congress's intent that all future updates to the template follow this same procedure. The FHWA will seek notice and comment through the Federal Register, as well as through other methods as appropriate, to seek input and communicate any potential future changes. The FHWA appreciates the feedback received from AASHTO, SDOTs, and other transportation stakeholders and intends to continue good communication.

Comment: The AASHTO further commented that section VIII provides processes for making amendments and modifications to individual S&O Agreements, which can be used to address incremental changes in Federal requirements, rather than requiring FHWA to introduce a new template. The AASHTO and NYSDOT stated that the template should only be updated when there are significant, substantive changes in Federal regulations or requirements.

The FHWA Response: The FHWA agrees that going through the amendment process, rather than issuing a new template, may be more appropriate for incorporating incremental changes in Federal requirements into S&O Agreements. The FHWA anticipates that the issuance of future revisions to the template will be based on substantive changes in Federal regulations or requirements, such as after the adoption of a new Federal transportation bill. There may be other times, however, where FHWA may find it more appropriate to issue a new template rather than to have FHWA Division Offices and State DOTs agree to amendments and then have FHWA process each amendment in accordance with section VIII.B.2.

Comment: The Joint States commented that section VIII.B.2 should be titled “Amendments that would not change the substance of the template” instead of just “Amendments” and further commented that this section should be revised to state that Amendments “would not change the substance of the template.”

The FHWA Response: The FHWA does not find these changes necessary. To start, amendments are between the State DOT and FHWA Division Office. While they may change the content of that specific S&O Agreement, they would not affect the S&O Agreement template. In addition, FHWA believes that it is appropriate for amendments to make substantive changes to an individual S&O Agreement. Without this ability, it is unclear how individual S&O Agreements could be changed to account for the circumstances of specific States. The FHWA observes that section VIII.B.1 provides an opportunity for a State DOT and its division office to make minor, non-substantive changes to the S&O Agreement.

Comment: The AASHTO, the Joint States, and NYSDOT also objected to language in proposed section VIII.C which would have required an S&O Agreement be replaced in its entirety at the request of the FHWA Office of Infrastructure. The commenters stated that this provision allows FHWA too much authority to unilaterally make changes without notice or comment and is inconsistent with the intent of section 11307 of BIL.

The FHWA Response: As previously stated, FHWA does not believe that section 11307 of BIL requires that additional future revisions to the S&O Agreement template go through the procedure laid out in that section. The FHWA, however, does agree that allowing the Office of Infrastructure to unilaterally replace an S&O Agreement for any reason may not be appropriate, as this could disrupt the delivery of the FAHP. The FHWA has modified the proposed language to clarify the reasons a new S&O Agreement

would be required, which are changes to regulations or statutes or upon issuance of a revised template.

Section IX. Agreement Term and Termination

Comment: The AASHTO, ODOT, SCDOT, and TxDOT all opposed the proposed change to section IX stating that an S&O Agreement would have a term of no greater than 6 years and that a new S&O Agreement must be executed before the expiration of the current S&O Agreement, claiming that there would be consequences if an S&O Agreement expires before a new S&O Agreement is executed. Commenters suggested modifying this provision to allow existing S&O Agreements to remain effective until a new superseding S&O Agreement is executed.

The FHWA Response: The FHWA agrees with the commenters that a situation in which an S&O Agreement expires could disrupt the administration of the FAHP and should be avoided. The intent of the proposed term was to ensure S&O Agreements are updated on a regular basis, such as every 6 years. After reviewing the comments received, FHWA now expects that future changes to statute and regulation will prompt updates to S&O Agreements without the need for a set term. The FHWA therefore agrees with commenters that this provision should be removed.

Comment: The FHWA also proposed in section IX to allow the FHWA Division Office to terminate an S&O Agreement at any time if the FHWA Division Office determines that the S&O Agreement is no longer in the public interest. The AASHTO, the Joint States, ODOT, and TxDOT all opposed this provision. Commenters stated that a termination of an S&O Agreement would be catastrophic to the delivery of Federal-aid projects and programs, that the language used was vague, and that this provision indicates a level of mistrust that does not serve to foster a cooperative relationship needed to ensure a successful joint agreement. These commenters argued that decisions on the

termination or replacement of an agreement should be made jointly between the State DOT and FHWA.

The FHWA Response: The FHWA agrees with the commenters that the termination of an S&O Agreement would have a negative impact on the delivery of the FAHP and should be avoided. The intent of this provision was to provide FHWA a means to expediently address an unforeseen extraordinary circumstance that could impair the ability of a State DOT to effectively carry out the project approvals and related responsibilities pursuant to an S&O Agreement. Upon careful reconsideration of the intent of this provision, FHWA acknowledges that should such circumstances ever arise, there are other statutory and regulatory actions FHWA may take on a project or programmatic basis to protect the Federal interest in the S&O of the FAHP. The FHWA therefore agrees with commenters that this provision should be removed.

Lastly, FHWA proposed section IX with a final provision that stated that expiration or termination of an S&O Agreement would mean that the assumption of project approvals by a State DOT would be automatically revoked. Because FHWA is removing all provisions related to the expiration or termination of an S&O Agreement, this language is unnecessary and will be removed, which fully deletes proposed section IX.

Attachment A. Project Responsibility Matrix

Comment: The AASHTO, NYSDOT, and ODOT commented that a distinction has been historically made in Attachment A between the assumptions of responsibilities on Interstate facilities and those on other National Highway System (NHS) facilities.

The FHWA Response: The flexibility for FHWA to retain selected approvals on the Interstate System while the State DOT assumes those approvals on non-Interstate NHS projects has traditionally been exercised, and FHWA is not proposing to change or limit this flexibility. The FHWA agrees that this flexibility is not made clear in the

template and intends to clarify this flexibility in instructions for developing revised S&O Agreements based on the revised template.

Comment: The AASHTO and ODOT commented that Attachment A should include all responsibilities that must be retained by FHWA as well as those that can be delegated per law or regulation.

The FHWA Response: The primary purpose of Attachment A is to describe the responsibilities that the State assumes from FHWA pursuant to 23 U.S.C. 106(c) and other legal authorities. To meet that purpose, Attachment A includes all FHWA project approvals that can be assumed by the State. In addition, FHWA included some actions that cannot be assumed to clarify a distinction with an action that can be assumed, clarify that a specific action cannot be assumed, or to otherwise avoid ambiguity. The purpose of the S&O Agreement is not to provide a comprehensive list of every FHWA project approval.

Comment: The NYSDOT commented that a statement should be added to Attachment A stating that projects selected by the FHWA for risk-based FHWA project involvement are not covered by the Attachment A matrix.

The FHWA Response: The FHWA agrees that this is an important point to make and has added language in section VI.D to clarify this. Project-specific S&O plans will distinguish which Attachment A assumptions are superseded by the project-specific plan. Attachment A assumptions that are not superseded by the project plan remain in effect.

Comment: The Joint States suggested that the third sentence of the introductory text to Attachment A should be modified to clarify that “all” elements of a FAHP project do not need to be eligible for FAHP funding. The commenter suggested language be added to clarify that only elements of the project that are to be supported by FAHP funding must be eligible for FAHP funding.

The FHWA Response: The FHWA agrees that a clarification is needed and modified this sentence to state that the State is responsible for ensuring that all applicable, rather than individual, elements of a project need to be eligible for FAHP funding. The FHWA disagreed with the suggested language as in certain situations, such as advance construction, the eligibility of elements not supported by FAHP funds is significant.

Comment: The FHWA proposed action 18 in table 3 as reading: “Approve any betterment to be incorporated into the project and for which emergency relief funding is requested.” The PennDOT commented that the “and” in this statement should be deleted.

The FHWA Response: The FHWA agrees and has modified Attachment A accordingly.

Comment: The GDOT commented on action 23 in table 4, which FHWA proposed would read: “Determine use of more costly signing, pavement marking and signal materials (or equipment) is in the public interest.” The GDOT stated that 23 CFR 655.606 uses the term “approved” instead of “determined”.

The FHWA Response: The FHWA agrees and replaced the term “determined” with “approved” to match 23 CFR 655.606.

Comment: The PennDOT commented that action 25 in table 4, which FHWA proposed to read, “Determination that a United States Coast Guard Permit is not required for bridge construction,” should be modified to limit this approval to when the bridge construction is over navigable water.

The FHWA Response: The FHWA disagrees with this suggested revision. To prevent conflicts with other documents, actions listed in Attachment A are clearly and concisely described without providing additional information or additional guidance on the action.

Additional Changes to Attachment A: In the process of reviewing comments and drafting a revised template, FHWA made several revisions to the language for actions 28, 29, 30 and 31 in Table 5. These changes were made to better align the language with language used in other actions in Attachment A and the associated regulations.

Major Projects: The major projects action in the proposed template “Review and accept initial financial plan and annual updates for Federal major projects [23 U.S.C. 106(h)]” (proposed action 1) was split into two actions, “Review and accept initial financial plan for Federal major projects [23 U.S.C. 106(h)]” and “Review and accept financial plan annual updates for Federal major projects [23 U.S.C. 106(h)]” for clarity. The major projects action in the proposed template “Review cost estimates for Federal major projects [23 U.S.C. 106(h)]” (proposed action 2) was deleted as FHWA determined that this action was intrinsically part of the review of the initial financial plan and financial plan annual updates and therefore duplicitous of other actions in Attachment A.

Further, in response to comments urging FHWA to maintain maximum flexibility in terms of allowing State DOTs to assume actions, FHWA undertook a review of proposed Attachment A to determine whether there were any actions that could be assumed by State DOTs. The FHWA determined that actions related to major projects, “Review and accept initial financial plan for Federal major projects [23 U.S.C. 106(h)]”, “Review and accept financial plan annual updates for Federal major projects [23 U.S.C. 106(h)]”, and “Approve project management plan for Federal major projects [23 U.S.C. 106(h)]” could be assumed by States and modified Attachment A accordingly.

Attachment B. Manuals, Agreements, Control, Monitoring, and Reporting Documents

Comment: Several commenters provided suggestions on Attachment B, which FHWA has reviewed and responded to in section VI above. In addition, an individual commenter suggested that FHWA should retain its approval authority for all manuals,

policies, and procedures used by a State DOT, regardless of whether such approval is contemplated by specific statute or regulation.

The FHWA Response: The FHWA cannot require State DOTs to submit manuals, policies, and procedures for approval by FHWA if such approval is not required by statute or regulation, in accordance with section 11307(e)(1) of BIL. Further, in line with section 1316(a) of the Fixing America's Surface Transportation (FAST) Act (Public Law 114-94), FHWA believes it appropriate to allow a State to assume responsibilities "to the maximum extent practicable."

Attachment C. Stewardship and Oversight Indicators

Comment: The GDOT commented that language should be added to the Attachment C heading paragraph that explains how to document when indicators are not included in the S&O Agreement.

The FHWA Response: The FHWA has clarified in Attachment C that establishing S&O Indicators is optional and that Attachment C should be used only when they are established. If a State DOT and FHWA Division Office have not established S&O Indicators, FHWA expects Attachment C to not be included in any S&O Agreement between them.

Comment: The PennDOT commented that the example Stewardship and Oversight Indicators in Attachment C do not seem directly related to how well a State DOT's assumption of responsibilities is functioning.

The FHWA Response: The Attachment C included in the proposed template is a drafting example, which is provided to demonstrate acceptable methods of showing S&O Indicators and examples of the type of information to include. Regarding the Indicator examples included, some are directly related to an assumable action, such as the example Indicator "Number of projects with conditional ROW," which is directly related to the conditional ROW actions in Attachment A. Other examples are indirectly related to an

assumable action, such as the example Indicator “Percent of DBE goal achieved,” which is indirectly related to project award actions in Attachment A.

General Comments:

Comment: The AASHTO, NYSDOT, and ODOT commented that individual FHWA Division Offices and State DOTs should have the flexibility to modify their S&O Agreement and add State-specific attachments to address such aspects as specific State responsibilities, delegation of State assumed responsibilities on subrecipient projects, or the oversight of subrecipients.

The FHWA Response: The FHWA disagrees with allowing flexibility to modify the template body or Attachment A. The template body includes provisions that apply to all States and modification in individual S&O Agreements would defeat the purpose of a single template that applies to all 52 FHWA Division Offices and State DOTs.

Similarly, FHWA does not believe that States should have the flexibility to modify Attachment A beyond allowing States to assume responsibilities where allowed per Attachment A. Attachment A describes actions that FHWA has determined are assumable based on the language of 23 U.S.C. 106(c), and FHWA does not believe that allowing for additional assumable actions would be appropriate.

Additional attachments to individual S&O Agreements are allowable. Additional attachments, however, cannot conflict with provisions in the template and must meet FHWA guidelines for public posting, including compliance with section 508 of the Rehabilitation Act of 1973.

Comment: The PennDOT commented that if funds are not being “passed” through the State DOT, the State DOT does not have a responsibility because the recipient would be executing an agreement directly with the FHWA.

The FHWA Response: The S&O Agreements are not applicable to non-State DOT recipients and issues associated with non-State DOT recipients are not discussed

here. The template and resulting S&O Agreements are not intended to provide program-specific guidance beyond what is necessary to establish the roles and responsibilities of the FHWA Division Office and the State DOT with respect to certain project approvals, related responsibilities, and FAHP oversight activities.

Comment: The AASHTO, NYSDOT, ODOT, and PennDOT commented that the template does not specifically address the wider range of potential subrecipients anticipated in various programs within the BIL. These commenters stated that the template should allow for means of addressing the delegation to and oversight of non-State DOT subrecipients. The PennDOT added that it was concerned over the impact to the agency regarding responsibility over such recipients. The NYSDOT commented that the template should provide greater guidance and flexibility in administering new programs.

The FHWA Response: The FHWA agrees that the template does not specifically address the range of potential subrecipients involved in specific programs. The template and resulting S&O Agreements are not intended to provide program specific guidance beyond what is necessary to establish the roles and responsibilities of the FHWA Division Office and the State DOT with respect to certain project approvals, related responsibilities, and FAHP oversight activities pursuant to 23 U.S.C. 106. To the extent that such entities are subrecipients of a State DOT, section VII of the template addresses the State DOT's responsibility for overseeing its subrecipients. The FHWA does not find it necessary to lay out specific means of addressing the delegation to and oversight of such subrecipients, as that is the responsibility of the State DOT. Part of this responsibility is to evaluate each subrecipient's risk of ensuring compliance and determining the appropriate oversight and monitoring in accordance with 2 CFR 200.332(b). The FHWA acknowledges that new programs under BIL may involve a

wider range of potential subrecipients and that risks will be different from traditional subrecipients who possess more experience administering FAHP projects.

Comment: An individual commenter expressed concern with State DOTs misapplying provisions of S&O Agreements under the current template and provided what he stated was an example of this occurring. This commenter argued that FHWA should provide a more detailed description of State DOT responsibilities in any revised template, particularly with respect to State DOT responsibilities for projects on the NHS that do not utilize Federal funds. This commenter also stated that FHWA should take extra care to ensure that entrenched commitment to erroneous views of the law and the duties imposed by Title 23, U.S.C. and the S&O Agreement is corrected, contained, and not adopted by other public officials or contractors, and that FHWA should include additional language to reflect the need for State DOTs to perform or directly supervise construction projects on the NHS, including those undertaken by its subrecipients, such as Local Public Agencies (LPA).

The FHWA Response: The FHWA agrees that it is important for State DOTs to recognize responsibilities on the NHS for projects that may not use Federal funds. The S&O Agreements, however, are not meant to lay out every responsibility a State DOT has that might be related to the FAHP; instead, they are meant to define the roles and responsibilities of FHWA and each State DOT regarding project approvals and related responsibilities under Title 23, U.S.C., and document methods of oversight. For example, S&O Agreements are not the place to discuss the relationship between State DOTs and LPAs, apart from the relationship that might exist when a State DOT provides a subaward to the LPA. The FHWA therefore disagrees with the commenter that S&O Agreements are appropriate places to define State DOT responsibilities in detail, such as State DOT responsibilities for projects that do not use Federal funds, which are not related to the purpose of an S&O Agreement.

The FHWA also agrees that it is important for State DOTs to supervise construction projects on the NHS, including those undertaken by its subrecipients. The FHWA does not, however, believe that the S&O Agreement needs to include additional language to reflect this need. Section VII of the template includes language stating that the State DOT is responsible for ensuring that its subrecipients meet applicable Federal requirements. The FHWA does not believe it appropriate or necessary to explicitly state that this oversight must be done by directly supervising construction of projects on the NHS.

Schedule to Implement Changes

In accordance with section 11307(c)(1) of BIL, FHWA has considered all comments received on its proposed S&O Agreement template. Through this notice, FHWA is describing the proposed changes to be made to that proposed template and is addressing comments in response to which changes were not made to the template. In accordance with sections 11307(c)(1)(C) and 11307(c)(3)(A) of BIL, FHWA is updating its S&O Agreement template, which can be found at:

<https://www.fhwa.dot.gov/federalaid/stewardship/>. Pursuant to section 11307(c)(3)(B) of BIL, FHWA will ensure that this revised template is used to update existing S&O Agreements not later than [INSERT DATE 1 YEAR AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Authority: 23 U.S.C. 106(c); section 11307, Pub. L. 117-58, 135 Stat. 532; 49 CFR 1.85.

Shailen P. Bhatt,

Administrator,

Federal Highway Administration.

[FR Doc. 2023-24960 Filed: 11/9/2023 8:45 am; Publication Date: 11/13/2023]