

Administration of Categorical Exclusions by State Departments of Transportation

Under the National
Environmental Policy Act



Prepared for
AASHTO Committee on Environment and Sustainability

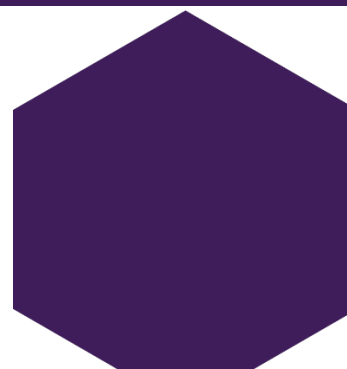
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Disclaimer

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1.0 Introduction

Programmatic Agreements (PAs) are agreements between State Departments of Transportation (State DOTs) and approving agencies that provide a streamlined process for the review and approval of frequently encountered environmental actions. State DOTs have used PAs since 1989, and currently, all fifty two “states” (including the District of Columbia and Puerto Rico) in the Federal-aid highway program have at least one PA in place¹. One type of PA, the programmatic categorical exclusion (PCE), provides a framework for duties and responsibilities between a State DOT and a Federal Highway Administration (FHWA) Division Office for the review and approval of actions at the project level that qualify as categorical exclusions (CEs). State DOTs experience several benefits from PCE agreements, including time savings for approval of CEs, an improved understanding of the state’s role and approval authority, and stronger relationships between State DOTs and FHWA Division Offices.

Through the *Moving Ahead for Progress in the 21st Century Act* (MAP-21) and the *Fixing America’s Surface Transportation* (FAST) Act, FHWA has mandated that all PCEs be revised to align with the new requirements before November 6, 2019. To ensure that all active PCE agreements between FHWA Division Offices and State DOTs conform to the statutory and legislative requirements, FHWA has issued a series of memoranda directing State DOTs on how to comply with the new requirements, as well as a PCE (Model) agreement template that can serve as a foundation for the preparation of future PCEs.

The intent of this report is to provide an additional resource to State DOTs seeking to develop new or revised PCE agreements by the November 6, 2019 deadline. To that end, this report presents an examination of best practices, as well as the content and structure of PCEs in use by DOTs² in Arizona, Connecticut, Nebraska, New Mexico, Ohio, Oregon, Pennsylvania, Texas, and Washington State. The report reviews PCE agreements used by these State DOTs and compares those PCEs to FHWA’s Model agreement. Additionally, interview responses from the selected State DOTs and their corresponding FHWA Division Offices are summarized to explain how PCEs are used in their states.

2.0 Understanding the PCE

PAs for CEs expedite the approval process and establish legal requirements between FHWA and State DOTs in the determination of which actions constitute CEs that can be prepared at the state level, and which actions must be reviewed by FHWA for CE determination. Each PCE defines the purpose of the agreement, roles and responsibilities between parties, documentation requirements, and performance measures. These agreements have been effective in reducing the time it takes to process CEs and have provided State DOTs with overall time savings in the project delivery process. PCE agreements cover actions listed in 23 Code of Federal Regulation (CFR) 771.117 and can facilitate the coordination of procedures, allowing staff and resources at both the Federal and state levels to become

¹For example, most State DOTs and FHWA have executed PAs that allow State DOTs to conduct Section 106 consultation with State Historic Preservation Officers (SHPOs). PAs between State DOTs, FHWA, Federal Railroad Administration (FRA), Federal Transit Authority (FTA), and the U.S. Fish and Wildlife Service (FWS) have executed the range-wide programmatic biological opinion (PBO) for the Indiana bat and northern long-eared bat (NLEB).

²Both Arizona and Nebraska have CE Assignment MOUs in place and Ohio and Texas have NEPA Assignment MOUs in place. The PCEs referenced in this document have been superceded.

more focused and efficient in the preparation of documentation and execution of CE determinations.

The ability of State DOTs to approve CEs has evolved over the past several years. MAP-21, signed into law in 2012, contained a provision in Section 1318(d)(2) that created express authority for FHWA to enter into PCE agreements with State DOTs, allowing the States to make CE approvals on FHWA's behalf. FHWA issued a final rule on October 6, 2014 requiring that all existing PCE agreements be revised and updated³. 23 CFR 771.117(g) establishes the four specific conditions applicable to PCE agreements:

1. The agreement must set forth the State DOT's responsibilities for making CE determinations, documenting the determinations, and achieving acceptable quality control and quality assurance;
2. The agreement may not have a term of more than five years, but may be renewed;
3. The agreement must provide for FHWA's monitoring of the State DOT's compliance with the terms of the agreement and for the State DOT's execution of any needed corrective action. FHWA must take into account the State DOT's performance when considering renewal of the PCE agreement; and
4. The agreement must include stipulations for amendment, termination, and public availability of the agreement once it has been executed.

In a memo dated February 4, 2015, FHWA explained several options for PCE agreements:

1. Allowing State DOTs to decide whether an action qualifies for a CE on behalf of FHWA and proceeds without individual FHWA review and approval; and
2. Allowing a State DOT to certify to FHWA that an action meets the criteria for a CE determination but not to proceed until there is an FHWA approval, or
3. Allowing the State DOT to be the decision maker for some projects, and FHWA for others.

In 2015, Section 1315(b) of the FAST Act clarified that State DOTs can make CE determinations on FHWA's behalf based on actions that qualify for CEs listed in 23 CFR 771.117 (c) and (d) or actions that have been designated by the Council on Environmental Quality (CEQ). Section 1315(a) of the FAST Act required that a programmatic agreement template be constructed that "provides for efficient and adequate procedures for evaluating Federal actions" but also allows for flexibility "as necessary to address the unique needs and characteristics of the State." Use of the template is not mandatory. A state can request its use by FHWA, or may use another format.

³<https://www.federalregister.gov/documents/2014/10/06/2014-23660/environmental-impact-and-related-procedures-programmatic-agreements-and-additional-categorical>

3.0 The FHWA (Model) Agreement

To guide State DOTs in the preparation of PCE agreements that would fulfill Federal regulatory requirements, FHWA has created templates that serve as a framework to define the CE review and approval responsibilities of both the state and FHWA. The most recent PCE template (Model) outlines how PCE agreements can potentially be organized by states to incorporate MAP-21 and FAST Act requirements.

The nine (9) sections outlined in the Model agreement include:

1. Parties
2. Purpose
3. Authorities
4. Responsibilities
5. Documentation of CE Approvals and Certifications
6. NEPA Approvals and Re-Evaluations
7. Quality Control/Quality Assurance, Monitoring and Performance
8. Amendments
9. Term, Renewal and Termination

Each of these sections are discussed below.

3.1 Parties

The Parties section lists the parties to the agreement, specifically the FHWA Division Office and the name of the State DOT. The only parties to current PCE agreements are State DOTs and FHWA Division Offices.

3.2 Purpose

The Purpose section of the Model summarizes the subject of the agreement between FHWA and a State DOT. The section authorizes State DOTs to determine on behalf of FHWA whether a project qualifies for a CE action specifically listed in 23 CFR 771.117 or a CE designated for the state. The inclusion of the state-designated CE represents an enhancement in the State DOT's authority to process projects as CEs. This section notes that a PCE also permits a state to certify to FHWA that an action it otherwise cannot approve according to the terms of the PCE still meets the criteria of a CE in 40 CFR 1508.4 and 23 CFR 771.117(a) if no unusual circumstances are present that would require an Environmental Assessment (EA) or Environmental Impact Statement (EIS).

3.3 Authorities

Federal law and regulations that guide the agreement are listed in the Authorities Section. The Model contains the following authorities:

- National Environmental Policy Act, 42 U.S.C. § 4321 et seq.
- Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141, 126 Stat. 405, Sec. 1318(d) (July 6, 2012)
- Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94, 129 Stat. 1312, Sec. 1315 (December 4, 2015)
- 40 CFR parts 1500 – 1508
- DOT Order 5610.1C
- 23 CFR 771.117

3.4 Responsibilities

The Responsibilities section describes the circumstances when a State DOT can make a project CE approval on behalf of FHWA. Qualifying actions are CEs established in 23 CFR 771.117(c) and (d), as well as actions designated by the State DOT as CEs, provided that the actions do not exceed thresholds contained in the agreement. Actions designated as CEs are listed in appendices to the agreement. Thresholds are established in this section and define when FHWA must make a CE determination based on a state's certification. Several thresholds are flexible and allow for agreed-to standards between the State DOT and FHWA, such as defining what constitutes an acquisition of a minor amount of right of way, or what level of an access control change will trigger FHWA review. Some thresholds do not allow for flexibility, such as United States Coast Guard bridge permits, or actions that result in an adverse effect to a historic property. This section explains the application of 40 CFR 1508.4 and 23 CFR 771.117(a) for state-level approval of an action that will not result in a significant environmental impact and does not involve unusual circumstances warranting preparation of an EA or EIS. Documentation requirements for FHWA reviews are outlined, as well as FHWA's responsibilities to provide technical assistance, timeliness of certified action review, and agreement oversight.

3.5 Documentation of CE Approvals and Certifications

The Documentation of CE Approvals and Certifications section clarifies how a State DOT should document and record CE approvals and certifications. For 23 CFR 771.117(c) approvals, the state must identify the action and ensure that all FHWA regulations are met, that no unusual circumstances are present, and that the approval is signed by appropriate state personnel. State-designated actions that meet CE thresholds for approval, as well as 23 CFR 771.117(d) approvals, must include documentation that supports the determination and show that no unusual circumstances exist on a project. Project records must be retained for a minimum of three (3) years after the completion of construction; the project records must include checklists or forms showing project effects, evidence of public involvement, stakeholder communications, the name and title of State DOT or FHWA staff who approved the document(s), and any reevaluation documentation or (in cases when documentation is not necessary) a statement of when the reevaluation was completed. Electronic or paper

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records maintained on a project may be requested by FHWA at any time during the retention period.

3.6 NEPA Approvals and Re-Evaluations

The office or officers at the state level who are authorized to approve or certify qualifying CE documents are listed in the NEPA Approvals and Re-Evaluations section. The state determines who will perform these duties.

3.7 Quality Control/Quality Assurance, Monitoring and Performance

The Quality Control/Quality Assurance, Monitoring and Performance section speaks to quality control, quality assurance, and quality performance by the State DOT and FHWA's role in oversight and monitoring. The State DOT submits an annual report to FHWA, summarizing performance for review that includes any action taken and/or operational improvements to ensure continuous quality control. The State DOT must agree to FHWA monitoring, which may include the review of technical competency and organizational capacity of State DOT staff, the quality and consistency of CE approvals, CE submissions to FHWA for approval, and the effectiveness of State DOT administration of internal CE approvals. Both parties agree to one (1) or more FHWA monitoring visits during the term of the agreement, and that the State DOT agrees to submit a corrective action plan within forty-five (45) days after a visit to address any findings or observations. FHWA may also require a State DOT to perform other activities to show quality performance and to ensure compliance with Federal law.

3.8 Amendments

The Amendments section allows for the execution of an amendment between FHWA and the State DOT.

3.9 Terms, Renewal, and Termination

Stipulations concerning the Term, Renewal, and Termination section of the agreement are also included. The Model agreement specifies a five (5) year renewable period. A State DOT's request for one or more renewals is permitted if FHWA determines that the state has satisfactorily carried out the provisions of the agreement. The Model contains a clause that allows either party to terminate the agreement with a thirty (30) day notice. Expiration or termination of the agreement also ends the ability of the State DOT to make CE approvals on FHWA's behalf.

4.0 Review of State PCEs

The researchers reviewed recent or current PCEs from select State DOTs to compare those PCEs to the FHWA Model and to determine whether the PCEs currently in use reflect stipulations contained in the Model. Agreements from the states⁴ of Arizona, Connecticut, Nebraska, New Mexico, Ohio, Oregon, Pennsylvania, Texas, and Washington State were the focus for the review. These State DOTs were chosen because the content, structure, and

⁴Both Arizona and Nebraska have CE Assignment MOUs in place and Ohio and Texas have NEPA Assignment MOUs in place, see Section 5.3.

approach of their PCEs were suitable as examples that other State DOTs could use as a guide for the establishment of, or revisions to, current PCEs.

Each State PCE or PA that was reviewed for this study exhibits many of the stipulations in the Model agreement. **Table 1** compares the federal Model to each State DOT's programmatic agreement. However, many of the agreements have been tailored, given the flexibility inherent in the Model, to address the needs of the specific State DOT. Of note in the review is that MAP-21 and/or the FAST Act are not directly referenced as Federal authorities in some agreements. Additionally, the appendices to several agreements are not present in online versions of the documents, and 23 CFR 771.117 (c) and (d) are not referenced in the appendices, but may be referenced in the body of the document.

5.0 Evaluation of State PCE Agreements

To understand the usefulness of PCE agreements, the researchers interviewed State DOTs and FHWA Division Offices in the nine selected states. Several topics were discussed with participants, including the evolution of their PCE agreements, the development of PCEs, implementation, metrics and performance, and lessons learned that other states could consider as they prepare future PCEs.

5.1 Background of State PCE Agreements

Many State DOTs have had PCEs in place since the early 1990s. Several states found their original PCE agreements to be too prescriptive and inflexible, which limited the potential benefits of the agreements.

Several issues with original or early versions of PCE agreements include:

- The agreement was too broadly written, with a low percentage of approvals allowed at the state level.
- The definition of a “minor” or “minimum” amount of ROW was unclear.
- The treatment of cultural resources, such as tribal lands, was unclear.
- Agreement vs. implementation issues: the tools for implementation at the state level did not match the process contained in the PCE and did not contain the same thresholds.

Many of the revisions to original PCE documents, coinciding with the passage of MAP-21 and FAST Act, created PCE versions that increase flexibility and alleviate process issues.

State DOTs that have used more recent FHWA templates have stated that the templates work well and provide efficient and adequate procedures for evaluating Federal actions. For example, revisions to Nebraska's PCE agreement, based on MAP-21 and FAST ACT policy updates, has resulted in an 80% retainage rate for state-level review and approval of CEs. Oregon DOT has reported an increase in their state-level retainage rate to approximately 90 percent, up from the 60 percent they approved through their original PCE agreement.

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Table 1: Programmatic Agreement Characteristics by State

	Model	Arizona	Connecticut	Nebraska	New Mexico	Ohio	Oregon	Pennsylvania	Texas	Washington
Is it titled as a Programmatic Agreement?	Y	N ¹	Y	Y	Y	N ¹	Y	Y	N ¹	Y
Are the parties defined?	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Is there a purpose statement?	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
Are the authorities directly stated the same as in the Model?	Y	N	Y	N	N	N	N	N	N	Y
Are responsibilities defined?	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Are actions that require FHWA CE review and approval based on State DOT certification, as stated in the Model, directly stated in the state document?	Y	N	Y ²	Y	Y	Y ²	N	Y ²	Y ²	Y ²
Are documentation requirements for CE approvals and certifications defined?	Y	Y ³	Y ³	Y	Y	N	Y	Y	Y ³	Y
Are offices or officers identified that may make State DOT CE approvals and CE certifications to FHWA for an original NEPA and re-evaluations?	Y	N	Y	Y	Y	N	Y	Y	Y	Y
Is quality control/quality assurance, monitoring and performance of the PA defined?	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Is there a section that defines how amendments will be handled?	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Is the term of the PCE, the possibility of renewal, and termination explained?	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Are there additional sections added?	N	Y	Y	Y	Y	Y	N	Y	Y	N
Does Appendix A contain actions listed in 23 CFR 771.117 (c)?	Y	N	Y ⁴	Y	Y	N	N	Y ⁴	N	N
Does Appendix B contain actions listed in 23 CFR 771.117 (d)?	Y	N	Y ⁵	Y	Y	N	N	Y ⁵	N	N
Does Appendix C contain state-designated CE actions?	Y	N	Y ⁶	Y	Y	N	N	Y ⁶	N	N
Is there an example of a CE checklist in Appendix D?	Y	N	Y	N	Y	N	N	Y ⁷	N	N

¹CE or NEPA Assignment agreement.²Actions that require FHWA CE review are either paraphrased, incomplete, or additional actions are added.³Documentation requirements are included in document, but not to the detail within the Model agreement.⁴⁻⁶Actions listed in 23 CFR 771.117 or state designated CE actions are not contained in separate appendices, but are listed elsewhere in the document.⁷The CE checklist is located in the Oregon PCE Appendix A.

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Historically, several State DOTs used FHWA templates to develop early versions of their PCEs while others prepared state-specific agreements not based on a template. For example, the original as well as later versions of the TxDOT PCE were specific to needs within the state and used no templates. Additionally, Ohio DOT has based its agreements on FHWA templates as well as example projects, which has worked very well for it.

The schedule of FHWA reviews for projects approved through State PCE agreements varies by state. Some State DOTs are reviewed quarterly for several cycles until FHWA determines that an annual review is sufficient. The frequency of FHWA audits can be influenced by stipulations in a PCE agreement, available staffing in FHWA field offices, and the level of findings at a previous audit.

5.2 Updated PCE Agreement Framework

The reasons for updating original PCE agreements for each state include fulfilling the policy mandates of MAP-21 and the FAST Act, increasing flexibility in state-level project approvals, crafting agreements that create more precise thresholds that define when projects are elevated to FHWA, and creating time and cost savings to the approval process.

Depending on the state, revisions to original PCE agreements or early revisions included:

- Format changes
- Language changes
- Modifications to add CE designations and C-List/D-List classifications
- Total rewrite of an earlier agreement

Many states report that PCE flexibility gradually increased through revisions to their original PCE agreements. The most flexible and streamlined revision to PCEs are based on FAST Act requirements that shift D-List project types to C-List, identify and detail impact thresholds, and lessen the need for FHWA intervention in processing CEs.

FHWA templates were used by many State DOTs to create current revisions to their PCE agreements, citing adequate flexibility in the 2015 template that allowed for state-specific modifications. Other states used an earlier PCE revision as a template for current versions their agreements.

Implementation

The timeframe to discuss and develop current PCE agreements has been quite varied for each State DOT. Preparing the agreement took two to three months for some states, while other states took seven to eight months or longer from draft to executed agreement.

Some State DOTs use staff training as a tool in implementing their PCE agreements. For example, Arizona DOT has developed presentations and training materials for staff as well as local government agencies.

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Other tools used include:

- Guidance from new PCE agreements
- FHWA website, templates, and guidance documents
- State DOT-created guidance and procedural documents
- Communication plans
- Improved filing systems
- Electronic CE guidance
- Electronic document submittal processes

Since the implementation of PCE agreements, some State DOTs as well as FHWA Division Offices have cited challenges in using the agreements. The Oregon FHWA Division Office stated that several questions have been discussed with Oregon DOT concerning United States Coast Guard permits, construction lighting, and what constitutes a permissible action. Citing the need for additional flexibility, Arizona DOT and Nebraska DOT (as of September 2018) have implemented a CE assignment agreement (23 U.S.C. 326) allowing review and approval of a higher percentage of project CEs at the state level. Ohio and Texas have gone further and implemented full NEPA assignments (23 U.S.C. 327) for maximum flexibility for review and approvals of most project environmental evaluations.

Most State DOTs incorporated no state policies for the implementation of revised PCE agreements. Oregon DOT was an exception, incorporating the State of Oregon's standardized QA/QC process into their revised PCE agreement.

Metrics/Performance – Impact Thresholds, Timeframes for Reviews, Expectations

Each PCE reviewed contains a performance and monitoring section. The section typically states that CE approvals are subject to periodic monitoring by FHWA. As a part of monitoring, a State DOT must prepare reporting that identifies and/or summarizes the quality and consistency of approvals, identify areas for improvement, and identify corrective actions the state will take to carry out those improvements.

Some PCEs have a training requirement as a performance measurement. For example, Nebraska DOT specifies that a minimum of three consultant training events take place during the five (5) year period of their current PCE. These events strengthen their environmental consultant prequalification process to ensure high quality document preparation.

Several DOTs use some form of performance monitoring, not stated in their agreements, to gauge the success of their processes. For example, Oregon DOT currently has three (3) years of CE approval data and compares the data year over year. Connecticut DOT tracks CEs approved at the state level versus those approved by FHWA. Washington DOT uses professional judgement to gauge the quality of CE approvals. Ohio DOT tracks the time and cost of document approvals.

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5.3 The Move to CE and NEPA Assignment Agreements

The State DOTs studied for this task include Connecticut, New Mexico, Oregon, Washington State, and Pennsylvania, all of which currently have PCE agreements in place, as well as State DOTs with executed CE and NEPA Assignment agreements with FHWA, including Arizona and Nebraska (23 U.S.C. 326) and Ohio and Texas (23 U.S.C. 327), respectively. However, there are important distinctions between PCE Agreements and CE and NEPA Assignment MOUs. The 326 and 327 MOUs allow FHWA to assign the related environmental responsibilities (e.g., Section 106, Section 7 consultations, Section 4(f)) tied to a CE approval to a State, that are never a part of a PCE agreement.

6.0 Conclusion: Learn From Others, Don't Reinvent the Wheel

As a state begins the process of drafting or revising a PCE, they should consider using the lessons learned from other states and their decades of experience in utilizing these agreements. The Texas FHWA Division Office believes, and many State DOTs agree, that PCE agreements are a good first start to streamlining the CE approval process.

6.1 Trust and Communication between FHWA and State DOTs

State DOTs should strive to build collaborative relationships and trust with their FHWA counterparts in carrying out the responsibilities outlined in a PCE. A PCE serves as the cornerstone upon which to build that relationship. For both parties, a PCE establishes expectations for the day-to-day business of ensuring that environmental actions on projects are reviewed, monitored, approved, and documented per MAP-21 and FAST Act. However, State DOTs and FHWA should foster communication and collaboration to function within to the terms of the PCE.

The Ohio FHWA Division Office recommends that both State DOT and FHWA staff tackle the hard issues in relationship building. Between 2013 and 2015 the relationship deteriorated between Ohio DOT, USFWS, and the FHWA Division Office. The agencies agreed to discuss issues through conflict resolution, which led to stronger working relationships and better communication.

Greater trust between a State DOT and FHWA may also lead to greater responsibility at the state level in the future. In the case of the Ohio DOT, their relationship building efforts contributed to FHWA's confidence in Ohio DOT's application for NEPA assignment and TxDOT first secured CE Assignment, before applying for full NEPA Assignment. The Texas FHWA Division Office believes that a PCE agreement is a great place to start a stepped-approach towards the greater responsibility and flexibility of a CE or NEPA assignment. Program reviews can be approached as learning experiences for both FHWA and the State DOT and not in an adversarial light.

6.2 Other Tips/Opportunities/Lessons Learned

State DOTs listed several lessons learned that contribute to the success of a PCE agreement.

- A clear understanding of CE thresholds in an agreement is instrumental in the use of the agreement.
- Collaboration with internal DOT engineers and planners as well as consultant firms is important to ascertain project boundaries and revisions.
- Hiring experienced staff and providing training for relevant environmental, planning, and engineering staff to relay categorical exclusion and other environmental policy changes is beneficial. Having programmatic agreements in place for actions such as Section 106 (*National Historic Preservation Act*), Section 7 (*Endangered Species Act*), and Section 4(f) (*Department of Transportation Act*), bolster the PCE process.
- Creation of a written or electronic CE checklist, visual aids, and other related guidance can be instrumental in showing staff how to review and approve CEs.
- Finally, using the templates provided by FHWA and revising agreements on a regular basis to keep procedures and policy fresh and in line with legislative updates is recommended.

All State DOTs interviewed reported that the success of an agreement is based on the relationship between a State DOT and FHWA. State DOTs should consider FHWA Division staff as partners in the agreement process. They recommended collaboration with FHWA before, during and after an agreement is executed. Engagement in trust building and active communication with FHWA to create and maintain good relationships is considered an optimal course of action.

Ohio FHWA Division Office's Top Lessons Learned	
1	Maintain open lines of communication between all parties.
2	Evaluate what is going on in your state at the field level. Take a process and see if it can be accomplished in a shorter timeline or at less expense. Determine if streamlined reporting is possible.
3	Have agreements in place that can streamline the PCE. Look at the core agreement and prepare other agreements simultaneously (they should interlock). This could include Section 106, ecology, and any other agency specific agreements.

Some DOTs may consider the possibility of partnering with the Federal Transit Administration (FTA) or Federal Railroad Administration (FRA) if there is an opportunity to do so. However, the FTA process to approve environmental documents is quite different and may not be a good fit for inclusion in future iterations of PCE agreements.

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6.3 Use of Available Resources

A plethora of online information exists that a state can use in the preparation of their PCE, including the FHWA (Model) agreement and example agreements from other states.

- The Programmatic Agreements Library (PAL) is the Center for Environmental Excellence by AASHTO library of programmatic agreements which contains examples of executed PCEs. The database contains research tools for practitioners including a link to full agreements, a category search, and a key word search to assist in locating important sections in documents.
- Many State DOTs have made their programmatic agreements available on their websites. Links to the agreements used for this report are also located in the Example PAs section of this document.
- FHWA maintains an online Environmental Review Toolkit that contains examples of streamlining and stewardship practices, including programmatic agreements, used by states to efficiently and effectively fulfill their NEPA obligations.
- FHWA has compiled an inventory of over 500 programmatic agreements that can be accessed through FHWA Division Offices.

7.0 Helpful Resources for PCE Agreements

7.1 Websites and Other Resources

FHWA EDC-1: Programmatic Agreements

<https://www.fhwa.dot.gov/innovation/everydaycounts/edc-1/programmatic.cfm>

FHWA EDC-2: Programmatic Agreements

<https://www.fhwa.dot.gov/innovation/everydaycounts/edc-2/programmatic.cfm>

FHWA Accelerating Project Delivery: Programmatic Categorical Exclusion Agreements

https://www.environment.fhwa.dot.gov/nepa/programmatic_ce.aspx

FHWA Accelerating Project Delivery: Benefits and Costs of Programmatic Agreements

https://www.environment.fhwa.dot.gov/Env_initiatives/EDC/PA_case_study.aspx

FHWA Environmental Excellence Awards: Programmatic Agreement: First Amended Programmatic Agreement Regarding Compliance with Section 106 of the National Historic Preservation Act

https://www.fhwa.dot.gov/environment/environmental_excellence_awards/eea_2015/page12.cfm

FHWA Environmental Review Toolkit: Statewide Section 106 Programmatic Agreements: A Streamlining Initiative

https://www.environment.fhwa.dot.gov/env_topics/historic_pres/archeology.aspx

FHWA Environmental Toolkit/Accelerative Project Delivery: A Practitioner's Guide to FHWA Programmatic Agreements for Categorical Exclusion

https://www.environment.fhwa.dot.gov/nepa/documents/pce_guidance_2016.aspx

FHWA Environmental Toolkit: FAST Act Guidance: Programmatic Agreements for Categorical Exclusions

https://www.environment.fhwa.dot.gov/legislation/authorizations/fastact/memo_PAs_for_CEs_1315.aspx

FHWA Environmental Toolkit: FAST Act Guidance: Changes to 23 U.S.C. 326 & 327 Through Implementation of Sections 1307 and 1308 of the Fixing America's Surface Transportation (FAST) Act

https://www.environment.fhwa.dot.gov/legislation/authorizations/fastact/memo_changesto23USC_1307.aspx

FHWA Environmental Toolkit: FAST Act Guidance: (Model) Programmatic Agreement

https://www.environment.fhwa.dot.gov/legislation/authorizations/fastact/model_2016programmatic_CE_agreement_1315.aspx

AASHTO Agency Use of and Approach to FHWA Approved Programmatic Agreements

[http://onlinepubs.trb.org/onlinepubs/archive/NotesDocs/25-25\(13\)_FR.pdf](http://onlinepubs.trb.org/onlinepubs/archive/NotesDocs/25-25(13)_FR.pdf)

AASHTO Center for Environmental Excellence: Programmatic Agreements Library (PAL)

https://environment.transportation.org/pal_database/

Advisory Council on Historic Preservation's (ACHP) Guidance on Section 106 Agreement Documents

<https://www.achp.gov/protecting-historic-properties/section-106-process/introduction-section-106>

National Park Service: Nationwide Programmatic Agreement for Section 106 of the National Historic Preservation Act Toolkit

<https://www.nps.gov/history/howto/PAToolkit/index.htm>

U.S. Department of Transportation: The FAST Act: Accelerating Project Delivery

<https://www.transportation.gov/fastact/project-delivery-factsheet>

Administration of Categorical Exclusions by State Departments of Transportation under the National Environmental Policy Act

March 2019

7.2 Example Agreements

This PA report reflects insights of several State DOTs and FHWA Division Offices that volunteered to participate in an interview process. The example materials provided below reflect the PCE agreements, as well as CE and NEPA assignment agreements referenced by those states in their responses.

Arizona

<https://www.azdot.gov/docs/default-source/environmental-planning-library/ce-assignment-mou.pdf?sfvrsn=2>

Connecticut

http://www.ct.gov/dot/lib/dot/documents/denviro/programmatic_ce_agreement_final_with_checklist_and_instructions_sept_2015.pdf

Nebraska⁵

<http://dot.nebraska.gov/media/3956/final-2015-pce-agreement-ndor-fhwa-signed.pdf>

Ohio

<http://www.dot.State.oh.us/NEPA-Assignment/Documents/Ohio%20MOU%20Executed%2012-11-15.pdf>

Oregon

http://www.oregon.gov/ODOT/GeoEnvironmental/Docs_NEPA/ODOT_FHWA_PCE_Agreement.pdf

Texas

<http://ftp.dot.State.tx.us/pub/txdot-info/env/nepa-assignment/txdot-fhwa-nepa-assignment-mou.pdf>

Washington State

<http://www.wsdot.wa.gov/NR/rdonlyres/87F13C66-A1B7-4FCD-B843-332E26B349C8/0/Signed2015PCE3.pdf>

⁵As of September 5, 2018, Nebraska has now become a CE Assignment State under 23 U.S.C. 326.

Appendix A: FHWA Model Agreement

**Administration of Categorical Exclusions by State Departments of
Transportation under the National Environmental Policy Act**

March 2019

[MODEL AGREEMENT]
PROGRAMMATIC AGREEMENT
BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION, [STATE] DIVISION
AND
THE [STATE DEPARTMENT OF TRANSPORTATION]
REGARDING THE PROCESSING OF ACTIONS CLASSIFIED AS CATEGORICAL
EXCLUSIONS FOR FEDERAL-AID HIGHWAY PROJECTS

THIS PROGRAMMATIC AGREEMENT ("Agreement"), made and entered into this ____ day of _____, 20XX, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION ("FHWA") and the STATE of _____, acting by and through its DEPARTMENT OF TRANSPORTATION [fill in correct transportation or highway agency title] ("SDOT") hereby provides as follows:

WITNESSETH:

Whereas, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, and the Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500-1508) direct Federal agencies to consider the environmental impacts of their proposed major Federal actions through the preparation of an environmental assessment (EA) or environmental impact statement (EIS) unless a particular action is categorically excluded;

Whereas, the Federal Highway Administration's (FHWA) distribution and spending of Federal funds under the Federal-aid Highway Program and approval of actions pursuant to Title 23 of the U.S. Code are major Federal actions subject to NEPA;

Whereas, the Secretary of Transportation has delegated to FHWA the authority to carry out functions of the Secretary under NEPA as they relate to matters within FHWA's primary responsibilities (49 CFR 1.81(a)(5));

Whereas, the FHWA's NEPA implementing procedures (23 CFR part 771) list a number of categorical exclusions (CE) for certain actions that FHWA has determined do not individually or cumulatively have a significant effect on the human environment and therefore do not require the preparation of an EA or EIS (23 CFR 771.117(c)-(d));

Whereas, the [Insert name of the State Department of Transportation here] is a State agency that undertakes transportation projects using Federal funding received under the Federal-aid Highway Program and must assist FHWA in fulfilling its obligations under NEPA for the SDOT projects (23 CFR 771.109);

Whereas, Section 1318(d) of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405 (July 6, 2012), allows FHWA to enter into programmatic agreements with the States that establish efficient administrative procedures for carrying out environmental and other required project reviews, including agreements that allow a State to determine whether a project qualifies for a CE on behalf of FHWA;

Whereas, the FHWA developed regulations implementing the authorities in section 1318(d), effective November 6, 2014 (23 CFR 771.117(g));

[Optional clause] Whereas, the FHWA and *[Insert name of the State Department of Transportation here]* have designated additional CEs for the State and identified them in this programmatic agreement pursuant to section 1315 of the Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94, 129 Stat. 1312 (Dec. 4, 2015), 40 CFR 1508.4 and 23 CFR 771.117(g);

Now, therefore, the FHWA and *[Insert name of the State Department of Transportation here]* enter into this Programmatic Agreement (“Agreement”) for the processing of categorical exclusions.

I. PARTIES

The Parties to this Agreement are the Federal Highway Administration (“FHWA”) and the *[Insert name of the State Department of Transportation here]* (hereinafter “SDOT”).

II. PURPOSE

The purpose of this Agreement is to authorize SDOT to determine on behalf of FHWA whether a project qualifies for a CE action specifically listed in 23 CFR 771.117 (listed in Appendix A and B of this Agreement) or a CE designated for the State (listed in Appendix C of this Agreement). This Agreement also authorizes SDOT to certify to FHWA that an action that it cannot approve on behalf of FHWA according to the terms of this Agreement, but meeting the CE criteria in 40 CFR 1508.4 and 23 CFR 771.117(a), qualifies for a CE as long as there are no unusual circumstances present that would require the preparation of either an environmental assessment (EA) or an environmental impact statement (EIS).

III. AUTHORITIES

This agreement is entered into pursuant to the following authorities:

- A. National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*
- B. Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141, 126 Stat. 405, Sec. 1318(d) (July 6, 2012)
- C. Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94, 129 Stat. 1312, Sec. 1315 (Dec. 4, 2015)
- D. 40 CFR parts 1500 - 1508
- E. DOT Order 5610.1C
- F. 23 CFR 771.117

IV. RESPONSIBILITIES

A. The SDOT is responsible for:

1. Ensuring the following process is completed for each project that qualifies for a CE:
 - a. For actions qualifying for a CE listed in Appendix A (CEs established in 23 CFR 771.117(c), Appendix B (CEs established in 23 CFR 771.117(d)) and designated CE actions in Appendix C, that do not exceed the thresholds in Section IV(A)(1)(b) below, the SDOT may make a CE approval on behalf of FHWA. The SDOT will identify the applicable CE from Appendix A, B, or C, ensure any conditions or constraints are met, verify that unusual circumstances do not apply, address any and all other environmental requirements, and complete the review with a signature evidencing approval. No separate review or approval of the CE by FHWA is required.
 - b. The SDOT may not approve actions listed in Appendices A, B, and C that exceed the thresholds. The SDOT may certify to FHWA that the action qualifies for a CE. An action requires FHWA CE review and approval based on the SDOT certification if the action:
 - i. Involves acquisitions of more than a minor amount of right-of-way. A minor amount of right-of-way is defined as *[insert the agreed-to standard]*;
 - ii. Involves acquisitions that result in *[insert the agreed-to standard]* residential or non-residential displacements;
 - iii. Results in capacity expansion of a roadway by addition of through lanes;
 - iv. Involves the construction of temporary access, or the closure of existing road, bridge, or ramps, that would result in major traffic disruptions. Major traffic disruption is defined as *[insert the agreed-to standard]*;
 - v. Involve the following changes in access control: *[list changes of access control that trigger FHWA review]*;
 - vi. Results in a determination of adverse effect on historic properties pursuant to Section 106 the National Historic Preservation Act (54 U.S.C. § 306108);
 - vii. Requires the use of properties protected by Section 4(f) (49 U.S.C. § 303/23 U.S.C. § 138) that cannot be documented with an FHWA *de minimis* determination, or a programmatic Section 4(f) evaluation other than the programmatic evaluation for the use of historic bridges;
 - viii. Requires the acquisition of lands under the protection of Section 6(f) of the Land and Water Conservation Act of 1965 (54 U.S.C. § 200305), the Federal Aid in Sport Fish Restoration Act (16 U.S.C. 777-777k, 64 Stat. 430), the Federal Aid in Wildlife Restoration Act (16 U.S.C. 669-669i; 50 Stat. 917), or other unique areas

or special lands that were acquired in fee or easement with public-use money and have deed restrictions or covenants on the property;

- ix. Requires a U.S. Army Corps of Engineers Section 404 (33 U.S.C. § 1344) permit other than a Nationwide Permit or a General Permit;
 - x. Requires a U.S. Coast Guard bridge permit (33 U.S.C. § 401);
 - xi. Requires work encroaching on a regulatory floodway or work affecting the base floodplain (100-year flood) elevations of a water course or lake, pursuant to Executive Order 11988 and 23 CFR 650 subpart A;
 - xii. Requires construction in, across, or adjacent to a river designated as a component of, or proposed for inclusion in, the National System of Wild and Scenic Rivers published by the U.S. Department of the Interior/U.S. Department of Agriculture;
 - xiii. Is defined as a “Type I project” per 23 CFR 772.5 and any SDOT noise manual for purposes of a noise analysis;
 - xiv. May affect federally listed or candidate species, or proposed or designated critical habitat or projects with impacts subject to the conditions of the Bald and Golden Eagle Protection Act;
 - xv. Includes acquisition of land for hardship or protective purposes, or early acquisition pursuant to Federal acquisition project (23 U.S.C. § 108(d));
 - xvi. Does not conform to the State Implementation Plan which is approved or promulgated by the U.S. Environmental Protection Agency in air quality non-attainment areas;
 - xvii. Is not included in or is inconsistent with the statewide transportation improvement program, and in applicable urbanized areas, the transportation improvement program; or
 - xviii. Is not consistent with the State’s Coastal Zone Management Plan.
- c. The SDOT may not approve actions not specifically listed as CEs in Appendices A, B, and C. Instead, if the SDOT believes that an action meets the requirements of a CE under 40 CFR 1508.4 and 23 CFR 771.117(a), the SDOT may certify that an action will not result in significant environmental impacts if the SDOT concludes that the action qualifies for a CE, and the action does not involve unusual circumstances that warrant the preparation of an EA or EIS. The SDOT shall submit this certification to FHWA for approval prior to the time FHWA contemplates its next approval or grant action for the project.

- i. If requested by the Division Office, SDOT shall provide a copy of the CE documentation prepared for the actions(s) in accordance with Section V of this Agreement.
 - ii. If any project requires a Section 4(f) *de minimis* determination or programmatic evaluation, the SDOT shall submit the 4(f) documentation for FHWA determination and approval.
 - iii. The SDOT may request notice to proceed with final design, acquisition of right-of-way, or construction from FHWA once SDOT has completed its certification that a project is a CE.
 - iv. The Division Office's objection to a SDOT certification may not constitute a disapproval of the action, but signifies that FHWA will need to engage in project-specific review to verify that the certification is adequate, which may include consultation with other agencies.
2. Providing a list of certified actions, pursuant to this Agreement to the Division Office semi-annually [*or at intervals agreed upon by the SDOT and Division Office*] and allowing the Division Office [10] business days to either agree that some or all certifications are a basis for FHWA's approval of a CE for these actions, or to object to the certification(s). The list of actions certified will contain the following information:
 - a. The SDOT project number and a project name, including the route number or facility name where the project will occur;
 - b. Identification of the CE action listed in Appendices A, B, and C, or if the action is not listed in 23 CFR 771.117, identification of the action as "CE not categorized;"
 - c. Consultations or technical analyses that are pending (if applicable); and
 - d. Whether the project included a Section 4(f) *de minimis* or programmatic evaluation.
3. Consulting with FHWA for actions that involve unusual circumstances (23 CFR 771.117(b)), to determine the appropriate class of action for environmental analysis and documentation. The SDOT may decide or FHWA may require additional studies to be performed prior to making a CE approval, or the preparation of an EA or EIS.
4. Meeting applicable documentation requirements in Section V for State CE approvals on FHWA's behalf and State CE certifications to FHWA, applicable approval and re-evaluation requirements in Section VI, and applicable quality control/quality, monitoring, and performance requirements in Section VII.
5. Relying only upon employees directly employed by the State to make CE approvals or certifications submitted to FHWA under this agreement. The SDOT may not delegate its

responsibility for CE approvals or certifications to third parties (i.e., consultants, local government staff, and other State agency staff).

B. The FHWA is responsible for:

1. Providing timely advice and technical assistance on CEs to the SDOT, as requested.
2. Providing timely input on and review of certified actions. FHWA will base its approval of CE actions on the project documentation and certifications prepared by SDOT under this Agreement.
3. Overseeing the implementation of this Agreement in accordance with the provisions in Section VII, including applicable monitoring and performance provisions.

V. DOCUMENTATION OF SDOT CE APPROVALS AND CERTIFICATIONS

A. For State CE approvals and State CE certifications to FHWA for approval, the SDOT shall ensure that it fulfills the following responsibilities for documenting the project-specific determinations made:

1. For actions listed in Appendices A, B, and C, the SDOT shall identify the applicable action, ensure any conditions specified in FHWA regulation are met, verify that unusual circumstances do not apply, address all other environmental requirements, and complete the review with a SDOT signature evidencing approval.
2. In addition, for actions listed in 23 CFR 711.117(d) and Appendix C, the SDOT shall prepare documentation that supports the CE determination and that no unusual circumstances exist that would make the CE approval inappropriate.

B. The SDOT shall maintain a project record for CE approvals it makes on FHWA's behalf and each CE submitted to FHWA for approval. This record should include at a minimum:

1. Any checklists (see Appendix D), forms, or other documents and exhibits that summarize the consideration of project effects and unusual circumstances;
2. A summary of public involvement complying with the requirements of the FHWA-approved public involvement policy;
3. Any stakeholder communication, correspondence, consultation, or public meeting documentation;
4. The name and title of the document approver and the date of SDOT's approval or FHWA's final approval; and

5. For cases involving re-evaluations, any documented re-evaluation (when required) or a statement that a re-evaluation was completed for the project (when documentation is not necessary).
- C. The SDOT should provide any electronic or paper project records maintained by the SDOT to FHWA at its request. The SDOT should retain those records, including all letters and comments received from governmental agencies, the public, and others for a period of no less than three (3) years after completion of project construction. This 3-year retention provision does not relieve SDOT of its project or program recordkeeping responsibilities under 2 CFR 200.333 or any other applicable laws, regulations, or policies.

VI. NEPA APPROVALS AND RE-EVALUATIONS

- A. Only the offices or offices specifically identified below may make the SDOT's CE approvals and CE certifications submitted to FHWA for approval:
 1. Approval of Appendix A CEs is delegated to *[insert office or officers authorized to approve Appendix A CEs within the State]*.
 2. Approval of Appendix B CEs is delegated to *[insert office or officers authorized to approve Appendix B CEs within the State]*.
 3. Approval of Appendix C CEs is delegated to *[insert office or officers authorized to approve Appendix C CEs within the State]*.
 4. Certification of CEs is delegated to *[insert office or officers authorized to certify actions as CEs within the State]*.
- B. In accordance with 23 CFR 771.129, the SDOT shall re-evaluate its determinations and certifications for projects, consult with FHWA, and as necessary, prepare additional documentation to ensure that determinations are still valid.

VII. QUALITY CONTROL/QUALITY ASSURANCE, MONITORING & PERFORMANCE

A. SDOT Quality Control & Quality Assurance

The SDOT shall carry out regular quality control and quality assurance activities to ensure that its CE approvals and CE submissions to FHWA for approval are made in accordance with applicable law and this Agreement.

B. SDOT Performance Monitoring and Reporting

1. The FHWA and SDOT agree to cooperate in monitoring performance under this Agreement and work to assure quality performance.
2. The SDOT agrees to annually submit to FHWA (electronically or hard copy) a report summarizing its performance under this Agreement. The report will identify any areas

where improvement is needed and what measures SDOT is taking to implement those improvements. The report will include a description of actions taken by SDOT as part of its quality control efforts under Section VII(a).

C. FHWA Oversight and Monitoring

1. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of SDOT, as well as SDOT's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of SDOT's CE approvals, CE submissions to FHWA for approval, adequacy and capability of SDOT staff and consultants, and the effectiveness of SDOT's administration of its internal CE approvals.
2. FHWA will conduct one or more program reviews as part of its oversight activities, during the term of this Agreement. The SDOT shall prepare and implement a corrective action plan to address any findings or observations identified in the FHWA review. The SDOT should draft the corrective action plan within 45 days of FHWA finalizing its review. The results of that review and corrective actions taken by the SDOT shall be considered at the time this Agreement is considered for renewal.
3. Nothing in this Agreement prevents FHWA from undertaking other monitoring or oversight actions, including audits, with respect to SDOT's performance under this Agreement. The FHWA may require SDOT to perform such other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with applicable Federal laws and regulations.
4. The SDOT agrees to cooperate with FHWA in all oversight and quality assurance activities.

VIII. AMENDMENTS

If the parties agree to amend this Agreement, then FHWA and SDOT may execute an amendment with new signatures and dates of the signatures. The term of the Agreement shall remain unchanged unless otherwise expressly stated in the amended Agreement.

IX. TERM, RENEWAL, AND TERMINATION

- A. This Agreement shall have a term of five (5) years, effective on the date of the last signature. The SDOT shall post and maintain an executed copy of this Agreement on its website, available to the public.
- B. This Agreement is renewable for additional five (5) year terms if SDOT requests renewal, and FHWA determines that SDOT has satisfactorily carried out the provisions of this Agreement. In considering any renewal of this Agreement, FHWA will evaluate the effectiveness of the Agreement and its overall impact on the environmental review process.

C. Either party may terminate this Agreement at any time only by giving at least 30 days written notice to the other party.

D. **Expiration or termination of this Agreement shall mean that the SDOT is not able to** make CE approvals on FHWA's behalf.

Execution of this Agreement and implementation of its terms by both parties provides evidence that both parties have reviewed this Agreement and agree to the terms and conditions for its implementation. This Agreement is effective upon the date of the last signature below.

Name:
Division Administrator
Federal Highway Administration

Date
[State] Division

Name:
Title: [SDOT executive officer with signature authority]

Date
[SDOT]

Appendix B: State DOT PCE, CE Assignment, and NEPA Assignment Agreements

**Administration of Categorical Exclusions by State Departments of
Transportation under the National Environmental Policy Act**

March 2019

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

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

State Assumption of Responsibility for Categorical Exclusions

THIS MEMORANDUM OF UNDERSTANDING ("MOU") made and entered into 3rd day of January, 2018, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION ("FHWA") and the STATE of Arizona, acting by and through its DEPARTMENT OF TRANSPORTATION ("State"), 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 ("DOT Secretary"), to assign, and a State to assume, responsibility for determining whether certain designated activities are included within classes of action that are categorically excluded from requirements for environmental assessments or environmental impact statements pursuant to regulations promulgated by the Council on Environmental Quality under part 1500 of title 40, Code of Federal Regulations ("CFR") (as in effect on October 1, 2003); and

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

Whereas, on July 7, 2015 FHWA and the State executed the *Programmatic Agreement (PCE Agreement) Regarding the Determination and Approval of Categorical Exclusion Actions for Federal -Aid Highway Projects* and intend to terminate this agreement upon the execution of this MOU; and

Whereas, on October 24, 2017, the 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 USDOT Docket Management System FHWA-2017-0044; and

Whereas, on October 24, 2017, the State published the proposed a notice of availability of the Section 326 MOU on its website at <https://www.azdot.gov/business/environmental-planning> and provided a 30-day opportunity for comment; and

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FHWA, Arizona Division and the Arizona Department of Transportation

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

Whereas, the DOT 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 the State in accordance with this MOU; and

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

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

STIPULATIONS

I. CATEGORICAL EXCLUSION RESPONSIBILITIES ASSIGNED TO THE STATE BY FHWA

- A. For the projects covered by this MOU, FHWA hereby assigns, and the State hereby assumes, subject to the terms and conditions set forth in 23 U.S.C. § 326 and this MOU, the responsibility for determining whether a proposed Federal-aid action is within a category of action that has been designated as a CE by the DOT Secretary, as specified in Stipulation I(B), and meets the definition of a CE as provided in 40 CFR 1508.4 (as in effect on October 1, 2003) and 23 CFR 771.117. This assignment applies only to projects for which the Arizona Department of Transportation is the direct recipient of Federal-aid highway program funding or is the project sponsor or cosponsor for a project requiring approval by the FHWA-Arizona Division Office. This assignment does not apply to responsibilities carried out by other modal administrations of the US Department of Transportation (USDOT) or the Office of the Secretary.
- 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);
 - b. The example activities listed in 23 CFR 771.117(d); and
 - 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 the State all responsibility for processing the CEs designated in Stipulation I(B) of this MOU, including any necessary CE approval actions. The State shall process all proposed projects that are CE candidates (CE projects), and any required reevaluations of CEs under 23 CFR 771.129 for CE projects not completed prior to the date of this MOU, in

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FHWA, Arizona Division and the Arizona Department of Transportation

accordance with the provisions of this MOU. With respect to matters covered by and subject to the terms of this MOU, this MOU supersedes any existing programmatic agreement that is solely between the State and FHWA concerning CEs in Stipulation I(B).

- D. The State, 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 the State shall bind FHWA to future action of any kind. No determination or agreement made by the State with respect to mitigation or other activities shall constitute a precedent for future determinations, agreements, or actions in the Federal-aid highway program unless FHWA consents, in writing, to such commitment.
- E. Prior to approving any CE determination the State shall ensure and document that for any proposed project the design concept, scope, and funding are consistent with the current State Transportation Improvement Program (STIP), Transportation Improvement Program (TIP), and Regional Transportation Plan (RTP) as applicable.

II. OTHER FHWA RESPONSIBILITIES ASSIGNED TO THE STATE AND RESPONSIBILITIES RESERVED BY FHWA

- A. For projects covered by this MOU, FHWA hereby assigns, and the State hereby assumes, the following FHWA responsibilities for environmental review, consultation, or other related actions required under Federal laws and Executive Orders applicable to CE projects: See Appendix A for a description of the environmental responsibilities assigned to the State by the FHWA for proposed projects subject to this MOU. This assignment includes the transfer to the State 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. The 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 the State 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 the State 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

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FHWA, Arizona Division and the Arizona Department of Transportation

consultation for an assigned project with any Indian tribe who directly contacts FHWA (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 the State is not adequate, then Stipulation III(C) applies. This MOU is not intended to abrogate, or prevent future entry into, any written agreement among the State, FHWA, and an Indian tribe under which the tribe agrees to permit the State 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. Review and approval of individual section 4(f) evaluations until such time ADOT staff complete Section 4(f) and legal sufficiency training. When such training has been completed, FHWA shall notify ADOT that the responsibility for review and approval of individual Section 4(f) evaluations is assigned. This modification shall not be deemed an amendment under Stipulation VIII.
- C. The State and FHWA will develop and document procedures for carrying out FHWA responsibilities retained by FHWA under Stipulation II(B), including how any FHWA decisions will be communicated to the State for inclusion in the State's decision-making under Stipulations I and II(A). The procedures will ensure that:
1. The State provides to FHWA any information necessary in order for FHWA to carry out its consultation, evaluation, or decision-making for Stipulation II(B) activities;
 2. The FHWA provides the State with a documented decision and any related information used for Stipulation II(B) decisions and needed by the State in order for the State to evaluate the project and make its decision whether the project qualifies as a CE; and
 3. As part of any request for FHWA authorization for funding or other action, the State 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 771.109(d).
- D. The State 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

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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 the State 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 the State, then, within six months after the effective date of this MOU, FHWA and the State will work to obtain any necessary consents or amendments (see Appendix B). Such actions include:

1. Consulting with the other parties to obtain written consent to the continuation of the interagency agreement in its existing form, but with the substitution through assignment of the State for FHWA with respect to interagency agreement provisions applicable to CE projects;
 2. Negotiating with the other parties to amend the interagency agreement as needed so that the interagency agreement continues but that the State assumes FHWA's responsibilities with respect to CE projects.
 3. If a third party does not agree to the assignment or amendment of the interagency agreement, then to the extent permitted by applicable law and regulation, the State must carry out the assigned environmental review, consultation, or other related activity in accordance with applicable laws and regulations but without the benefit of the provisions of the interagency agreement.
- E. The State shall carry out the assigned consultation, review and coordination activities in a timely and proactive manner. The State shall make all reasonable and good faith efforts to identify and resolve conflicts with Federal agencies, State and local agencies, Indian tribes as defined in 36 CFR 800.16(m), and the public during the consultation and review process.

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

- A. Notwithstanding any other provision of this MOU, any activity that does not satisfy the criteria for the CE categories described in Stipulation I(B) is **excluded** from this assignment. Exclusion also may occur at any time during the environmental process if the State determines that the project fails to meet the CE criteria. The provisions of Stipulation IV(C) apply to such cases. These determinations are subject to FHWA review.
- B. Because the State assumes responsibility for environmental processing of the CEs designated in this MOU, FHWA no longer will be responsible for

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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 the State's environmental processing of any project if FHWA has any reason to believe that the State's performance with respect to the project does not satisfy the terms and conditions of this MOU. The scope of the evaluation will be commensurate with the potential problem. If FHWA subsequently determines that the State'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 the State's compliance with the MOU, or action to exclude the project from assignment under this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.

- C. If a project-related concern or issue is raised in 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 the State, then FHWA may reassume responsibility for processing the project or an individual responsibility assumed by the State. The FHWA shall notify the State that the project will be excluded from this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.

IV. STATE PERFORMANCE REQUIREMENTS

- A. Compliance with governing laws, regulations and MOU. The State shall make all determinations under this MOU in accordance with 23 CFR 771.117(a) and (b) and succeeding regulations. All actions by the State in carrying out its responsibilities under this MOU shall comply with, and be consistent with, the coordination provisions of Stipulation II and all applicable Federal laws, regulations, Executive Orders, policies, and formal guidance. The State also shall comply with State and local laws to the extent applicable.
1. Failure to meet the requirements of Stipulation IV(A) is grounds for a decision by FHWA to terminate this MOU pursuant to Stipulation IX(A) if FHWA determines, after good-faith consultation with the State, that there is an irreconcilable material conflict between a provision of State law, regulation, policy, or guidance and applicable Federal law, regulation, policy, or guidance, and FHWA reasonably determines that such conflict is preventing the State from meeting its Stipulation IV(A) obligations. The grounds for such decision may include, but are not limited to, the mere existence of the conflict (i.e., on its face) and/or the effect of the conflict on the State's decision(s) on proposed CE project(s) (i.e., as applied).
 2. Official DOT and FHWA formal guidance and policies relating to environmental review matters are posted online at FHWA's website or sent to the State electronically or in hard copy.
 3. After the effective date of this MOU, the FHWA will use its best efforts to

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ensure that any new or revised FHWA policies and guidance that are final and applicable to the State's performance under this MOU are communicated to the State within ten (10) calendar days of issuance. Delivery may be accomplished by e-mail, mail, by publication in the *Federal Register*, or by means of a publicly available online posting including at the sites noted above. If communicated to the State by e-mail or mail, such material may be sent either to the party specified in this MOU to receive notices, or to the Arizona Department of Transportation Environmental Planning Administrator.

4. In the event that a new or revised FHWA policy or guidance is not made available to the State as described in the preceding paragraph, and if the State had no actual knowledge of such policy or guidance, then a failure by the State to comply with such Federal policy or guidance will not be a basis for termination under this MOU.
5. The State will work with all other appropriate Federal agencies concerning the laws, guidance, and policies relating to any Federal laws that such other agencies administer.
6. In order to minimize the likelihood of a conflict as described in Stipulation IV(A)(1) above, after the effective date of this MOU the State will use its best efforts to ensure that any proposed new or revised State laws, regulations, policies, or guidance that are applicable to the State's performance under this MOU are communicated to FHWA for 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.

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

1. Institute and maintain the 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 I and II;
4. For CE's 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 the States'

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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 the State official approving the determination;
6. Include the following determination statement when documenting the CE findings:

“The State 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. The State 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 January 3, 2018, executed between FHWA and the State.”

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 and CE activities not assigned: determination and documentation. For projects that are candidates for CE classification but that the State determines should be excluded from processing under this assignment, the State shall:

1. Document the exclusion findings in the project file, including the reason for the finding;
2. Notify FHWA; and
3. Work with the FHWA, now as the responsible party under NEPA, and proceed with review and documentation of the project under the appropriate NEPA procedures.

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

1. Using appropriate technical and managerial expertise to perform the functions required under this MOU and applicable laws, regulations,

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policy, and guidance;

- a. Devoting adequate financial and staff resources to carry out the responsibilities assumed by the State; and
 - b. Demonstrating, in a consistent manner, the capacity to perform the State's responsibilities under the MOU and applicable Federal law.
2. The State agrees that it shall maintain on its staff or through consultant services all of the environmental and other technical expertise needed to carry out its responsibilities under this MOU and 23 U.S.C. § 326. Without limiting the foregoing, when carrying out the requirements of Section 106 of the National Historic Preservation Act, as amended, the State shall comply with 36 CFR 800.2(a)(1). All actions that involve the identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meet the Secretary of the Interior's Professional Qualifications Standards (published at 48 FR 44738-44739). The State shall ensure that all documentation required under 36 CFR 800.11 is reviewed and approved by a staff member or consultant who meets the Professional Qualifications Standards.

E. State quality control.

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

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

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adequacy and capability of the resources applied by the State, and the quality and consistency of the State's administration of its responsibilities under this MOU. In support of the monitoring efforts:

1. The State shall submit to FHWA a list of the CE determinations and Section 4(f) determinations that the State approved during the previous 6 months (January 1 through June 30, and July 1 through December 31), within 15 business days after the end of each semi-annual reporting period. Reduction in reporting frequency, and any revocation of such reduction by FHWA, shall not be deemed an amendment under Stipulation VIII.
2. State shall submit to the FHWA (via electronic copy) a self-assessment report summarizing its performance under this MOU at least 30 days prior to a scheduled monitoring review by FHWA. The report will identify any areas where improvement is needed and what measures the State is taking to implement those improvements. The report will include actions taken by the State as part of its quality control efforts under stipulation IV(E). Following submission of the report to the FHWA (electronic or in hard copy). The State shall schedule a follow-up meeting with FHWA at which the parties will discuss the report, the State's performance of this MOU, and the FHWA's monitoring activities.
3. The State 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 the FHWA at any time during normal business hours. The State shall provide the FHWA with electronic copies of any documents the FHWA may request within five business days. The State 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 the State of its project or program recordkeeping responsibilities under 2 CFR 200.300 or any other applicable laws, regulations, or policies.
4. The State shall ensure that project records are available to the public consistent with requirements applicable to Federal agencies under 5 U.S.C. § 552 (the Freedom of Information Act (FOIA), as amended in 2002) and NEPA.
5. The FHWA periodically shall review the State's records and may interview State staff to evaluate the State's performance under this MOU. FHWA shall conduct one review within 6 months of the execution of this agreement, and may be coordinated with the review of the State's report under Stipulation IV(F)(2). The FHWA anticipates that under normal circumstances, its evaluation of the State's performance will be based on a modified version of a typical FHWA CE process review (to view FHWA guidance on how

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monitoring should occur visit

<http://www.fhwa.dot.gov/hep/6004stateassumpt.htm>). Modifications to the CE process review will include incorporation of measures specific to the responsibilities assigned to the State pursuant to 23 U.S.C. §326, and will include performance measurements of compliance and timeliness. However, the FHWA reserves the right to determine in its sole discretion the frequency, scope, and procedures used for monitoring activities. The State, by its execution of this MOU acknowledges that it is familiar with the FHWA CE Process Review procedures and with the expected modifications that will be adopted for the purpose of monitoring the State's MOU performance.

6. Nothing in this Stipulation shall prevent FHWA from undertaking other monitoring actions, including audits, with respect to the State's performance of the MOU. The FHWA, in its sole discretion, may require the State to perform such other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with this MOU, 23 U.S.C. § 326, and other applicable Federal laws and regulations. Such requirement shall not be deemed an amendment under Stipulation VIII.
 7. The State agrees to cooperate with FHWA in all quality assurance activities.
- G. State liability. The State agrees that it is solely responsible and solely liable for complying with and carrying out this MOU, for the performance of all assigned responsibilities as provided by applicable law and for any decisions, actions, or approvals by the State, per 23 U.S.C. § 326(b)(2). The FHWA shall have no responsibility or liability for the performance of responsibilities assigned to the State, including without limitation any decision or approval made by the State. Where the State exercises any assigned authority on a proposed project which FHWA determined to be a CE prior to the execution of this MOU, the State assumes sole environmental review responsibility and liability for any subsequent substantive environmental review action it takes on that project.
- H. 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, the State agrees to coordinate with FHWA and any USDOJ or Federal agency attorneys in the defense of that action.
 2. The State shall defend all claims brought against the State in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, the State shall provide qualified and competent legal counsel, including outside counsel if necessary. The State shall provide the defense at

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its own expense, subject to 23 U.S.C. 326(f) concerning Federal-aid participation in attorney's fees for outside counsel hired by the State. The State shall be responsible for opposing party's attorney's fees and court costs if a court awards those costs to an opposing party, or in the event those costs are part of a settlement agreement.

3. The State will notify the FHWA's Arizona Division Office and USDOJ's Assistant Attorney General for the Environment and Natural Resources Division, within seven (7) calendar days of the State's Legal Division's receipt of service of process of any complaint, concerning discharge of any responsibility assumed under this MOU. The State's notification to the FHWA and USDOJ shall be made prior to its response to the complaint. In addition, the State shall notify FHWA's Arizona 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. The State will provide FHWA's Arizona 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. The State 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 the State, within seven (7) calendar days of the date of filing.
5. The State will notify the FHWA's Arizona Division Office and USDOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and USDOJ with a reasonable amount of time of at least ten (10) calendar days, to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. The State will not execute any settlement agreement until: (1) FHWA and USDOJ have provided comments on the proposed settlement; (2) FHWA and USDOJ have indicated that they will not provide comments on the proposed settlement; or (3) the review period has expired, whichever occurs first.
6. Within seven (7) calendar days of receipt by the State, the State will provide notice to FHWA's Arizona Division Office and USDOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities the State has assumed under this MOU. The State shall notify FHWA's Arizona Division Office and USDOJ within five (5) days of filing a notice of appeal of a court decision. The State shall confer with FHWA and USDOJ regarding the appeal at least forty-five (45) calendar days before filing an appeal brief in the case.
7. The State hereby consents to intervention by FHWA in any action or proceeding arising out of, or relating to, the State's discharge of any responsibility assigned to the State under this MOU.

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8. The State's notification to FHWA and USDOJ in subparts IV(H)(3)-(6) shall be made by electronic mail to FHWA_assignment_lit@dot.gov and NRSDOT.enrd@doj.gov, unless otherwise specified by FHWA and USDOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in subpart IV(H)(4), the State 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 FHWA.Arizona@dot.gov unless otherwise specified by the State. 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, NW, Room 2143, Washington, DC 20530.

For FHWA: Division Administrator, FHWA Arizona Division, 4000 N. Central Avenue, Suite 1500, Phoenix, Arizona 85012-3500

For ADOT: Environmental Planning Administrator, Arizona Department of Transportation, 1611 W. Jackson St., MD EM02, Phoenix, AZ 85007

- I. Federal Register. While the MOU is in effect, if any CE project or program documents are required to be published in the *Federal Register*, such as a notice of final agency action under 23 U.S.C. § 139(l), the State shall transmit such document to the FHWA's Division Office and the FHWA will publish such document in the *Federal Register* on behalf of the State. The State is responsible for the expenses associated with the publishing of such documents in the *Federal Register*, in accordance with guidance issued by the FHWA.
- J. Participation in Resource Agency Reports. The State agrees to provide data and information requested by the FHWA Office of Project Development and Environmental Review and resource agencies, with a cc to the FHWA Arizona 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. Such reports include but are not limited to:
1. Archeology Report requested by the National Park Service;
 2. Endangered Species Act Expenditure Reports requested by the United States Fish and Wildlife Service and the National Marine Fisheries Service;
 3. NEPA Litigation Reports requested by the Council on Environmental Quality; and

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4. Environmental Conflict Resolution reports requested by the Council on Environmental Quality.

V. STATE CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

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

As provided by Arizona Revised Statutes (A.R.S.) § 28-334, Arizona waives its immunity under the Eleventh Amendment of the U.S. Constitution. If this waiver is withdrawn, then the State'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), the State agrees that it shall be deemed to be a Federal agency for the purposes of the Federal law(s) under which the State exercises any responsibilities pursuant to this MOU and 23 U.S.C. § 326.
- D. The State may not assign or delegate its rights or responsibilities under this MOU to any other agency, political subdivision, or entity, or to any private individual or entity. Without limiting the foregoing, the State understands and agrees that it must retain the environmental decision-making responsibilities assigned to it under this MOU and may not assign or delegate such decision-

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making responsibilities to consultants or others.

- E. With respect to the public availability of any document or record under the terms of this MOU or the State's open records law, A.R.S. § 39-101 et seq., the State certifies that the laws of the State provide that any decision regarding the release or public availability of a document or record may be legally challenged or reviewed in the courts of the State.
- F. The State certifies that the persons signing this MOU and providing certifications are duly authorized to do so and have the legal authority to:
 - 1. Enter into this MOU on behalf of the State;
 - 2. Make the certifications set forth in this MOU; and
 - 3. Bind the State to the terms and conditions contained in this MOU.
- G. The State further certifies that, in enacting the Arizona Revised Statutes, Chapter 2, Article 2, Section 28-334, the State has waived the State's Eleventh Amendment rights and consented to Federal court jurisdiction with regard to the compliance, discharge and enforcement of any responsibility of the USDOT Secretary that the State assumes under this MOU and 23 U.S.C 326.
- H. The State's Attorney General, by issuing an opinion letter that is addressed to the FHWA Administrator and attached to this MOU, has made the requisite certifications as the State's Chief Legal Officer. A copy of the opinion letter is attached to this MOU as Appendix C.

VI. PUBLIC NOTICE AND COMMENT

- A. The execution of this MOU, and of any amendment or renewal, requires prior public notice and an opportunity for comment.
- B. The State shall publish notice of the availability of this MOU, and any proposed amendment or renewal, for public review and comment and information regarding access to the USDOT Docket Management System on its website.
- C. The FHWA Arizona 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. The FHWA will establish a docket in the USDOT Docket Management System

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to receive comments.

- D. The State and the FHWA shall consider comments provided by the respondents to the public notices before finalizing the MOU, or any proposed amendment or renewal agreement. Upon completion of the decision-making process, the FHWA shall publish a notice in the *Federal Register* that announces the agency's decision and the execution of the MOU. The notice also will inform the public of the availability in the USDOT Docket Management System of a brief summary of the results of the decision-making process and a copy of any final MOU executed by the State and the FHWA, whether initial, amended, or renewed. The notice also will advise where the final MOU is available on the State's website.
- E. The State agrees that at all times that this MOU is in effect, the State will post on its website (<https://www.azdot.gov/business/environmental-planning>) a notice of the availability to the public, upon request, of copies of the State's biannual reports of CE determinations prepared pursuant to Stipulation IV(F)(1), the State's performance reports prepared pursuant to Stipulation IV(F)(2), and the FHWA performance monitoring reports prepared pursuant to Stipulation IV(F)(5). The FHWA will arrange for the posting of a similar notice on the FHWA's website or create a link from the FHWA's site to the State's site.

VII. INITIAL TERM AND RENEWAL

- A. This MOU shall have a term of three (3) years, beginning on the date of the last signature.
- B. This MOU is renewable for additional terms of three (3) years each if the State requests renewal and the FHWA determines that the State has satisfactorily carried out the provisions of this MOU. In considering any renewal of this MOU, the FHWA will evaluate the effectiveness of the MOU and its overall impact on the environmental review process. The FHWA may decide not to renew the MOU if the FHWA determines that the operation of the MOU has substantial adverse effects on the environmental review process. Such evaluation may include consideration of any effects from the assumption by the State of only some, but less than all, of the FHWA's environmental review, consultation, or other related responsibilities as listed in Stipulation II.
- C. At least six (6) months prior to the end of the initial term and of any renewed term of this MOU, the State and the FHWA shall meet to discuss the results of the monitoring and consider any amendments to this MOU. This meeting may be combined with a meeting to discuss performance under the monitoring provisions in Stipulation IV(F)(2) and (F)(5) of this MOU.
- 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.

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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 is 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 the FHWA and the State may execute an amendment with new signatures and dates of the signatures. The term of the MOU shall remain unchanged unless otherwise expressly stated in the amended MOU. Any amendment that extends the term of the MOU shall be treated as a renewal and the FHWA must make the determinations required for a renewal under Stipulation VII.

IX. TERMINATION

A. Termination by the FHWA

- 1. As provided at 23 U.S.C. 326(d)(1), FHWA may terminate the State'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 the State is not adequately carrying out the responsibilities assigned to the State under this MOU;
 - b. FHWA provides to the State a written notification of its determination;
 - c. FHWA provides the State 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 the State, 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, the State 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;

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- c. Failure to secure or maintain adequate personnel and financial resources to carry out the responsibilities assumed;
 - d. Substantial noncompliance with this MOU; or
 - e. Persistent failure to adequately consult, coordinate, and/or take the concerns of other Federal agencies, as well as SHPOs/THPOs, into account in carrying out the responsibilities assumed.
3. If FHWA terminates one or more of the State's responsibilities under this MOU in accordance with 23 U.S.C. 326, FHWA shall provide written notice of that termination to the State, and such notice that 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 the State of this MOU will transfer to FHWA.

B. Termination by the State

- 1. The State 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 the State seeks to terminate its participation in this Program, and subject to such terms and conditions as FHWA may provide.
- 2. The Arizona Legislature and Governor may, at any time, terminate the State's authority granted to participate in this Program. In the event, FHWA and the State will develop a plan to transition the responsibilities that the State 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 the State.
- 3. Any such withdrawal of assignment which FHWA and the State have agreed to under a transition plan will not be subject to the procedures or limitations provided for in subpart IX of this MOU and will be valid as agreed to in the transition plan.

C. Validity of the State Actions

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

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

1. The party wishing to initiate the termination or exclusion shall provide to the other party a written notice of intent. The notice should identify the proposed action and explain the reason(s) for the proposed action.
2. Following the notice, the parties shall have a thirty (30) calendar-day period during which the FHWA and the State shall consult on amendments or other actions that would avoid termination or exclusion. By agreement, the parties may extend this consultation period, provided that such extension may not exceed the term of the MOU.
3. Following the consultation period, any termination or exclusion by FHWA shall be effective as of a date thirty (30) calendar days after the date of either a post-consultation agreement between the State and FHWA or the date of the State's receipt of a FHWA notice of final determination of termination or exclusion. In the event of termination initiated by the State, the termination shall be effective ninety (90) calendar days after the date of FHWA's receipt of the State's termination notice. All responsibilities covered by the termination or exclusion shall revert to the FHWA as of that effective date.
4. In the event of termination or exclusion, the State and the FHWA agree to cooperate to make the transfer of responsibilities back to the FHWA effective in as orderly and administratively efficient manner as possible. The State will promptly provide FHWA any documents, records and other project-related material needed for FHWA to proceed with processing any affected project. Appropriate NEPA procedures, including those under any applicable programmatic CE agreement, shall apply to the subsequent processing of projects.

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

1. The State is not performing in accordance with this assignment; and
2. Extreme conditions exist that justify immediate exclusion or termination and transfer back to the FHWA of the responsibilities covered by the exclusion or termination.

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FHWA, Arizona Division and the Arizona Department of Transportation

3. In such cases, the FHWA shall notify the State in writing of its determination and action, and specify the reason for the action.
- C. The State's liability for its acts and omissions under this MOU, and the provisions of Stipulation V, shall survive the MOU. This survival clause includes, without limitation, the provisions of Stipulations IV (G)-IV(H) relating to liability and litigation.
- D. Exclusion actions, and any decision not to renew, do not require public notice and comment.
- E. Termination or other action by the FHWA in accordance with the provisions of this MOU does not limit or otherwise affect the FHWA's ability to seek any other remedy or to take action under other provisions of applicable law, including without limitation any appropriate remedies as provided in 23 CFR 1.36.

XI. STATE EXECUTION OF ASSIGNED RESPONSIBILITIES WITHOUT FHWA INVOLVEMENT

- A. The FHWA will not provide any project-level assistance to the State in carrying out any of the responsibilities assigned under this MOU. "Project-level assistance" includes advice, consultation, or document review with respect to the discharge of such responsibility for a particular highway project. However, "project-level assistance" does not include discussions concerning issues addressed in prior projects, legal interpretations of any applicable law contained in titles 23 or 49 of the United States Code, legal interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance. If a need for project-level assistance is identified as a result of the government-to-government consultation process described in Stipulation II(B)(1), then the FHWA shall reassume responsibility for the project as provided in Stipulation III(C).
- B. The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving the State's consultation or coordination with another Federal, State, or local agency with respect to the State's discharge of any of the responsibilities the State has assumed under this MOU for any particular highway project. However, the FHWA holds both monitoring and quality assurance obligations under this MOU and general oversight and stewardship obligations under the Federal-aid Highway Program. In furtherance of those obligations, the FHWA may elect to attend meetings between the State and other Federal agencies. Prior to attending such meetings, the FHWA will make a reasonable and diligent effort to give the State notice.

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

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

XII. NOTICES

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

State of Arizona:

ADOT Director
Arizona Department of Transportation
206 S. 17th Ave
Mail Drop 100A
Phoenix, AZ 85007

Federal Highway Administration:

Division Administrator
4000 North Central Avenue,
Suite 1500
Phoenix, AZ 85012

U.S. Department of Justice:

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

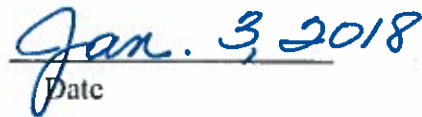
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Execution of this MOU and implementation of its terms by the State formally evidence that the parties have reviewed this MOU and determined that it complies with the laws, regulations and policies applicable to the FHWA and the State. Accordingly,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


FEDERAL HIGHWAY ADMINISTRATION



Karla S. Petty, Division Administrator
Arizona Division Office


Date

STATE OF ARIZONA


Dallas Hammit, State Engineer and Deputy
Director for Transportation,
Arizona Department of Transportation


Date

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Appendix A

List of FHWA Responsibilities Assigned

Air Quality

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

Noise

Noise Control Act of 1972, 42 U.S.C. §§ 4901–4918

Compliance with the noise regulations in 23 CFR part 772 (except approval of the State noise policy in accordance with 23 CFR 772.7)

Wildlife

Section 7 of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544, and 1536

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

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

Historic and Cultural Resources

Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306108

Archeological Resources Protection Act of 1979, 16 U.S.C. 470aa, et seq.

Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. § 138 and 49 U.S.C. § 303; 23 CFR part 77 Title 54, Chapter 3125—Preservation of Historical and Archeological Data, 54 U.S.C. §§ 312501–312508

Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013; 18 U.S.C. § 1170

Social and Economic Impacts

American Indian Religious Freedom Act, 42 U.S.C. § 1996¹

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

Water Resources and Wetlands

Clean Water Act, 33 U.S.C. §§ 1251–1377.

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

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. §§ 3921, 3931

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

FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777

Parklands

Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. § 138 and 49 U.S.C. 303; and 23 CFR part 774

Land and Water Conservation Fund (LWCF), Pub. L. 88-578, 78 Stat. 897 (known as

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Section 6(f))

Hazardous Materials

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

Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 9671 – 9675

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

Land

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

Executive Orders Relating to Highway Projects

E.O. 11990, Protection of Wetlands

E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 C.F.R. sections 650.113 and 650.115)

E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations

E.O. 11593, Protection and Enhancement of Cultural Resources¹

E.O. 13007, Indian Sacred Sites¹

E.O. 13112, Invasive Species

FHWA-Specific

Planning and Environmental Linkages, 23 U.S.C. § 168, except for those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135

Programmatic Mitigation Plans, 23 U.S.C. § 169 except for those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135

Note:

¹Under these laws and Executive Orders, FHWA will retain responsibility for conducting formal government-to-government consultations with federally recognized Indian tribes. The State will continue to handle routine consultations with the tribes and understands that a tribe has the right to direct consultation with FHWA upon request. The State may also assist FHWA with formal consultations, with the consent of a tribe, but FHWA remains responsible that this consultation occurs.

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Appendix B

**List of ADOT Programmatic Agreements/Memoranda of Understanding
Statewide Agreements**

Programmatic Agreement between the Arizona Department of Transportation, Federal Highway Administration, the Arizona State Historic Preservation Officer, the Bureau of Indian Affairs, the Bureau of Land Management, the Bureau of Reclamation, the United States Army Corps of Engineers, the United States Forest Service, the Arizona State Land Department, Arizona State Parks, the Arizona State Museum, the Gila River Indian Community, the Hualapai Tribe and the Advisory Council on Historic Preservation.

Signatories: ADOT, FHWA, SHPO, BIA, BLM, BOR, Corps, USFS, ASLD, ASP, ASM, GRIC, Hualapai, ACHP

Effective Date: December 15, 2015

Memorandum of Agreement between the Arizona Department of Transportation, Federal Highway Administration, Arizona Division, and the United States Army Corps of Engineers Los Angeles District Concerning Funding for the Department if the Army Corps Permit Process on Priority Federal-Aid Highway Projects

Signatories: ADOT, FHWA, CORPS

Effective Date: March 18, 2013

Memorandum of Agreement between the Arizona Department of Transportation, the Federal Highway Administration, Arizona Division, and the United States Fish and Wildlife Service

Signatories: ADOT, FHWA, USFWS

Effective Date: June 16, 2015

Memorandum of Understanding between the Arizona Department of Transportation, the Federal Highway Administration, Arizona Division, and the Bureau of Land Management, Arizona

Signatories: ADOT, FHWA, BLM

Effective Date: September 2, 2008

Memorandum of Understanding Among the Arizona Department of Transportation, the Federal Highway Administration, Arizona Division, and the USDA Forest Service, Southwestern Region Regarding the Construction, Operation and Maintenance of Highways in Arizona Crossing National Forest System Lands

Signatories: ADOT, USFS, FHWA

Effective Date: September 2, 2008

List of related Agreements/Memoranda of Understanding

U.S. Environmental Protection Agency Region IX, U.S. Department of Transportation, Federal Highway Administration Arizona Division, Memorandum of Understanding, Sole Source Aquifer Review pursuant to Section 1424 (e) Of the Safe Drinking Water Act

Signatories: FHWA, EPA

Effective Date: November 27, 2002

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Appendix C

**Arizona Attorney General Letter of Opinion
Dated November 7, 2017**



MARA BRNOVICH
Attorney General

Office of the Attorney General
State of Arizona

November 7, 2017

Brandye Hendrickson
Acting Administrator
Federal Highway Administration
1200 New Jersey Ave., SE
Washington, DC 20590

Subject: Certification from State Attorney General required by FHWA for assignment of NEPA and other responsibilities to ADOT (23 U.S.C. §§ 326 & 327)

Dear Ms. Hendrickson:

Pursuant to the authority provided by the Moving Ahead for Progress in the 21st Century Act or "MAP-21," and specifically 23 U.S.C. § 327 as amended by MAP-21, the Arizona Department of Transportation ("ADOT") has advised this Office that it is submitting an application to the Federal Highway Administration ("FHWA") for assignment of responsibilities for compliance with the National Environmental Policy Act ("NEPA") and other federal environmental laws for federal-aid highway projects ("NEPA Assignment"). On September 16, 2014, FHWA published rules setting forth the requirements for such applications.¹ FHWA's rules specify that a state's application for NEPA Assignment must include certain certifications by the State's Attorney General or other state official legally empowered by state law to issue legal opinions that bind the state.²

ADOT and FHWA plan to enter into a Memorandum of Understanding ("MOU") regarding the assignment of the federal environmental review responsibilities after a public review of the application. ADOT and FHWA also plan to enter into a separate MOU for the assignment of authority to make categorical exclusion determinations under 23 U.S.C. § 326 ("CE Assignment"). The purpose of this letter is to provide the certifications required by FHWA to accompany ADOT's application for NEPA Assignment as well as to enter into MOU's for both NEPA Assignment and CE Assignment.

The Attorney General serves as the chief legal officer of the state.³ In my official capacity as Attorney General of the State of Arizona, I hereby certify the following:

- As stated in A.R.S. § 28-334(C)(1), ADOT is legally authorized by state law to assume the responsibilities of the United States Department of Transportation with respect to duties

¹ 79 Fed. Reg. 55,381 (Sept. 16, 2014).

² 23 C.F.R. § 773.109(a)(6)-(7)

³ A.R.S. § 41-192

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under NEPA and any other federal environmental law pertaining to review or approval of a highway project in this state.

- The Legislature enacted A.R.S. § 28-334(C)(2), providing, "[s]overeign immunity from civil suit in federal court is waived consistent with 23 United States Code §§ 326 and 327 and limited to the compliance, discharge or enforcement of a responsibility assumed by... [ADOT]... under this paragraph." The State's waiver is made consistent with 23 U.S.C. § 327, which states: "[t]he United States district courts shall have exclusive jurisdiction over any civil action against a State for failure to carry out any responsibility of the State under this section."
- The Arizona Public Records Law (A.R.S. § 39-101 *et seq*) is comparable to 5 U.S.C. § 552 (the Freedom of Information Act), including providing that any decision regarding the public availability of a document under state law is reviewable by a court of competent jurisdiction.

Sincerely,

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

Mark Brnovich
Attorney General

#6581697

CE Programmatic Agreement Revisions

August 2015

The Programmatic Agreement for CEs has been Revised

The Federal Highway Administration (FHWA) recently revised 23 CFR Part 771, its regulations pertaining to Categorical Exclusions (CEs). Due to this, the FHWA Connecticut Division worked with Connecticut Department of Transportation to update the Programmatic Agreement for the Processing of Categorical Exclusions. The purpose of this update was to add the new CE actions; further streamline the programmatic agreement; and clarify sections of the CE agreement, checklist, and instructions

so it is easier to understand and use. The new Programmatic Agreement is in effect as of August 27, 2015.

This is a fact sheet summarizing the major changes of the Programmatic Agreement. A detailed training course will be provided in the future by CTDOT and FHWA.

The FHWA Connecticut Division would like to thank those from CTDOT who participated in reviewing and editing this Programmatic Agreement.

New Categorical Exclusions

The FHWA adopted new Categorical Exclusions in 23 CFR 771.117(c):

- (22) Projects entirely within the operational right-of-way (ROW). Projects, as defined in 23 U.S.C. §101, that would take place entirely within the existing operational right-of-way. Existing operational right-of-way refers to right-of-way that has been **disturbed for an existing transportation facility or is maintained for a transportation purpose**. This area include the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, etc.) and other areas maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities. Portions of the right-of-way that have not been disturbed or that are not maintained for transportation purposes are not in the existing operational right-of-way.
- (23) A Federally-funded project: (i) That receives less than \$5,000,000 of Federal funds; or, (ii) With a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated cost.
- (24) Localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.
- (25) Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. §§1341; 1342)) carried out to address water pollution or environmental degradation.
- (29) Purchase, construction, replacement, or rehabilitation of ferry vessels (including improvements to ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities which themselves are within a CE.
- (30) Rehabilitation or reconstruction of existing ferry facilities that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in the existing facility's capacity. Example actions include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.

CE Actions that have moved from the Programmatic to the Automatic CE List

In addition to the new CE actions, three CEs that were listed under 23 CFR §771.117(d)(1) to (3) are now listed under 23 CFR §771.117(c)(26) to (28). These are the following:

- (26) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes), if the action meets the constraints in paragraph (e) of this section.
- (27) Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints in paragraph (e) of this section.
- (28) Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings, if the actions meet the constraints in paragraph (e) of this section.

Note : The constraints discussed are incorporated into the evaluation of whether a project meets the constraints of being an automatic or programmatic CE.

What Changes Were Made to the CE Checklist?

Below is a summary of what has changed with respect to the resource categories on the CE Checklist. Individual CEs no longer have to be prepared if there is a no adverse effect to Section 106 resources. In addition, if the project qualifies for a 4(f) de minimis use or 4(f) exception, FHWA will concur on this finding, and an Automatic or Programmatic CE can be prepared for the project. The requirements regarding an Individual CE have also changed for Floodways and Floodplains, as well as Air Quality conformity. For further information, contact CTDOT's Office of Environmental Planning.

Resource	Old Checklist	New Checklist
ROW Use and ROW Relocations	Two separate questions.	Combined into one question.
Historic Properties (Section 106 Resources)	Automatic and Programmatic CE if "No Historic Properties Affected". Individual CE if "Historic Properties Affected" (Adverse Effect or <i>No Adverse Effect</i>).	Automatic or Programmatic CE if: "No historic properties affected" or "No adverse effect". Individual CE if "Adverse Effect".
Tribal Consultation	Was part of Historic Properties Question	Now is a separate question.
Section 4(f) Resources	Automatic and Programmatic CEs could only be prepared if no 4(f) resources used. If there was a "use" or an exception to a "use", then an Individual CE would need to be prepared.	Automatic and Programmatic CEs can be prepared if 4(f) exception or 4(f) de minimis use is concurred upon by FHWA. Put concurrence in project file. Individual CEs needed for Programmatic 4(f) or Full 4(f) evaluations.
Floodways and Floodplains	Individual CE needed if a CLOMR or LOMR needed.	Individual CE needed if there is a "significant encroachment" on a 100-year floodplain or floodway.
Air Quality	If a project level conformity analysis (air quality assessment) is completed, then an Individual CE is required.	If a project level conformity analysis (air quality assessment) is completed and the project is found to be in conformity, then an Automatic or Programmatic CE can be prepared. An Individual CE would be needed if the project is determined to be in non-conformity based on the analysis.

Changes to the Approval Page of the CE Checklist

In addition to the changes to the checklist, we have made changes to the approval page of the CE Checklist for clarity.

There is space for the names of the project engineer, project manager, principal engineer, and division manager to be added to the signature block. Please utilize these, as it is sometimes hard to read signatures, especially once they have been photocopied.

If the project is an Automatic or Programmatic CE, the Division Manager will sign the fourth line.

If the project is an Individual CE, the Division Manager will sign the fifth line, and it will be sent to FHWA for approval.

CE Determination Checklist
State Project Number (Construction): _____

This project qualifies for the following type of Categorical Exclusion:

Automatic CE _____
Programmatic CE _____
Individual CE _____

CTDOT has determined that this project does not individually or cumulatively have a significant impact on the environment as defined by NEPA, or involve unusual circumstances as defined in 23 CFR §771.117(b), and is excluded from the requirements to prepare an EA or EIS. CTDOT further certifies that all other environmental requirements, such as Air Quality, Historic Preservation (Section 106), Section 4(f), etc., to the extent such requirements apply to this project, also have been satisfied. CTDOT will keep within its project records the documentation to justify support for this Automatic or Programmatic Categorical Exclusion.

Prepared by: _____
Project Engineer Date

Reviewed by: _____
Project Manager Date

CE Approval Recommended by: _____
Principal Engineer Date

Automatic or Programmatic CE Approved by: _____
Manager Date
OR
Division of Bridges / Division of Highway Design / Division of Traffic Engineering / Division of Facilities and Transit

Individual CE Recommended for FHWA Approval by: _____
Manager Date
Division of Bridges / Division of Highway Design / Division of Traffic Engineering / Division of Facilities and Transit

cc: Thomas Maziarz – Mark Alexander



U.S. Department
of Transportation
**Federal Highway
Administration**

CE Programmatic Agreement Revisions

CE Checklist Detailed Instructions

The CE Checklist Detailed Instructions have also been revised throughout to clear up areas that have led to confusion in the past. Plus, new information has been added where the evaluation of resources has changed since 2012. Below are some of the highlights:

- ◆ A new sub-heading has been added describing what the Purpose and Need is versus the Project Description.
- ◆ The section discussing Re-evaluations has been updated to provide clarity as to when a re-evaluation is needed for a project.
- ◆ Language has been added to the Right-of-way Acquisition/Use and Relocations section that needs to be included in the cover letter for all right-of-way acquisitions, easements, and relocations.
- ◆ The 100-year Floodplains and Floodways section has been updated, with the definition of “significant encroachment”, which is now what triggers and Individual CE.
- ◆ The Sole Source Aquifer section has been updated; please allow the FHWA CT Division to coordinate with the USEPA on this resource.
- ◆ MSATs information has been updated in the Air Quality Section.
- ◆ Information has been updated in the U.S. Coast Guard Bridge Permit section.

What's Next?

FHWA and CTDOT will be working on developing a short training course for everyone who fills out the CE checklists to attend, including consultants. At this course, we will discuss the CE checklist and detailed instructions. We will also discuss the resources being evaluated in the CE, and what new changes have recently occurred to the resource evaluation based on changes to laws, regulations, policies, etc. This course will be recorded so that new employees can review this information when they start at CTDOT.

In the meantime, if you have any questions, please contact the Office of Environmental Planning to assist you.

CTDOT Office of Environmental Planning:

Stephen Delpapa: 860-594-2941
Thomas Doyle: 860-594-2944
Kevin Fleming: 860-594-2924



PROGRAMMATIC AGREEMENT

BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION AND THE CONNECTICUT DEPARTMENT OF TRANSPORTATION FOR PROCESSING OF CATEGORICAL EXCLUSIONS

September 2015

Section 1: Parties

The parties to this Agreement are the Federal Highway Administration (FHWA), Connecticut Division, and Connecticut Department of Transportation (CTDOT).

Section 2: Purpose of Agreement

The purpose of this Agreement is to authorize CTDOT to determine on behalf of FHWA whether a project qualifies for a CE specifically listed in 23 CFR §771.117 (refer to **Section 8** of this Agreement). This Agreement also authorizes CTDOT to certify to FHWA that an action not specifically listed in 23 CFR 771.117, but meeting the Categorical Exclusion (CE) criteria in 40 CFR §1508.4 and 23 CFR §771.117(a), qualifies for a CE as long as there are no unusual circumstances present that would require the preparation of either an environmental assessment (EA) or an environmental impact statement (EIS).

Section 3: Authorities

This Agreement is entered into pursuant to the following authorities:

- A. National Environmental Policy Act, 42 U.S.C. §§4321 - 4370
- B. Moving Ahead for Progress in the 21st Century Act, P.L. 112-141, 126 Stat. 405, Sec. 1318(d)
- C. 40 CFR Parts §§1500 - 1508
- D. DOT Order 5610.1C
- E. 23 CFR §771.117

Section 4: Background

This Programmatic Agreement revises FHWA and CTDOT procedures for processing CEs. These procedures comply with FHWA regulations entitled, "Environmental Impact and Related Procedures," 23 CFR Part 771. This agreement also reflects the terms within the FHWA Joint Stewardship and Oversight Agreement signed by FHWA and CTDOT.

Section 5: Applicability

This Programmatic Agreement applies to all projects that involve FHWA funding or approvals. This Programmatic Agreement does not apply to any other documentation required under the Connecticut

Environmental Policy Act (**CEPA**), as amended, nor does this Agreement apply to 100% state funded projects that do not require FHWA approval.

Section 6: Responsibilities

FHWA will rely upon the results of CTDOT's processing of actions that meet the criteria in this Programmatic Agreement to fulfill its review and approval obligations set forth in the Council on Environmental Quality (**CEQ**) regulations (40 CFR Parts 1500-1508) and FHWA's regulations (23 CFR §771.117). CTDOT will document that the project satisfies the conditions identified in this Programmatic Agreement; will not result in significant social, economic, and environmental impacts; and, is therefore categorically excluded from the requirement to prepare an EA or EIS. For those projects that meet the activities listed in 23 CFR §771.117(c) or (d) that have unusual circumstances (as defined in **Section 7, Part C**) or do not satisfy the conditions listed in **Section 8, Part A** of this Agreement, an Individual CE will be prepared and submitted to FHWA for review and approval. In addition, actions not listed in 23 CFR §771.117(c) or (d) but meet the criteria for a CE under 23 CFR §771.117 will require an Individual CE to be prepared and submitted to FHWA for review and approval.

At the time CTDOT submits a Fiscal Management Information System (**FMIS**) authorization to move from preliminary design to final design, right-of-way acquisition, or construction, CTDOT shall document whether the proposed project is an Automatic, Programmatic, or Individual CE and the date it was approved. **The CE must be approved prior to Design Approval** for a project, per the CTDOT memorandum entitled *Implementation of FHWA Policy on Permissible Project Related Activities during the NEPA Process*, dated May 22, 2012.

FHWA will perform Tribal Consultation as part of their Government-to-Government responsibilities. CTDOT will provide FHWA with a copy of the required Section 106 consultation documents to facilitate this process.

Section 7: Definitions

- A. **Categorical Exclusions** are actions that, in accordance with CEQ regulations (40 CFR §1508.4) and FHWA regulations found in 23 CFR §771.117(a), individually or cumulatively do not involve "significant" environmental impacts. Categorical exclusions:
- Do not induce significant impacts to planned growth or land use for the area;
 - Do not require the relocation of significant numbers of people;
 - Do not have a significant impact on any natural, cultural, recreational, historic, or other resource;
 - Do not have significant air, noise, or water quality impacts;
 - Do not have a significant impact on travel patterns; or,
 - Do not otherwise, individually or cumulatively, have any significant environmental impacts.
- B. **Significant** as used in NEPA requires consideration of both context and intensity, and is defined in 40 CFR §1508.27.
- **Context** – The significance of an action varies with the setting.
 - **Intensity** – This refers to the severity of the impact.

The Office of Environmental Planning (OEP) staff and FHWA will be able to assist with the determination of whether an impact is significant.

C. **Unusual circumstances** are discussed in 23 CFR §771.117(b), which states that any action which would normally be classified as a CE, but could involve unusual circumstances, will require CTDOT, in cooperation with FHWA, to conduct appropriate environmental studies to determine if the CE classification is proper. If the CE classification is not proper, FHWA will identify the proper level of NEPA evaluation and documentation, which could be an EA or EIS. Unusual circumstances include the following:

- Significant environmental impacts to the natural and human environment;
- Substantial controversy on environmental grounds;
- Significant impact on properties protected by Section 4(f) of the USDOT Act of 1966, or Section 106 of the National Historic Preservation Act; or,
- Inconsistencies with any Federal or State law requirement or administrative determination relating to the environmental aspects of the action.

Section 8: Categorical Exclusion Types

There are three types of categorical exclusions: Automatic (CE-A), Programmatic (CE-P), and Individual (CE-I). Automatic and Programmatic CEs may be processed by CTDOT, who may then make a CE approval on FHWA's behalf. FHWA will conduct a quarterly audit to ensure projects processed as CE-As and CE-Ps are compliant with NEPA, all other federal laws, and the conditions of this agreement. Projects processed as CE-As and CE-Ps must meet all the conditions listed in Section A below.

A. **Conditions for Automatic and Programmatic Categorical Exclusions**

A proposed project may be processed as an Automatic or Programmatic CE, if **all** of the following conditions listed below are met.¹ If one or more conditions are not met, the proposed project must be evaluated and individually approved by FHWA as an Individual CE (CE-I).

1. **Public Involvement** – no substantial public opposition to the proposed project for any reason, including those based on environmental grounds or due to the proposed use of any temporary road, detour or ramp closure.
2. **Rights-of-Way** – the project does not require any residential or non-residential displacements, OR does not require acquisition or use of more than 10 percent of any parcel for permanent easement or fee taking.
3. **Hazardous Materials/Waste Sites** – no known Superfund sites are located within or adjacent to the project.
4. **Historic Properties (Section 106 Consultation)** – consultation with the OEP and/or State Historic Preservation Office (SHPO) has resulted in a finding of “**No Historic Properties Affected**” or “**No Adverse Effect**” for all properties listed, or eligible for listing, in the

¹ From *FHWA Memorandum – Categorical Exclusion (CE) Documentation and Approval*, March 30, 1989 and supplemented.

National Register of Historic Places (**NRHP**) within the Area of Potential Effect (**APE**) of the proposed project.

5. **Tribal Consultation** – Tribal consultation must be completed for the project by the FHWA with documentation (in the form of a response from the Tribes or an email from FHWA stating that the 30-day Tribal consultation period is concluded), and no significant religious or cultural properties of concern are identified by the Tribes.
6. **Section 4(f) Resources** - does not require the use of any property or properties protected by Section 4(f) of the U.S. Department of Transportation Act of 1966 (49 U.S.C. §303). Note: if the FHWA concurs with a 4(f) exception or *de minimis* impact finding, then the project can be processed as a CE-A or CE-P.
7. **Section 6(f) Resources** – does not require the use of any property or properties protected by Section 6(f) of the Land and Water Conservation Fund Act.
8. **U.S. Army Corps of Engineers (USACE) Section 404 Permit** – the project does not require an individual USACE Section 404 Permit.
9. **100-year Floodplains or Floodways** – no “significant encroachment” (as defined in 23 CFR §650.105)¹ on a floodplain.
10. **Sole Source Aquifers** – no construction in a sole source aquifer (Note: the installation or replacement of signs, pavement markings, and rumble strips, as well as pothole filling, crack sealing, and joint repair does not require an Individual CE as long as there is very minimal ground disturbance.)
11. **Wild and Scenic Rivers** – no construction in, across or adjacent to a river designated as a component or proposed for inclusion in the National System of Wild and Scenic Rivers.
12. **Noise** – the project is not a Type I or Type II project per the federal noise regulations (23 CFR Part 772), and a noise analysis is not required.
13. **Air Quality and Project Level Conformity** – The proposed project is in a currently approved Statewide Transportation Improvement Program (**STIP**) and conforming Transportation Improvement Program (**TIP**); AND there are no violations of the National Ambient Air Quality Standards (**NAAQS**) at any new or revised signalized intersections; AND the project is either exempt from conformity, or the air quality assessment determined the project is in conformity.
14. **Federally Protected Species** – Based on information from the Connecticut Department of Energy and Environmental Protection (**CTDEEP**) Natural Diversity Database and the US Fish and Wildlife Service (**USFWS**), the project will have “no effect” or is “not likely to adversely effect” federally protected species or critical habitat.

¹ See Detailed Instructions for definition of significant encroachment.

15. **Title VI and Environmental Justice** – does not result in a disproportionately high and adverse human health or environmental effects to minority or low-income populations.

16. **U.S. Coast Guard Bridge Permit** – does not require a U.S. Coast Guard Bridge Permit, this includes projects that can be exempted from U.S. Coast Guard permitting by FHWA under the Surface Transportation and Uniform Relocation Assistance Act of 1987 (**STURAA**).

B. Automatic Categorical Exclusions (CE-A): Are actions listed in 23 CFR §771.117(c) which meet the criteria for CEs and normally do not require any further NEPA approvals by FHWA. CTDOT may approve these actions on behalf of FHWA so long as they retain for FHWA's inspection documentation that evaluates (1) project impacts, (2) indicate that unusual circumstances are not present as described in 23 CFR §771.117(b), and (3) demonstrate that the conditions listed above in Section 8, Part A, are met. CTDOT Prime Design Unit will maintain a record which documents the determination that the project activity was contained in 23 CFR §771.117(c), meets the Conditions for CE-As in Section 8 of this Agreement and by law, and that unusual circumstances were not present. This record will be made available to FHWA upon request. Under this Agreement these actions are only those CE-As now or hereafter designated by FHWA in 23 CFR §771.117(c), including the following:

1. Activities which do not involve or lead directly to construction, such as planning and research activities; grants for training; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system.
2. Approval of utility installations, unless requiring exceptions under the CTDOT Utility Accommodation Plan, along or across a transportation facility.
3. Construction of bicycle and pedestrian lanes, paths and facilities.
4. Activities included in the CTDOT's "Highway Safety Plan" funded by Highway Related Safety Grants (402 Safety Program, 23 U.S.C. §402).
5. Transfer of Federal lands pursuant to 23 U.S.C. §107(d) and/or 23 U.S.C. §317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA.
6. The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.
7. Landscaping.
8. Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.

9. The following actions for transportation facilities damaged by an incident resulting in an emergency declaration by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. §5121):
 - (i) Emergency repairs under 23 U.S.C §125.
 - (ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:
 - (A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and,
 - (B) Is commenced within a 2-year period beginning on the date of the declaration.
10. Acquisition of scenic easements.
11. FHWA determination of payback under 23 U.S.C. §156 for property previously acquired with Federal-aid participation.
12. Improvements to existing rest areas and truck weigh stations.
13. Ridesharing activities.
14. Bus and rail car rehabilitation.
15. Alterations to facilities or vehicles in order to make them accessible to elderly and handicapped persons.
16. Program administration, technical assistance activities, and operating assistance to transit authorities, to continue existing service or increase service to meet routine changes in demand.
17. The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a CE.
18. Track and railbed maintenance and improvements when carried out within the existing right-of-way.
19. Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.
20. Promulgation of rules, regulations, and directives. [This does not apply to CTDOT.]
21. Deployment of electronics, photonics, communications, or information processing used

singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience. Examples include, but are not limited to, traffic control and detector devices, lane management systems, electronic payment equipment, automatic vehicle locators, automated passenger counters, computer-aided dispatching systems, radio communications systems, dynamic message signs, and security equipment including surveillance and detection cameras on roadways and in transit facilities and on buses.

22. Projects, as defined in 23 U.S.C. §101, that would take place entirely within the existing operational right-of-way. Existing operational right-of-way refers to right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose. This area include the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, etc.) and other areas maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities. Portions of the right-of-way that have not been disturbed or that are not maintained for transportation purposes are not in the existing operational right-of-way.
23. A Federally-funded project: (i) That receives less than \$5,000,000 of Federal funds; or, (ii) With a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated cost.
24. Localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.
25. Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. §§1341; 1342)) carried out to address water pollution or environmental degradation.
26. Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes), if the action meets the constraints in 23 CFR §771.117(e). (Note, the constraints listed in 23 CFR §771.117(e) are incorporated in **Section 8, Part A**, Conditions for CE-A and CE-P.)
27. Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints in 23 CFR §771.117(e). (Note, the constraints listed in 23 CFR §771.117(e) are incorporated in **Section 8, Part A**, Conditions for CE-A and CE-P.)

28. Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings, if the actions meet the constraints in 23 CFR §771.117(e). (Note, the constraints listed in 23 CFR §771.117(e) are incorporated in **Section 8, Part A**, Conditions for CE-A and CE-P.)
29. Purchase, construction, replacement, or rehabilitation of ferry vessels (including improvements to ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities which themselves are within a CE.
30. Rehabilitation or reconstruction of existing ferry facilities that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in the existing facility's capacity. Example actions include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.

C. Programmatic Categorical Exclusions (CE-P): Are actions listed in 23 CFR §771.117(d) which meet the criteria for CEs and normally do not require any further NEPA approvals by FHWA. CTDOT may approve such actions on behalf of FHWA so long as they retain documentation for FHWA's inspection that (1) evaluates project impacts, (2) indicate that unusual circumstances are not present as described in 23 CFR §771.117(b), and (3) demonstrate that the conditions listed above in **Section 8, Part A**, are met. The CTDOT Prime Design Unit will maintain a project record which documents the determination that the project activity was contained in 23 CFR §771.117(d), meets the conditions in Section 4 of this Agreement and by law, and that unusual circumstances were not present as described in 23 CFR §771.117(b). This record will be made available to FHWA upon request during the quarterly CE audit. Under this Programmatic Agreement these actions are only those CE-Ps now or hereafter designated by FHWA in 23 CFR §771.117(d), including the following:

(1 to 3 are reserved per the regulations.)

4. Transportation corridor fringe parking facilities.
5. Construction of new truck weigh stations or rest areas.
6. Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.
7. Approvals for changes in access control.
8. Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.
9. Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities

where only minor amounts of additional land are required and there is not a substantial increase in the number of users.

10. Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.
11. Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.
12. Acquisition of land for hardship or protective purposes. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.
 - (i) Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.
 - (ii) Protective acquisition is done to prevent imminent development of a parcel which may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

D. Individual Categorical Exclusions (CE-I): are actions listed in 23 CFR §771.117(c) and (d) which would normally be classified as CEs, but involve unusual circumstances or do not meet the Conditions for Automatic or Programmatic CEs listed in **Section 8, Part A**. Also, this includes actions not listed in 23 CFR §771.117(c) or (d) that meet the criteria for a CE under 23 CFR §771.117. CTDOT is responsible for gathering additional information and/or performing studies and providing project documentation to FHWA for review. FHWA will determine if the CE classification is appropriate and make CE determination in accordance with 23 CFR §771.117.

If a CE-I determination is requested of FHWA, FHWA shall consider the information contained in any records provided by CTDOT. Those requests shall be addressed with the following FHWA action:

1. If adequate, approval will be granted and notification shall be sent to CTDOT in a timely manner.
2. If inadequate or incomplete, FHWA shall request any additional information required.
3. If ineligible, the CE will be denied and the recommendation to CTDOT will be made regarding further NEPA evaluations.

Section 9: Re-evaluations of Categorical Exclusions

CTDOT shall prepare a re-evaluation whenever a re-evaluation is required based on the circumstances described in (a) and (b) below.

- (a) A re-evaluation must occur when there is a change in the scope or location of the project, and new impacts may occur that were not previously considered in the CE.
- (b) A re-evaluation must occur if major steps to advance the action (e.g. authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) have not occurred within three (3) years after the CE was approved by FHWA or by CTDOT.

The purpose of the re-evaluation is to ensure that all CE determinations remain valid pursuant to 23 CFR §771.129 and NEPA. CTDOT shall document the outcome of any re-evaluation and include it in the project file in the Prime Design Unit and this documentation will be made available to FHWA upon request. Re-evaluations for CE-As and CE-Ps will be processed and certified by CTDOT for FHWA and must be included in the project files. FHWA will be responsible for reviewing and concurring on re-evaluations of CE-Is. If during a re-evaluation, the conditions listed in Section 8 are not met for CE-As or CE-Ps due to the change in scope of work or unforeseen conditions, CTDOT will send the re-evaluation to FHWA for review and a decision on how to proceed.

Section 10: CTDOT Procedures and Performance Requirements for Processing Actions that are Categorical Exclusions

A. CTDOT Procedures

1. CTDOT will develop preliminary design of a proposed project to a degree necessary to conduct an interdisciplinary review and complete the attached CE Determination Checklist. In no instances will CTDOT develop a project's final design prior to the completion of NEPA.
2. CTDOT will summarize the public involvement conducted to date. If a public hearing was held, CTDOT will send a copy of the hearing transcript, in accordance with 23 CFR §771.111(h), to FHWA. For a CE-I, CTDOT will provide a summary of the public involvement meeting to FHWA.
3. CTDOT will document Automatic and Programmatic CE approvals on FHWA's behalf with the CE Determination Checklist. The Checklist will be prepared by the Project Engineer, reviewed by the Project Manager, reviewed by the Principal Engineer, and approved by the Division Manager. Supporting documentation that indicates that all the required conditions are satisfied will be contained in the project file in the Prime Design Unit and this documentation will be made available to FHWA upon request.
4. CTDOT will develop documentation for all projects that qualify as CEs (Automatic, Programmatic, and Individual). CTDOT OEP will maintain a list of the CE approvals on FHWA's behalf (for CE-A and CE-P projects) and certifications (for CE-I projects) made and provide that list to FHWA quarterly.

5. Actions that do not satisfy the conditions for an Automatic or Programmatic CE may still qualify as an Individual CE, if FHWA agrees. In this case, the CTDOT will send a CE-I request to FHWA for review. The request must include a copy of the CE Determination Checklist with supporting documentation that evidences that the project will not have significant impacts. See the attached Detailed Instructions and Individual CE Submission Requirements regarding format and content of Individual CEs.
6. FHWA reserves the right to review CE documentation on specific projects at its discretion.
7. CTDOT will conduct re-evaluations for projects. A re-evaluation must occur if the scope of work has changed or unforeseen conditions have occurred, or if major steps to advance the action (e.g. authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) have not occurred within three (3) years after the CE was approved by FHWA or by CTDOT. CTDOT will complete a re-evaluation to determine if the CE is still valid. Re-evaluations will be included in the project file the Prime Design Unit and this documentation will be made available to FHWA upon request.
8. CTDOT may request technical assistance from FHWA at any time. Such requests do not override the provisions contained in this Agreement.
9. CTDOT shall provide a letter and documentation similar to the SHPO letter for FHWA to provide to the THPO for Tribal Consultation under Section 106.

B. CTDOT Performance Requirements

1. CTDOT must maintain adequate organizational and staff capability and expertise, or procure through consultant services some or all of the technical expertise needed, to effectively carry out the provisions of this Agreement. This includes, without limitation:
 - (a) Using appropriate technical and managerial expertise to perform the functions set forth under this Agreement; and,
 - (b) Devoting adequate financial and staff resources to carry out the certification and processing of projects under this Agreement.
2. CTDOT shall carry out regular quality control activities to ensure that its CE approvals are made in accordance with applicable law and this Agreement.
3. CTDOT shall monitor its processes relating to project approvals, environmental analysis, and project file documentation, and check for errors and omissions. CTDOT shall take corrective action as needed. CTDOT shall document its quality control activities and any corrective actions taken.
4. CTDOT, in cooperation with the FHWA, will conduct a training session for all CTDOT staff that prepare, review, or approve CEs once this Programmatic Agreement is implemented and it will be recorded. Any new staff will be required to watch the recorded version of this

training prior to conducting CEs for CTDOT to ensure this Agreement and NEPA is followed.

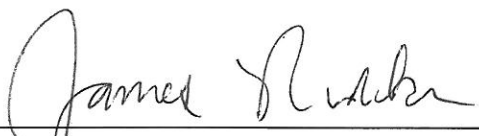
5. FHWA and CTDOT shall cooperate in monitoring performance under this Agreement and each party shall modify its practices as needed to assure quality performance by CTDOT and FHWA.
6. CTDOT shall schedule a follow-up meeting with FHWA at which the parties will discuss and report CTDOT's performance of this Agreement, and FHWA's monitoring activities after the end of each federal fiscal year.

Section 11: Agreement Revisions and Dissolution

This Agreement and/or its attachments may be amended to expand, delete, or modify contents, by mutual consent of the Division Administrator of FHWA and the Commissioner of CTDOT or their designees at any time, without affecting the term of the agreement. This Agreement may be reviewed after five (5) years, based on adequate performance measured through FHWA audits to ensure it meets the needs of the CTDOT and FHWA. CTDOT shall post and maintain the current version of this Agreement on its web site, available to the public. Termination of this Agreement by either party may occur at any time with a 30-day written notice. Termination of this Agreement shall mean that CTDOT is not able to make CE approvals on FHWA's behalf. Periodic reviews of the implementation of this Agreement will be conducted as deemed necessary by FHWA to verify that CTDOT has satisfactorily carried out the provisions of this Agreement.

Section 12: Approval of Agreement

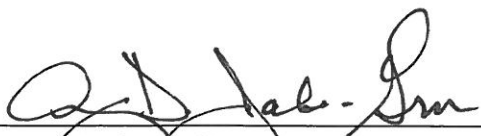
Accordingly, this Programmatic Agreement which shall become effective on the last date indicated below.



James P. Redeker
Commissioner
Connecticut Department of Transportation



Date



Amy D. Jackson-Grove
Division Administrator
Federal Highway Administration



Date

CATEGORICAL EXCLUSION DETERMINATION CHECKLIST

(See Detailed Instructions for information on how to fill out this checklist.)

State Project # (Design): _____	State Project # (Construction): _____
Federal-aid Project # (Design): _____	Route/Road: _____
Project Manager: _____	Project Engineer: _____
P.M. Telephone Number: _____	P.E. Telephone Number: _____
P.M. Email: _____	P.E. Email: _____

Project Name and Town Location: _____

Purpose and Description of Project (**an attachment is acceptable**):

Part 1: CE or CE Re-evaluation?¹

	YES(✓)	NO (✓)
Has there been a change in project scope, unforeseen conditions, change in law/regulation since OEP recommended on CTDOT's Environmental Review Form that the project be classified as a CE?	<input type="checkbox"/>	<input type="checkbox"/>
Has it been three years since the CE was approved and no major steps to advance the project have occurred?	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> ➤ If YES to either question, STOP filling out this CE Checklist and submit a request to OEP for an update of the Environmental Review Form. See Detailed Instructions regarding re-evaluations. ➤ If NO to both questions, proceed to Part 2: Conditions for AUTOMATIC and PROGRAMMATIC Categorical Exclusions on page 2. 		

¹ See **Detailed Instructions** for further explanations of the questions and documentation requirements.

Part 2: Conditions for Automatic and Programmatic Categorical Exclusions: For a project to be an Automatic or Programmatic CE, **none** of these conditions can be present.

	YES(✓)	NO (✓)
1. <u>Public Involvement</u> – Did the public involvement process generate substantial opposition to the project for any reason, including those based on environmental grounds or due to the proposed use of any temporary road, detour or ramp closure?	<input type="checkbox"/>	<input type="checkbox"/>
2. <u>ROW Relocations or Acquisition/Use</u> – Does the project involve the use of more than 10% of any parcel for permanent easement or fee taking, or require any residential or non-residential relocations?	<input type="checkbox"/>	<input type="checkbox"/>
3. <u>Hazardous Waste</u> – Has the Office of Environmental Compliance determined that there are known Superfund sites nearby that may affect the project?	<input type="checkbox"/>	<input type="checkbox"/>
4. <u>Historic Properties (Section 106)</u> – Has an “Adverse Effect” finding been made, in consultation with the State Historic Preservation Officer (SHPO), for any properties listed, or eligible for listing, in the National Register of Historic Places, within the Area of Potential Effect (APE) of the proposed project?	<input type="checkbox"/>	<input type="checkbox"/>
5. <u>Tribal Consultation</u> – Have the Tribes determined that the project would impact potentially significant religious and cultural resources?	<input type="checkbox"/>	<input type="checkbox"/>
6. <u>Section 4(f)</u> – Does the project require the use of properties protected by Section 4(f) of the USDOT Act of 1966? <i>(Note: a project such as those listed in 23 CFR §774.13 with an approved 4(f) exception concurred upon by the FHWA CT Division can be processed as a CE-A or CE-P. In addition, a project with an approved 4(f) de minimis finding signed by the FHWA CT Division can also be processed as a CE-A or CE-P.)</i>	<input type="checkbox"/>	<input type="checkbox"/>
7. <u>Section 6(f)</u> – Does the project require use of properties protected by Section 6(f) of the Land and Water Conservation Fund Act?	<input type="checkbox"/>	<input type="checkbox"/>
8. <u>USACE Individual Permit</u> – Will the USACE require an Individual Permit for the work as proposed?	<input type="checkbox"/>	<input type="checkbox"/>
9. <u>100-year Floodplain or Floodways</u> – Does the project have a “significant encroachment” on a floodplain (100-year flood) or floodway?	<input type="checkbox"/>	<input type="checkbox"/>
10. <u>Sole Source Aquifers</u> – Does the project involve construction in a sole source aquifer? <i>(Note: the installation or replacement of signs, pavement markings, and rumble strips, as well as pothole filling, crack sealing, and joint repair is allowable so long as there is very minimal ground disturbance.)</i>	<input type="checkbox"/>	<input type="checkbox"/>
11. <u>Wild and Scenic Rivers</u> – Does the project involve construction in, across or adjacent to a river designated as a component of, or proposed for inclusion in, the National System of Wild and Scenic Rivers?	<input type="checkbox"/>	<input type="checkbox"/>

State Project Number: _____

	YES(✓)	NO (✓)
12. Noise – Is the project classified as Type I or II, requiring a noise analysis?	<input type="checkbox"/>	<input type="checkbox"/>
13. Air Quality – Are there any NAAQS violations for the project, or did the individual Project Level Conformity assessment (if required) find the project to be in non-conformity?	<input type="checkbox"/>	<input type="checkbox"/>
14. Federally Protected Species – If construction is proposed in an area known to have populations of any federally listed endangered or threatened species or critical habitat, is it USFWS's and/or CTDEEP's conclusion that the project "is likely to adversely affect" any of these resources?	<input type="checkbox"/>	<input type="checkbox"/>
15. Title VI and Environmental Justice – Does the project involve disproportionately high or adverse human health or environmental effects to minority or low-income populations?	<input type="checkbox"/>	<input type="checkbox"/>
16. U.S. Coast Guard Bridge Permit – Will a U.S. Coast Guard Bridge Permit be required for the project?	<input type="checkbox"/>	<input type="checkbox"/>
17. FHWA ROW Office Determinations – Will FHWA have to make a determination regarding: <ul style="list-style-type: none"> • Occupancy, Use, and Reservation of Airspace Rights? • Disposal of Excess Right-of-way (purchased with or maintained with Federal Funding)? • Change in Access Control? • Federal Land Transfers? • Acquisition of Land for Hardship or Protective Purposes? 	<input type="checkbox"/>	<input type="checkbox"/>

- If **YES** for any one of Questions 1 to 17, the project does not qualify as an Automatic or Programmatic CE. An Individual CE approval from FHWA is required. See **DETAILED INSTRUCTIONS** for the preparation of an Individual CE.
- If **NO** for all of Questions 1 to 17, the project may qualify as an Automatic (Questions 18 to 47) or Programmatic CE (Questions 48 to 56).

Proceed to **Part 3: Automatic CE Section** on page 4.

State Project Number: _____

Part 3: Automatic CE Actions: This section will determine if the project qualifies for an Automatic CE [Found in 23 CFR §771.117(c)].

	YES(✓)	NO (✓)
18. Is this an activity that does not involve or lead directly to construction?	<input type="checkbox"/>	<input type="checkbox"/>
19. Is the primary purpose of the project the approval of utility installations (not requiring exceptions under the CTDOT Utility Accommodation Plan) along or across a transportation facility?	<input type="checkbox"/>	<input type="checkbox"/>
20. Is the primary purpose of the project the construction of bicycle and pedestrian lanes, paths and facilities?	<input type="checkbox"/>	<input type="checkbox"/>
21. Is the primary purpose of the project the transfer of Federal lands pursuant to 23 U.S.C. §107(d) and/or 23 U.S.C. §317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA?	<input type="checkbox"/>	<input type="checkbox"/>
22. Is the project an activity included in CTDOT's "Highway Safety Plan" that is funded by Highway Related Safety Grants (402 Safety Program)?	<input type="checkbox"/>	<input type="checkbox"/>
23. Is the primary purpose of the project the installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction?	<input type="checkbox"/>	<input type="checkbox"/>
24. Is landscaping the primary purpose of the activity?	<input type="checkbox"/>	<input type="checkbox"/>
25. Is the primary purpose of the project the installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, or railroad warning devices where no substantial land acquisition or traffic disruption will occur?	<input type="checkbox"/>	<input type="checkbox"/>
26. Is the primary purpose of the project emergency repairs under the Emergency Relief Program?	<input type="checkbox"/>	<input type="checkbox"/>
27. Is the primary purpose of the project the acquisition of scenic easements?	<input type="checkbox"/>	<input type="checkbox"/>
28. Is this activity a determination of payback for property previously acquired with Federal-aid participation?	<input type="checkbox"/>	<input type="checkbox"/>
29. Is the primary purpose of the project improvements to existing rest areas and truck weight stations?	<input type="checkbox"/>	<input type="checkbox"/>
30. Is the project a ridesharing activity?	<input type="checkbox"/>	<input type="checkbox"/>
31. Is the project a bus or rail car rehabilitation?	<input type="checkbox"/>	<input type="checkbox"/>
32. Is the primary purpose of the project to make alterations to facilities or vehicles in order to make them accessible to elderly and handicapped persons?	<input type="checkbox"/>	<input type="checkbox"/>
33. Does the activity consist of program administration, technical assistance, or operating assistance to transit authorities?	<input type="checkbox"/>	<input type="checkbox"/>
34. Does the activity consist of the purchase of vehicles where their use can be accommodated by existing facilities or by new facilities which themselves are within a CE?	<input type="checkbox"/>	<input type="checkbox"/>
35. Is the primary purpose of the project track or rail bed maintenance or improvements carried out within the existing right-of-way?	<input type="checkbox"/>	<input type="checkbox"/>

State Project Number: _____

	YES(✓)	NO (✓)
36. Is the primary purpose of the project the purchase and installation of operating or maintenance equipment to be located within a transit facility and with no significant impacts off the site?	<input type="checkbox"/>	<input type="checkbox"/>
37. Does the activity consist of the promulgation of rules, regulations and directives?	<input type="checkbox"/>	<input type="checkbox"/>
38. Does the project consist of the deployment of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience? Examples include, but are not limited to, traffic control and detector devices, lane management systems, electronic payment equipment, automatic vehicle locaters, automated passenger counters, computer-aided dispatching systems, radio communications systems, dynamic message signs, and security equipment including surveillance and detection cameras on roadways and in transit facilities and on buses.	<input type="checkbox"/>	<input type="checkbox"/>
39. Does the project take place entirely within the existing operational right-of-way? ⁴	<input type="checkbox"/>	<input type="checkbox"/>
40. Does the project have limited federal assistance, in that it either: (i) receives less than \$5,000,000 of Federal funds; or, (ii) It is a project with a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated cost?	<input type="checkbox"/>	<input type="checkbox"/>
41. Is the primary purpose of the project localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys?	<input type="checkbox"/>	<input type="checkbox"/>
42. Is the primary purpose of the project environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. 1341; 1342)) carried out to address water pollution or environmental degradation?	<input type="checkbox"/>	<input type="checkbox"/>

⁴ Existing operational right-of-way refers to right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose. This area include the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, etc.) and other areas maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities. Portions of the right-of-way that have not been disturbed or that are not maintained for transportation purposes are not in the existing operational right-of-way.

State Project Number: _____

	YES(✓)	NO (✓)
43. Is the primary purpose of the project the modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (e.g. parking, weaving, turning, climbing)?	<input type="checkbox"/>	<input type="checkbox"/>
44. Is the primary purpose of the project a highway safety or traffic operations improvement project including the installation of ramp metering control devices and lighting?	<input type="checkbox"/>	<input type="checkbox"/>
45. Is the primary purpose of the project bridge rehabilitation, reconstruction or replacement, or the construction of grade separation to replace existing at-grade railroad crossings?	<input type="checkbox"/>	<input type="checkbox"/>
46. Is the primary purpose of the project the purchase, construction, replacement, or rehabilitation of ferry vessels (including improvements to ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities which themselves are within a CE?	<input type="checkbox"/>	<input type="checkbox"/>
47. Is the primary purpose of the project the rehabilitation or reconstruction of existing ferry facilities that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in the existing facility's capacity? (Example actions include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.)	<input type="checkbox"/>	<input type="checkbox"/>

- The project is an Automatic CE if:
- **NO** for all Questions 1 to 17 in Part 2, AND
 - **YES** for any one of Questions 18 to 47 in Part 3, AND,
 - The project does not include any substantial work in addition to the above, or involve unusual circumstances [see 23 CFR §771.117(b)].

Include the Checklist and supporting documentation in the project file.

- If **NO** for all of Questions in Part 3 (Questions 18 to 47), the project does not qualify as an Automatic CE.

Proceed to **Part 4: Programmatic CE Section (Questions 48 to 56)** on page 7.

State Project Number: _____

Part 4: Programmatic CE Actions: This section will determine if the project qualifies for Programmatic CE [Found in 23 CFR §771.117(d)].

	YES(✓)	NO (✓)
48. Is the primary purpose of the project transportation corridor fringe parking facilities?	<input type="checkbox"/>	<input type="checkbox"/>
49. Is the primary purpose of the project the construction of new truck weigh stations or rest areas?	<input type="checkbox"/>	<input type="checkbox"/>
50. Is the primary purpose of the project the approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts?	<input type="checkbox"/>	<input type="checkbox"/>
51. Is the primary purpose of the project the approvals for changes in access control?	<input type="checkbox"/>	<input type="checkbox"/>
52. Is the primary purpose of the project the construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic?	<input type="checkbox"/>	<input type="checkbox"/>
53. Is the primary purpose of the project rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.	<input type="checkbox"/>	<input type="checkbox"/>
54. Is the primary purpose of the project construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks, and related street improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic?	<input type="checkbox"/>	<input type="checkbox"/>
55. Is the primary purpose of the project the construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community?	<input type="checkbox"/>	<input type="checkbox"/>
56. Is the primary purpose of the project the acquisition of land for hardship or protective purposes? Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.	<input type="checkbox"/>	<input type="checkbox"/>

State Project Number: _____

- The project qualifies as a Programmatic CE if
 - NO for all Questions 1 to 17 in Part 2, AND,
 - If **YES** for any one of Questions 48 to 56 in Part 4, AND,
 - The project does not include any substantial work in addition to the above, or involve unusual circumstances [see 23 CFR §771.117(b)]

Include this Checklist and supporting documentation in the project file.

- If **NO** for all Questions in Part 4 (Questions 48 to 56), the project does not qualify for a Programmatic CE. See **DETAILED INSTRUCTIONS** for the preparation of an Individual CE.

CE Determination Checklist

State Project Number: _____

This project qualifies for the following type of Categorical Exclusion:

Automatic CE	<input type="checkbox"/>
Programmatic CE	<input type="checkbox"/>
Individual CE	<input type="checkbox"/>

CTDOT has determined that this project does not individually or cumulatively have a significant impact on the environment as defined by NEPA, or involve unusual circumstances as defined in 23 CFR §771.117(b), and is excluded from the requirements to prepare an EA or EIS. CTDOT further certifies that all other environmental requirements, such as Air Quality, Historic Preservation (Section 106), Section 4(f), etc., to the extent such requirements apply to this project, also have been satisfied. CTDOT will keep within its project records the documentation to justify support for this Automatic or Programmatic Categorical Exclusion.

Prepared by:

_____	_____
Project Engineer	Date

Reviewed by:

_____	_____
Project Manager	Date

CE Approval
Recommended by:

_____	_____
Principal Engineer	Date

Automatic or
Programmatic CE
Approved by:

_____	_____
Manager	Date

OR

Division of Bridges / Division of Highway
Design / Division of Traffic Engineering /
Division of Facilities and Transit

Individual CE
Recommended for
FHWA Approval
by:

_____	_____
Manager	Date

Division of Bridges / Division of Highway
Design / Division of Traffic Engineering /
Division of Facilities and Transit

The following items **must** be included in the CE documentation, regardless of the type of CE:

<input type="checkbox"/>	Environmental Review Form (refer to Detailed Instructions for Question #1)
<input type="checkbox"/>	Completed CE Checklist
<input type="checkbox"/>	Project Description (if not described in CE Checklist)
<input type="checkbox"/>	Project Location Map
<input type="checkbox"/>	Appropriate Sheets from Design Plan depicting Proposed Action, if applicable
<input type="checkbox"/>	Tribal Consultation Coordination (Tribal or FHWA correspondence)
<input type="checkbox"/>	Section 106 Coordination (OEP or SHPO correspondence)
<input type="checkbox"/>	Public Involvement Documentation
<p>For Individual CEs, include supporting documentation for the specific “Conditions not met for an Automatic or Programmatic CE” in Part 2 (Questions 1-17). Use DETAILED INSTRUCTIONS (next section) for additional information on documentation required for these specific conditions.</p>	

DETAILED INSTRUCTIONS FOR CATEGORICAL EXCLUSION DETERMINATION CHECKLIST

Purpose and Need, and Project Description

Purpose and Need: The purpose of a project is a concise statement as to why the project is being proposed. The need explains the existing transportation problem(s) to be addressed and their underlying causes. The purpose and need helps define why the expenditure of funds for the project is worthwhile, and justifies why the project is needed to agencies and the public. For all CEs, there should be a purpose and need statement that identifies and specifically describes the transportation or other needs that the project or right-of-way action is intended to satisfy (e.g., provide system continuity, alleviate traffic congestion, correct safety deficiencies, correct geometric deficiencies, etc.).

Project Description: Describe the proposed project scope or right-of-way action in sufficient detail as necessary so someone not familiar with the project or action can easily understand the scope. Be sure to also describe the existing conditions and proposed improvements, i.e., lane widths, shoulder widths, bridge widths, etc., as appropriate.

Information about the purpose and need can be found at the following FHWA website page:

- *FHWA – NEPA and Transportation Decisionmaking - Elements of a Purpose and Need:*
<http://www.environment.fhwa.dot.gov/projdev/tdmelements.asp>

Part 1: Categorical Exclusion or Re-evaluation of Categorical Exclusion?

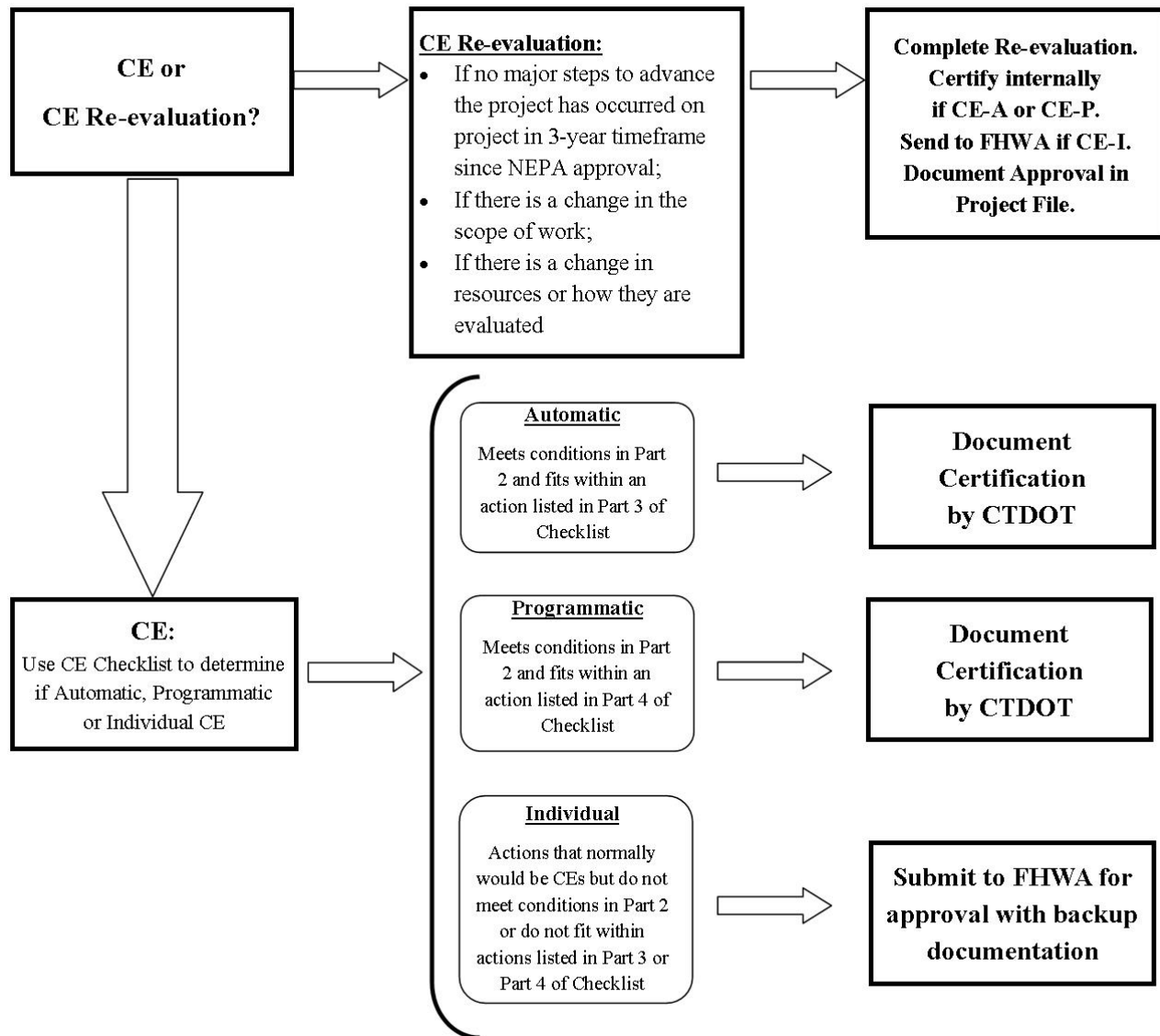
It is important to know if the project has a previously approved Categorical Exclusion (CE) or if it is a new project. If it is a new project, then the CE Determination Checklist should be used. However, if it is a re-evaluation of a previously approved project then a re-evaluation of the CE needs to be completed. The CE Process is outlined in the flow chart on the next page.

1. Re-evaluation of Categorical Exclusion

A Re-evaluation of the project **must occur** if either of the following two conditions is met:

- If the scope of work has substantially changed or unforeseen conditions have surfaced since the Office of Environmental Planning (OEP) last reviewed the project; or,
- If major steps to advance the action (e.g. authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) have not occurred within three (3) years after the CE was approved by FHWA or by CTDOT.

Detailed Instructions for CE Checklist (Continued)



“Major steps” include design approval to proceed into final design; authorization to proceed with right-of-way acquisition; approval of plans, specifications and estimates; or start of construction. If a CE is approved in year 1 and design approval is granted year 2, then the CE re-evaluation would be needed 3 years after design approval is granted if no other major steps have occurred. For example, if a CE is approved 2012 and final design is authorized 2014 (and no other major steps have occurred), then the CE would need to be re-evaluated 3 years after the final design was authorized (in 2017).

In order to do the Re-evaluation, a new Environmental Review Form request needs to be submitted to OEP as well as the previously approved CE, Environmental Review Form, and any supporting documentation. OEP will need to re-evaluate the scope to determine if the project is

Detailed Instructions for CE Checklist (Continued)

still expected to qualify as a CE. If not, the OEP, in conjunction with the appropriate engineering unit, will discuss the National Environmental Policy Act (NEPA) class of action with the Federal Highway Administration (FHWA) to determine whether an Environmental Assessment (EA) or Environmental Impact Statement (EIS) needs to be conducted. This form is important in that it is used to determine at this early stage if the project is expected to qualify as a CE. This form may have been completed several years ago and the scope of work may have changed or unforeseen conditions may have surfaced since then that may warrant either an EA or an EIS. Per internal procedures, CTDOT will update the environmental review form three years after NEPA approval and no major steps have occurred (final design, ROW, etc.) to ensure there have been no changes with regards to resources or laws applicable to resources in the project area.

Additional information on this subject is available at the following FHWA website pages:

- *NEPA Documentation:* <http://environment.fhwa.dot.gov/projdev/pd4document.asp>
- *FHWA Environmental Guidebook:*
<http://www.environment.fhwa.dot.gov/guidebook/index.asp>
- *23 CFR Part 771 – Environmental Impact and Related Procedures:*
<http://www.fhwa.dot.gov/legregs/directives/fapg/cfr0771.htm>

2. **Categorical Exclusion**

For a new project, the CE Determination Checklist should be completed as information becomes available. The Checklist and supporting documentation will document the answers. If the answer to a question is unknown, more analysis and/or coordination may need to be done.

All of the Conditions for an Automatic or Programmatic CE must be met for a project or right-of-way action to qualify as an Automatic CE (CE-A) or Programmatic CE (CE-P). If any of the conditions are not met, the project or right-of-way action may still qualify as an Individual CE (CE-I). In this case the Connecticut Department of Transportation (CTDOT) must submit a CE-I determination request to the Federal Highway Administration (FHWA) for approval.

Please refer to the section of this document on Individual CE for guidance regarding the format of CE-I determination requests and the specific information that needs to be submitted in support of a CE-I request.

Part 2 (below) provides further explanation of the questions on the CE Determination Checklist and the specific information that needs to be submitted to FHWA for any Condition that requires the project to be requested as a CE-I, or documentation that is needed in the project file for CE-As and CE-Ps.

Part 2: Conditions for Automatic and Programmatic Categorical Exclusions

1. **Public Involvement** – Public involvement must comply with 23 U.S.C. §128, 23 CFR §771.111(h), and the FHWA-approved CTDOT Public Involvement Procedures (<http://www.ct.gov/dot/lib/dot/documents/dplans/PIP.pdf>). Public involvement may include a public hearing, public information meeting, or no public meeting at all. Minimum public

Detailed Instructions for CE Checklist (Continued)

involvement normally consists of an information meeting. If CTDOT and local officials believe an informational meeting is not needed, then project records must indicate concurrence by local officials. This may be in the form of a letter from the first selectman, a report of meeting, or perhaps a telephone report. **Simply informing local officials of a proposed project is not sufficient public involvement.**

Substantial opposition may be evident from correspondence on the project, from oral or written comments received during any scoping meetings, or as a result of public meetings or hearings. If substantial opposition occurs, then a CE-I must be prepared.

If any proposed temporary roads, detours, or ramp closures generate substantial opposition, describe the proposed methods of maintaining and protecting traffic, the anticipated duration and effects of these methods on the local community (including any vegetation removal, right-of-way acquisition, signing and/or signalization, noise, and traffic congestion), and any measures included in the project to mitigate these effects. Mitigation measures may include the restoration and/or enhancement of the temporary road or detour route, re-planting affected areas, noise abatement, contract provisions to limit the duration of the temporary traffic measures, or any other means identified during coordination with the local community.

Project records for all projects must include a summary of the public involvement process. A summary of the public involvement process includes:

- When news releases were issued and copies of meeting notices, if applicable;
- When public meetings, and/or meetings with public officials were held;
- When concurrence was made by local officials that no public meeting is needed (if applicable);
- Approximate number from the public that attended any public meeting(s);
- Summary of any substantive comments, questions, and concerns raised by the public at any public meeting(s) or written comments received; and,
- Commitments CTDOT/municipality has made in response to the public involvement process.

Transcripts for all public hearings (with public involvement summary) must be sent to FHWA, even if the project qualifies for a CE-A or CE-P. The transcript shall include a certificate that a hearing was held and copies of all written statements received.

For all Individual CEs, CTDOT shall include a copy of the public involvement summary and a transcript (if a public hearing was held). Transcripts may be sent to FHWA in advance of the CE-I determination request.

Additional information on this subject is available at the following FHWA website page:

- *FHWA Public Involvement:*
http://www.fhwa.dot.gov/planning/public_involvement/index.cfm

Detailed Instructions for CE Checklist (Continued)

2. **Right-of-Way Acquisition/Use and Relocations** – Since the CE determination is made relatively early in the design process, precise estimates of the amount of permanent easements of fee takings may not be available; therefore, use best engineering judgment. The 10% limit applies to every individual parcel which requires a permanent easement or fee taking.

If a permanent easement or fee taking will require 10% or greater of any parcel, then a CE-I must be prepared. The CE-I must describe where the permanent easements and fee takings will occur and provide the appropriate sheets from the preliminary design plans that show where the parcels are located that do not meet the 10% limit. **Make sure that the following statement is included in the CE-I cover letter:** “Property acquisition will be performed in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.”

An **Individual CE-I** needs to be prepared:

- If there is a permanent easement or fee taking that requires 10% or greater of any parcel; or,
- If the project requires any residential or non-residential relocations.

If the project requires any residential or non-residential relocations, then a CE-I must be prepared with a narrative containing the following information:

- a description of the types of properties to be acquired;
- any unique characteristics that will need to be addressed during relocation;
- the findings of the Rights-of-Way Relocation Survey; and,
- all other pertinent information.

Additionally, the narrative must be accompanied by the Rights of Way Relocation Survey as well as the available preliminary design plan sheets that depict parcel locations. **Make sure that the following statement is included in the CE-I cover letter:** “Property acquisition will be performed in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.”

Additional information on this subject is available at the following FHWA website page:

- *FHWA Realty – Relocation:*
http://www.fhwa.dot.gov/real_estate/practitioners/uniform_act/relocation/index.cfm
- *FHWA Realty:* <http://www.fhwa.dot.gov/realestate/index.htm>

3. **Hazardous Waste/Material Sites** – Contact the Office of Environmental Compliance to determine if there are any sites classified by the U.S. Environmental Protection Agency (**USEPA**) as Superfund sites located nearby which may have an effect on the project. If so, then a CE-I is required. If the Superfund site is not within the project limits but near the project, provide a location map depicting the Superfund site and a description of the interaction or lack thereof between the two sites. Provide the appropriate sheets from the preliminary design plans that show where the Superfund sites are located in relation to the project and describe how they may affect the project. Location data can be derived from the USEPA Enviromapper:

Detailed Instructions for CE Checklist (Continued)

<http://www.epa.gov/emefdata/em4ef.home>.

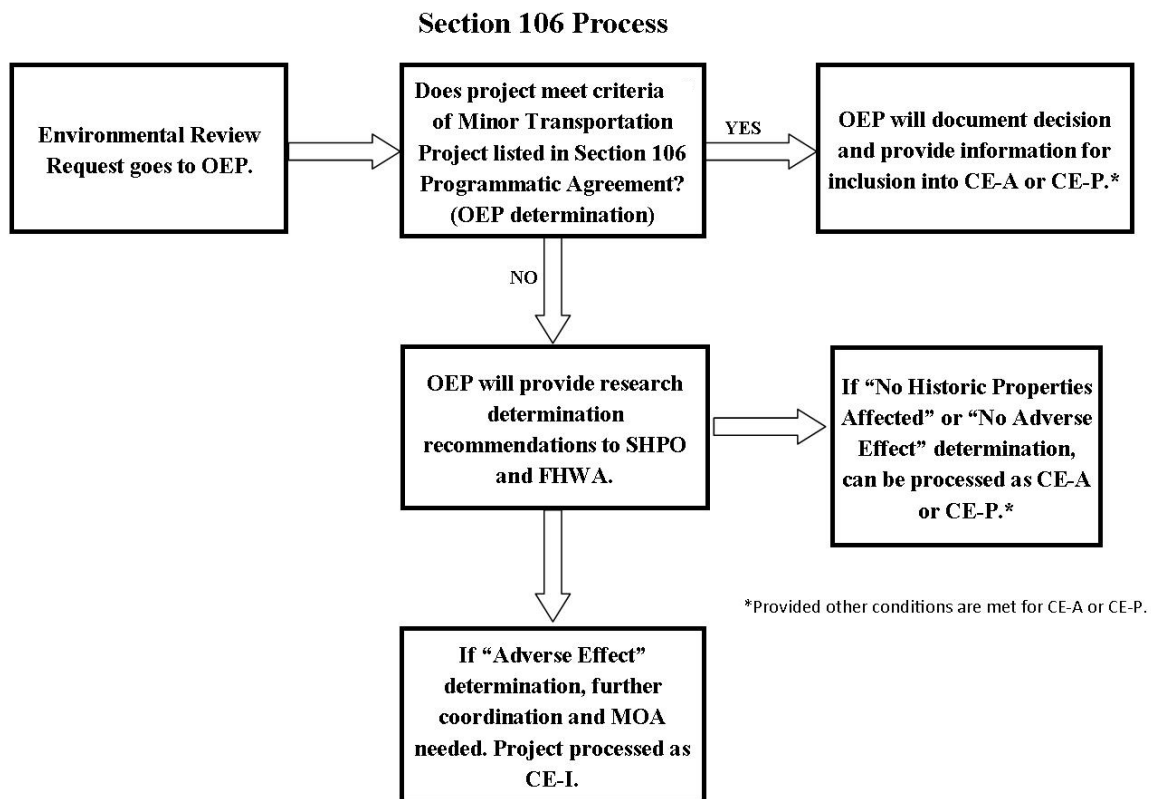
Additional information on this subject is available at the following FHWA website page:

- *FHWA Hazardous Materials/Waste Sites Resources:*
<http://www.environment.fhwa.dot.gov/guidebook/results.asp?selSub=46>

4. **Historic Properties** – Section 106 of the National Historic Preservation Act of 1966 and its implementing regulations (36 CFR Part 800) requires Federal agencies to take into account the effects of their undertakings on historic properties. This includes projects that use FHWA funds and actions that require FHWA approval.

The Section 106 Programmatic Agreement (October 2012) was signed by FHWA, CTDOT-OEP, SHPO, and the Advisory Council on Historic Preservation (**ACHP**) that allows the OEP staff to make determinations on minor transportation projects that are listed in this agreement. OEP staff will review the project to see if it qualifies for the projects listed in the Programmatic Agreement as part of the Environmental Review Form process. More detail may be needed later on by OEP for further coordination with SHPO, FHWA, and ACHP.

If the project is determined to fall within the minor transportation projects listed in Section 106 Programmatic Agreement, then documentation from OEP staff should be attached to the CE Determination Checklist, regardless of CE type (automatic, programmatic, or individual).



Detailed Instructions for CE Checklist (Continued)

If the project does not fall within the minor transportation projects listed in the Section 106 Programmatic Agreement, as determined by the OEP staff, then OEP will consult with SHPO. SHPO recommends a determination of effect to FHWA, which will usually be one of the following: “No Historic Properties Affected”, “No Adverse Effect”, or “Adverse Effect” “The Historic Properties condition is only satisfied if a **NO HISTORIC PROPERTIES AFFECTED or NO ADVERSE EFFECT** recommendation is received in writing from the SHPO or OEP – all other recommendations of effect require an CE-I.

Section 106 Documentation Requirements: The documentation standards for Section 106 findings are detailed in 36 CFR §800.11. For **Adverse Effect recommendations**, one copy of the required documentation must be submitted by CTDOT to FHWA. This documentation should include appropriate sheets from the preliminary design plans that show how historic properties may be affected as well as original photographs of these properties. **A copy of OEP’s finding or SHPO’s recommendation must be included with the CE Checklist for ALL projects.**

Adverse Effect Determinations: If SHPO issues an “adverse effect” recommendation, FHWA must notify the ACHP of the adverse effect recommendation. This notification must be accompanied by the draft Section 106 documentation required by 36 CFR §800.11(e). The ACHP will then have 15 calendar days to advise the FHWA whether or not the ACHP wishes to participate in the Section 106 consultation process. Other parties may also be consulted, as deemed appropriate by FHWA, CTDOT, SHPO, or ACHP. In addition, the public must be afforded an opportunity to provide comments on the draft Section 106 finding in accordance with CTDOT’s Public Involvement Procedures. Specifically, there must be a notice in the newspaper stating that there is an adverse impact and that FHWA has made a draft Section 106 finding that is available for review by the public for 15 days and that any comments should be addressed to the following: Environmental Protection Specialist, FHWA CT Division, 628-2 Hebron Avenue, Suite 303, Glastonbury, CT 06033. If there is a public meeting in association with the project, the public meeting notice should state this and the documentation should be at the meeting for review. Any comments will be addressed and the draft Section 106 finding will be finalized after that time.

A Memorandum of Agreement (**MOA**), prepared by CTDOT, is required to indicate what will be done to mitigate the adverse effects of the project on historic properties. The Individual CE request **should not be submitted to FHWA** until coordination with the ACHP is complete and the MOA has been signed by all parties. FHWA will notify CTDOT when this process is completed and the CE-I can be submitted for approval. **A copy of the signed MOA should be included with the Individual CE determination request.**

NOTE: *Section 106 is a completely separate process from Section 4(f). Section 106 involves evaluating the effects of a federal undertaking on historic properties and offering the ACHP, SHPO, Tribes, and the public an opportunity to comment. Section 4(f) is focused on the “use” or incorporation of a property from a historic resource for transportation purposes. Transportation projects must not “use” property*

Detailed Instructions for CE Checklist (Continued)

from a historic resource unless avoidance is not feasible and prudent. This entails consideration of alternatives to avoid the use of historic properties for transportation purposes as well as measures to minimize harm to these properties (see Number 6 below, Section 4(f)).

For additional guidance, contact OEP staff and/or FHWA.

Additional information on this subject is available at the following Internet web site address:

<http://environment.fhwa.dot.gov/histpres/index.asp>

5. **Tribal Consultation** – Tribes are sovereign nations, and thus, the FHWA must conduct tribal consultation for each project as part of the Section 106 process. OEP will provide FHWA with a copy of the required consultation documentation. A Tribal Programmatic Agreement exists between FHWA and the Tribes to exempt certain projects from Tribal Review. FHWA will review the information provided by OEP and determine whether Tribal Consultation is needed. If needed, FHWA will initiate consultation with the Tribal Historic Preservation Officers (**THPOs**) for the project. The THPOs have 30 calendar days to respond to the initial consultation information. For some projects, additional information or a site visit may be needed to suffice the concerns of the THPOs. For projects that cannot be resolved through additional information or site visits, the FHWA, as part of the Section 106 process, will work to resolve adverse effects as expeditiously as possible with the Tribes. Once Tribal Consultation is concluded, FHWA will send written correspondence (via email) to OEP staff and the project can proceed.
6. **Section 4(f) Resources** – Per Section 4(f) of the U.S. Department of Transportation Act of 1966, FHWA may not approve the use of land from any Section 4(f) property, including publicly owned parks, recreational areas, wildlife and waterfowl refuges, or public and private historic sites, unless a determination is made that:
 - a. There is no feasible and prudent alternative to the use of land from the property; and,
 - b. The action includes all possible planning to minimize harm to the property resulting from such use.

“Use” is defined as a fee taking, a permanent easement or “constructive use” of the affected Section 4(f) property. Section 4(f) does not generally apply to temporary construction easements provided certain conditions are satisfied (*see FHWA’s Section 4(f) Policy Paper*, <http://environment.fhwa.dot.gov/4f/4fpolicy.asp>). However an exception package will need to be signed by FHWA for temporary easements from Section 4(f) properties. “Constructive use” occurs when the proximity impacts of the project to the Section 4(f) property are so great that the purpose(s) for which the Section 4(f) property exists are substantially impaired.

Per 23 CFR §774.17, the term “historic site” includes any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the NRHP. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the NRHP.

Detailed Instructions for CE Checklist (Continued)

Section 4(f) Determinations: If the applicability of Section 4(f) for a specific property is not clear, FHWA should be consulted. For those situations where a determination is provided in writing by FHWA that Section 4(f) does not apply, **a copy of this determination should be included with the CE Checklist.**

- **Section 4(f) Exceptions:** Per 23 CFR §774.13, there are exceptions to the requirement for Section 4(f) approval. OEP staff will be able to determine if the project meets the criteria for a Section 4(f) exception. OEP will prepare a Section 4(f) exception concurrence for the FHWA to review. If FHWA agrees with the exception, they will sign the concurrence and send it back to OEP. The signed concurrence must be included as part of the CE documentation. **The CE can be processed as a CE-A or CE-P if FHWA concurs with the exception.**
- **Nationwide Programmatic Section 4(f) Evaluations:** Many uses of Section 4(f) property may qualify for application of one of the following Nationwide Programmatic Section 4(f) Evaluations:
 - (a) Independent Walkway and Bikeways Construction Projects;
 - (b) Use of Historic Bridges;
 - (c) Minor Involvement with Historic Sites;
 - (d) Minor Involvement with Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges; and,
 - (e) Net Benefits to a Section 4(f) Property.

More information about these Nationwide Programmatic Section 4(f) Evaluations can be found at the following link:

<http://www.environment.fhwa.dot.gov/4f/4fnspeval.asp>.

Nationwide Programmatic Section 4(f) Evaluations must be submitted to FHWA for approval and should include plans of the proposed project (with property boundary lines clearly shown) and original photographs that show how the Section 4(f) properties may be affected. OEP staff can determine whether a project will qualify for a Nationwide Programmatic Section 4(f) Evaluation, and assist with the preparation of this document for review by the FHWA. A CE-I must be prepared if a Nationwide Programmatic Section 4(f) Evaluation is used.

- **De Minimis Use Determinations:** The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) allowed for streamlining of the Section 4(f) process where the project would have a “*de minimis*” impact on the 4(f) resource. According to the Section 4(f) Policy Paper, a *de minimis* impact is one that, after taking into account any measures to minimize harm (such as avoidance, minimization, mitigation, or enhancement measures), results in either:
 1. A Section 106 finding of no adverse effect or no historic properties affected for a historic property; or,

Detailed Instructions for CE Checklist (Continued)

2. A determination that the project would not adversely affect the activities, features, or attributes qualifying a park, recreation area, or refuge for protection under Section 4(f).

OEP staff will be able to determine if the project fits within the *de minimis* impact determination and will prepare a *de minimis* determination request for FHWA to review and approve. If the Section 4(f) resource is a historic property, SHPO will need to be notified of the intent to issue the *de minimis* finding. If the Section 4(f) resource is a publicly owned park, recreation area, or wildlife/waterfowl refuge, FHWA will inform the officials with jurisdiction over the property they intend to make a *de minimis* finding and a public review/comment period is required. The officials with jurisdiction over the property must concur “that the use of the property will not have an adverse effect on the features or activities that qualify the resource for Section 4(f) protection.” Once the public review/comment period ends, if no substantial comments are received contrary to the *de minimis* use finding, FHWA will sign the determination and send it back to OEP. The signed concurrence must be included as part of the CE documentation. If FHWA signs the determination, the CE can be processed as a CE-A or CE-P.

- **Individual Section 4(f) Evaluations:** If a project does not meet the criteria for a Section 4(f) Exception, a Nationwide Programmatic 4(f) Evaluation, or a *de minimis* use determination, then an Individual Section 4(f) Evaluation will need to be prepared. OEP staff will assist with the preparation of the Draft Individual Section 4(f) Evaluation as specific elements must be included in the evaluation. The Draft Individual Section 4(f) Evaluation must be forwarded to FHWA to circulate for review and comment (minimum 45 days) to the National Park Service (**NPS**), and, as appropriate, to the U.S. Department of Housing and Urban Development and/or the U.S. Department of Agriculture. The Final Section 4(f) evaluation must be reviewed for legal sufficiency (30-day review period) by FHWA legal counsel before final approval.

For an Individual Section 4(f) Evaluation:

- There is a **45-day comment period** on the draft individual section 4(f) evaluation; and,
- There is a **30-day review period** for FHWA legal sufficiency for the final individual section 4(f) evaluation.

Keep these review times in mind during project scheduling.

The Individual CE determination request should not be submitted to FHWA until after the required Section 4(f) documentation has been completed by CTDOT and approved by FHWA. **A copy of the approved Section 4(f) documentation should be included with the Individual CE determination request.**

If a Section 4(f) *de minimis* finding, programmatic evaluation, or individual evaluation is completed for the project, the public must be notified of the impacts, and coordination with the property owner must take place, in accordance with CTDOT’s Public Involvement Procedures.

Detailed Instructions for CE Checklist (Continued)

NOTE: Section 4(f) is a completely separate process from Section 106 (see section "Detailed Instructions for CE Checklist #7).

References:

- (a) 23 CFR Part 774
- (b) FHWA Technical Advisory T 6640.8A, entitled, "Guidance for Preparing and Processing Environmental and Section 4(f) Documents," dated October 30, 1987.
<http://environment.fhwa.dot.gov/projdev/impta6640.asp>
- (c) FHWA Section 4(f) Policy Paper:
<http://www.environment.fhwa.dot.gov/4f/4fpolicy.asp>.

Additional information on this subject is available at the following Internet web site address: <http://www.environment.fhwa.dot.gov/4f/index.asp>

For additional guidance, contact OEP and/or FHWA.

7. **Section 6(f)** – The purpose of Section 6(f) of the Land and Water Conservation Fund Act is to preserve, develop, and assure the quality of outdoor recreation resources for present and future generations. This Act applies to projects that impact recreational lands purchased or improved with Land and Water Conservation Funds. CTDOT must receive approval from the National Park Service (NPS) for any conversion of property covered under this Act to a use other than public, outdoor recreational use. To determine if there is a Section 6(f) property within or adjacent to a project area, please review the grant listing at <http://waso-lwcf.ncrc.nps.gov/public/index.cfm>. CTDEEP has a designated staff member responsible for Section 6(f) coordination. Please send information to the following:

CTDEEP Deputy Commissioner
Outdoor Recreation and Natural Resources
79 Elm Street, 3rd Floor
Hartford, CT 06106-5127

If the project requires the conversion of any Section 6(f) property or improvements, an Individual CE is required. FHWA can assist you in this process if needed. Individual CEs must include a copy of the approval letter from CTDEEP or the NPS prior to submission to the FHWA for review and approval.

Additional information on this subject is available at the following Internet web site address: <http://www.nps.gov/lwcf/>

8. **U.S. Army Corps of Engineers - Individual Permit** – If an Individual Permit from the USACE is required, then an **Individual CE is required**. The Individual CE should include the

Detailed Instructions for CE Checklist (Continued)

approximate area of wetland impact and the appropriate sheets from the preliminary design plans that show the wetland locations. OEP will be able to assist with determining the type of permits needed for the project when the Permit Needs Determination Form is filled out and submitted.

Additional information on this subject is available at the following Internet web site address:

<http://www.environment.fhwa.dot.gov/ecosystems/wetlands.asp>

<http://www.nae.usace.army.mil/Missions/Regulatory.aspx>

9. **100-year Floodplains and Floodways** – Flood Hazard Areas are delineated on Federal Emergency Management Agency (**FEMA**) maps which are available for every city and town in the state. The design of the project should have sufficient detail to determine whether work will be required within a regulatory floodway or base floodplain and whether this work will have an adverse effect. Provide plans and details depicting overall floodway and floodplain impacts and proposed mitigation to OEP and the Hydraulics and Drainage Unit. The CTDOT Hydraulics and Drainage unit should be contacted regarding the severity of the adverse effect, if applicable. If the project would result in a “significant encroachment” into the 100-year floodplain or floodway, then an Individual CE would be required. “Significant encroachment” is defined in 23 CFR §650.105(q) as the following:

“Significant encroachment” shall mean a highway encroachment and any direct support of likely base flood-plain development that would involve one or more of the following construction-or flood-related impacts:

- (1) A significant potential for interruption or termination of a transportation facility which is needed for emergency vehicles or provides a community's only evacuation route.
- (2) A significant risk, or
- (3) A significant adverse impact on natural and beneficial flood-plain values.

Additional information on this subject is available at the following Internet web site addresses:

<http://www.environment.fhwa.dot.gov/guidebook/results.asp?selSub=89>

<http://www.fema.gov/national-flood-insurance-program-flood-hazard-mapping>

10. **Sole Source Aquifers** – Sole Source Aquifers are Federally regulated areas where groundwater protection is of the utmost importance, due to the fact that residents in the area rely upon this water resource as their sole source of drinking water. There are currently only two Federally designated sole source aquifers in Connecticut:

- the Pootatuck Aquifer in the Newtown/Monroe area; and,
- the Pawcatuck Basin Aquifer System in the Stonington/North Stonington area.

Detailed Instructions for CE Checklist (Continued)

Information must be provided to FHWA to coordinate with USEPA's Region 1 Drinking Water Quality and Protection Unit so they are given the opportunity to ensure that Federally assisted projects will not adversely affect groundwater resources. The designation has no direct effect on land use decisions made at the state or local level, but if the project has any Federal funding, coordination with USEPA is necessary. Contact OEP for assistance when dealing with projects in a sole source aquifer. If a project is in a sole source aquifer recharge area, an Individual CE is required. *Note: the installation or replacement of signs, pavement markings, and rumble strips, as well as pothole filling, crack sealing, and joint repair does not require an Individual CE as long as there is very minimal ground disturbance. Other minimal ground disturbance activities may be included later once an MOA is established between FHWA and USEPA.* The Individual CE must include documentation of the required coordination with the USEPA.

Additional information on this subject is available at the following Internet web site address:
http://www.epa.gov/region1/eco/drinkwater/pc_solesource_aquifer.html

11. **Wild and Scenic Rivers** – The purpose of the Wild and Scenic Rivers Act is to preserve and protect wild and scenic rivers and immediate environments for the benefit of present and future generations. CTDOT must coordinate with the NPS and CTDEEP if the project includes construction in, across, or adjacent to a river designated or proposed for inclusion in the National System of Wild and Scenic Rivers, and an Individual CE must be prepared. There are two wild and scenic rivers in Connecticut:

- The upper **Farmington River** (a 14-mile section of the **West Branch**) is protected from immediately below the Goodwin Dam in Hartland through Barkhamsted and New Hartford down to the downstream end of the New Hartford/Canton town line. For further information, see <http://www.rivers.gov/rivers/farmington.php>.
- **Eightmile River** (a total of 25.3 stream miles) in southeastern Connecticut is designated as scenic, including the entire main stem of the river from Lake Hayward Brook to the Connecticut River, as well as portions of the following tributaries of Eightmile River: East Branch; Harris Brook; Beaver Brook, and Falls Brook. For further information, see <http://www.rivers.gov/rivers/eightmile.php>.

Wild and Scenic River coordination should be addressed to the following person:

National Park Service
Attn: New England Team Leader
Northeast Region Rivers Program
15 State Street
Boston, MA 02109

Results of this coordination should be included in the Individual CE. For additional information, contact OEP staff or FHWA.

Detailed Instructions for CE Checklist (Continued)

- 12. Noise** – FHWA regulations (23 CFR Part 772) require the identification of noise impacts and the consideration of noise abatement that would substantially reduce noise impacts. A noise analysis must be completed for any project that is considered **Type I** or **Type II** as defined in 23 CFR §772.5. Any proposed noise abatement must be both “reasonable” and “feasible”. Feasibility deals primarily with engineering considerations (e.g., topography, drainage, safety, maintenance, access requirements for driveways and ramps, and the presence of local cross streets). Reasonableness is based on a number of factors, such as the amount of noise reduction that can be achieved, the cost of noise abatement, and the views of the property owners and residents benefitted by the abatement. Refer to the CTDOT “Highway Traffic Noise Abatement Policy for Projects Funded by the Federal Highway Administration” dated July 2011, (or as amended) for more information.

OEP will assist in the determination of whether a project is classified as a Type I or Type II project and if a noise analysis is needed. If a noise analysis is required, an Individual CE is also required. The noise analysis report should be included with the Individual CE for submission to FHWA.

Additional information on this subject is available at the following Internet web site address:
<http://www.fhwa.dot.gov/environment/noise/>

- 13. Air Quality and Project Level Conformity** – The regulations implementing the Clean Air Act (CAA), as amended, require that transportation plans, programs and projects in non-attainment or maintenance areas for transportation-related criteria pollutants (e.g., ozone, PM₁₀, PM_{2.5}, CO) that are funded or approved by FHWA must be in conformity with the State Implementation Plan (SIP). The USEPA has set standards for six criteria pollutants, known as the National Ambient Air Quality Standards (NAAQS). Conformity is determined through the process specified in USEPA’s transportation conformity regulations (40 CFR Part 93). Projects located in attainment areas are not subject to the conformity regulations. However, as of July 2, 2014, the entire state of Connecticut is in non-attainment for ozone, and three regions are in maintenance for CO. However, the CO maintenance periods will end in these areas on the following dates:
- Hartford-New Britain-Middletown in 2015
 - New Haven-Meriden-Waterbury in 2018
 - Southwestern Connecticut in 2020

(For information as to which town or city is located in these areas, see additional information at <http://www.ct.gov/dot/lib/dot/documents/dpolicy/policymaps/ref/COAreas.pdf>). Projects in Connecticut are subject to conformity for at least one of the above pollutants unless they are exempt from conformity (per 40 CFR §93.126), or are exempt from a regional emissions analysis (per 40 CFR §93.127). **For all air quality and project level conformity determinations and analyses, please contact the Travel Demand/Air Quality (TD/AQ) Section of the Bureau of Policy and Planning.**

Detailed Instructions for CE Checklist (Continued)

- **Project Level Emissions Analysis** – This type of analysis (a.k.a., “hot-spot” analysis) applies to CO and PM₁₀ concentrations. In Connecticut, the following projects require a CO “hot-spot” analysis [see 40 CFR §93.123(a)]:

- (a) Projects that affect intersections currently at Level of Service (**LOS**) D, E, or F, or will change to LOS D, E, or F because of increased traffic volumes related to the project.

Projects may fall within the CO categorical hot-spot finding, per guidance issued February 12, 2014. FHWA’s website regarding the CO categorical hot-spot analysis finding can be used to determine if the project fits within the parameters. (http://www.fhwa.dot.gov/environment/air_quality/conformity/policy_and_guidance/mcf/index.cfm)

PM hot-spot quantitative analyses is required for the following projects (per 40 CFR §93.123(b)(1):

- (a) New highway projects that have a significant number of diesel vehicles, and expanded highway projects that have a significant increase in the number of diesel vehicles;
- (b) Projects affecting intersections that are at Level-of-Service D, E, or F with a significant number of diesel vehicles, or those that will change to Level-of-Service D, E, or F because of increased traffic volumes from a significant number of diesel vehicles related to the project;
- (c) New bus and rail terminals and transfer points that have a significant number of diesel vehicles congregating at a single location;
- (d) Expanded bus and rail terminals and transfer points that significantly increase the number of diesel vehicles congregating at a single location; and,
- (e) Projects in or affecting locations, areas, or categories of sites which are identified in the PM₁₀ or PM_{2.5} applicable implementation plan or implementation plan submission, as appropriate, as sites of violation or possible violation.

The TD/AQ Section staff will be able to assist in determining whether a project level emissions analysis is required for the project. **If applicable, a copy of the Air Quality Assessment memorandum must be included with the Categorical Exclusion Checklist.** If there are any violations of the NAAQS resulting from this project, an Individual CE is required.

Additional information on this subject is available at the following Internet web site address: http://www.fhwa.dot.gov/environment/air_quality/

Detailed Instructions for CE Checklist (Continued)

- **Project Level Conformity** – The criteria for determining conformity of a project are contained in 40 CFR §93.109. For projects that are either (a) exempt from Transportation Conformity; (b) exempt from a regional emissions analysis; or, (c) do not otherwise require a project level emissions analysis, an Automatic or Programmatic CE is applicable. A list of exempt projects can be found in 40 CFR §93.126 and 40 CFR §93.127.

For those projects that do not qualify as an Automatic or Programmatic CE per any of the above-listed three conditions, if the project is included in the applicable Metropolitan Planning Organization's (MPO's) current conforming TIP **and** the current conforming STIP, the project is in conformity, and a separate Project Level Conformity determination is not required unless a Project Level Emissions analysis is required. For all other projects, if the project is not from a conforming plan and TIP, a separate Project Level Conformity determination is required. **An Individual CE must be prepared if the Project Level Emissions analysis results in a finding of non-conformity for the project. If the Project Level Emissions analysis finds that the project is in conformity, then an Automatic or Programmatic CE can be prepared.**

Project Level Conformity determinations should be developed in consultation with the TD/AQ Section and must be included with the CE Checklist.

Additional information on this subject is available at the following Internet web site address:

http://www.fhwa.dot.gov/environment/air_quality/conformity/

- **Mobile Source Air Toxics (MSATs)** – USEPA has identified a list of hazardous air pollutants that come from mobile sources, which are known or suspected to cause adverse health and environmental effects, known as Mobile Source Air Toxics (MSATs). FHWA has issued interim guidance regarding the consideration of MSATs in NEPA documents (*Interim Guidance Update on Mobile Source Air Toxic Analysis in NEPA*, December 6, 2012, http://www.fhwa.dot.gov/environment/air_quality/air_toxics/policy_and_guidance/aqintguidmem.cfm). Through this guidance, FHWA has developed the following tiered approach for analyzing MSATs:
 - (a) No analysis for projects with no potential for meaningful MSAT effects;
 - (b) Qualitative analysis for projects with low potential for MSAT effects; or,
 - (c) Quantitative analysis to differentiate alternatives for projects with higher potential MSAT effects.

For projects that are automatic CEs (Part 3 of the CE Checklist) found in 23 CFR §771.117(c), or exempt from conformity requirements under the CAA pursuant to 40 CFR §93.126, no analysis or discussion of MSAT is necessary. For other projects with no or negligible traffic impacts, no MSAT analysis is recommended. **However, the**

Detailed Instructions for CE Checklist (Continued)

supporting documentation for the CE should document the basis for the determination, and have a brief description of the factors considered using the prototype language found in Appendix A of the Interim Guidance.

Projects with low MSAT effects require a qualitative analysis. These are the types of projects that serve to improve operations of highway, transit or freight without adding substantial new capacity, or without creating a facility that is likely to meaningfully increase MSAT emissions. Types of projects can include the following: minor widening projects; new interchanges; replacing a signalized intersection on a surface street; or, projects where the design year traffic is projected to be less than 140,000 to 150,000 average annual daily traffic (AADT). **Appendix B of the Interim Guidance has prototype language that must be included in the CE.**

Projects with higher potential MSAT effects are those that would do the following:

- ❖ Create or significantly alter a major intermodal freight facility that has the potential to concentrate high levels of diesel particulate matter in a single location, involving a significant number of diesel vehicles for new projects or accommodating with a significant increase in the number of diesel vehicles for expansion projects; or,
- ❖ Create new capacity or add significant capacity to urban highways such as interstates, urban arterials, or urban collector-distributor routes with traffic volumes where the AADT is projected to be in the range of 140,000 to 150,000 or greater by the design year; and also,
- ❖ Proposed to be located in proximity to populated areas.

If the project meets these criteria, then coordination with FHWA must occur. For additional guidance, contact TD/AQ Section of Planning for assistance.

- 14. Federally Protected Species** – Federally protected species are those listed as threatened and endangered by the U.S. Fish and Wildlife Service (**USFWS**) per the Endangered Species Act, or bald and golden eagles, which have special protection under the Bald and Golden Eagle Protection Act. Areas containing known population of occurrences of federally protected species are depicted on maps provided by CTDEEP's Natural Diversity Database Unit that are updated every six months. In addition, the USFWS has the Information for Planning and Conservation (IPaC) online database that OEP reviews for the potential presence of federally protected species. OEP reviews these data sources and reports its findings on the Environmental Review Form. If the project is not located in or near an area with these resources, an Automatic or Programmatic CE is applicable. In addition, if OEP views that the project will have "no effect" to a federally protected species or critical habitat, an Automatic or Programmatic CE can be used.

If there is an indication that there may be a federally protected species or its critical habitat is present in or near the area of the project, OEP will note this on the Environmental Review Form, and a memorandum is sent to the CTDEEP Natural Diversity Database Unit and informal

Detailed Instructions for CE Checklist (Continued)

consultation is conducted with the USFWS. These agencies will reply with guidance, such as a request for a field review of the project by a biologist, special precautions to be taken, or seasonal restrictions for work within the area. If the project “is not likely to adversely effect” these resources, an Automatic or Programmatic CE is applicable. If a federally protected species is “likely to be adversely affected”, then formal consultation will occur between OEP, FHWA, and the USFWS per Section 7 of the Endangered Species Act, and an Individual CE must be submitted to the FHWA.

Additional information on this subject is available at the following Internet web site address:

<http://www.environment.fhwa.dot.gov/guidebook/results.asp?selSub=28>

15. **Title VI and Environmental Justice** – Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color or national origin. Executive Order No. 12898 requires federal agencies to identify and address, as appropriate, disproportionately high and adverse impacts on minority and low-income populations. A narrative is required to analyze any disproportionate impacts on minority and low-income populations affected by the project that cannot be avoided, minimized or mitigated.

Additional information on this subject is available at the following Internet web site address:

http://www.fhwa.dot.gov/environment/environmental_justice/

16. **U.S. Coast Guard Bridge Permit** – For projects involving bridges over navigable waterways, if a Bridge Permit from the U.S. Coast Guard is required, an Individual CE is required. The Individual CE should include a summary of coordination with the U.S. Coast Guard regarding all project activities subject to their jurisdiction, including navigation lighting. If the project can be exempt from a bridge permit by the FHWA under the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) exemption, then an Automatic or Programmatic CE can be prepared. Contact OEP Wetlands and Natural Resources Staff for further information about whether a bridge qualifies for a STURAA exemption.

Additional information on this subject is available at the following Internet web site address:

http://www.uscg.mil/hq/cg5/cg551/BPAG_Page.asp

17. **ROW Office Determinations**

- A. **Occupancy, Use & Reservation of Airspace Rights** - Although 23 CFR §710.405 specifically deals with approval of actions concerning air rights on the interstates, any use of airspace contemplated by the Department must assure that such occupancy, use or reservations are in the public interest and will not impair or interfere with the free and safe flow of traffic. The temporary or permanent occupancy, reservation or use of air rights must be approved by the FHWA unless delegation of this authority is covered by the Utility Accommodation Manual (2/2009). Approvals actions for the occupancy, reservations or use of air rights must not have significant environmental effects and/or adverse effects on the environment

Detailed Instructions for CE Checklist (Continued)

to satisfy conditions or criteria for CEs.

- B. **Disposal of Excess Right-of-Way** - Real property interests determined to be excess to transportation needs may be sold, conveyed, transferred or otherwise disposed of from the State's care, custody and control in accordance with 23 CFR §710.403(d). The State shall specify in the ROW Operations Manual, procedures for the rental, leasing, licensing, maintenance and disposal of real property acquired with Title 23 of the United States Code funds. Chapter IV in the State's Manual of Organization Functions and Procedures specify the steps necessary for disposal of excess right of way. If the disposal requires approval from FHWA then the State shall submit documentation that demonstrates specific conditions or criteria for CEs are satisfied and that significant environmental effects will not result.
- C. **Change in Access Control** - For any change in access control or other use or occupancy of acquired real property along the **Interstate**, the Department shall secure an approval from FHWA for such change or use. Changes in access control which do not individually or cumulatively have significant environmental effects may meet the criteria for a CE. The State seeking administrative approval from the FHWA shall submit documentation that demonstrates such criteria satisfying the conditions for a CE that demonstrate no significant environmental impacts resulting from the change in access control activities.
- D. **Acquisition of Land for Hardship or Protective Purposes** - The State may initiate the acquisition of real property at any time it has the legal authority to do so based on program or project considerations (but such acquisition is subject to certain conditions if NEPA review is not complete or if a later request for credit to the State share or for reimbursement is contemplated). Prior to the State obtaining final environmental approval, the Department may request FHWA agreement to provide reimbursement for advanced acquisition of a particular parcel or a limited number of parcels, to prevent imminent development and increased costs on the preferred location (Protective Buying) or to alleviate hardship to a property owner or owners on a preferred location (Hardship Acquisition). There are general limiting conditions found within 23 CFR §710.503. Acquisition of property under this section and under the conditions listed shall not influence the environmental assessment of a project including the decision relative to the need to construct the project or the selection of a specific location. These types of land acquisitions will qualify for a CE only where the acquisitions will not limit the evaluation of alternatives including shifts in alignment for planned construction projects which may be required in the NEPA process.
- E. **Federal Land Transfers** - Sections 107(d) and 317 of Title 23 of the United States Code provide for the transfer of lands or interest in lands owned by the United States to a State Department of Transportation or its nominee for highway purposes. The State may file an application with the FHWA, or can make application directly to the land-owning agency if the land owning agency has authority for granting interest in land. Conditions for making

Detailed Instructions for CE Checklist (Continued)

such application may be found in 23 CFR §710.601. If the actions meet the criteria in §771.117(c) and do not involve unusual circumstances those actions would qualify as a CE under 23 CFR §771.117(c)(5).

Part 2: FORMAT FOR INDIVIDUAL CATEGORICAL EXCLUSIONS

When submitting Individual CEs to FHWA for approval, use the following guidelines in formatting the request for CE concurrence. Questions may be directed to the FHWA Connecticut Division Environmental Protection Specialist at (860) 494-7577.

General:

- Send the request to FHWA in letter format.
- Send a signed scanned copy of the letter or an original on CTDOT letterhead to FHWA, addressed to the FHWA Division Administrator.
- Send the Individual CE Request and supporting documentation to the official FHWA Connecticut Division Mailbox at Connecticut.FHWA@dot.gov.

Subject:

- State project number (and construction number, if different)
- Federal project number
- Short description and location, such as “Reconstruction of Commerce Drive – Fairfield”
- **“REQUEST FOR CATEGORICAL EXCLUSION CONCURRENCE” “REQUEST FOR CONCURRENCE ON CATEGORICAL EXCLUSION RE-EVALUATION”**

Purpose and Description:

- Identify and specifically describe the transportation or other needs that the project or right-of-way action is intended to satisfy (e.g., provide system continuity, alleviate traffic congestion, correct safety deficiencies, correct geometric deficiencies, etc.).
- Describe the proposed project scope in sufficient detail as necessary so someone not familiar with the project or action can easily understand the scope. Be sure to also describe the existing conditions and proposed improvements, i.e., lane widths, shoulder widths, bridge widths, etc., as appropriate.

The following attachments must be included with all CE-I Requests:

- Completed and Signed CE Determination Checklist.
- Environmental Review Form (must be completed within three years of requesting CE concurrence).
- Location map that shows project limits and legible street names and route numbers.
- Public Involvement Documentation; refer to the specific instructions for detailed information on documentation required (Item #3).
- Section 106 Consultation (OEP or SHPO).

Detailed Instructions for CE Checklist

(Continued)

- Tribal Consultation (from FHWA through OEP).
- Supporting documentation only for the Condition(s) of Automatic/Programmatic CE that are not met (Part 3, Questions 1 to 17) and require the project to be requested as a CE-I; no backup documentation needs to be included to substantiate the CE conditions that are met; refer to the DETAILED INSTRUCTIONS for specific information on documentation required.
- Clearly establish why the associated potential impacts are not considered to be “Significant” – see ***Definitions, Conditions, and Classifications of Categorical Exclusions*** for a discussion of “significant”.
- Air Quality Memorandum (if analysis performed).
- Appropriate sheets from the preliminary design plans that shows area affected by the Programmatic CE condition(s) not met. Fold oversize sheets to 8½” x 11”.
- Photographs (when appropriate) to further describe existing conditions.

**PROGRAMMATIC
CATEGORICAL EXCLUSION AGREEMENT
BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION
AND
THE NEBRASKA DEPARTMENT OF ROADS**

**REGARDING THE PROCESSING OF HIGHWAY PROJECTS CATEGORICALLY
EXCLUDED FROM THE REQUIREMENTS TO PREPARE EITHER AN
ENVIRONMENTAL ASSESSMENT OR ENVIRONMENTAL IMPACT STATEMENT**

APRIL 2015

(SUPERSEDES AGREEMENT DECEMBER 1, 2008 - PROGRAMMATIC AGREEMENT
FOR NEPA CATEGORICALLY EXCLUDED TRANSPORTATION PROJECTS)



U.S. HIGHWAY 20 BRIDGE OVER THE WHITE RIVER, DAWES COUNTY
PHOTOGRAPH BY JUSTIN WILLIAMS

Whereas, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370h (2014), and the Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500-1508) direct Federal agencies to consider the environmental impacts of their proposed major Federal actions through the preparation of an environmental assessment (EA) or environmental impact statement (EIS) unless a particular action is categorically excluded;

Whereas, the Federal Highway Administration's (FHWA) distribution and spending of Federal funds under the Federal-aid Highway Program and approval of actions pursuant to Title 23 of the U.S. Code are major Federal actions subject to NEPA;

Whereas, the Secretary of Transportation has delegated to FHWA the authority to carry out functions of the Secretary under NEPA as they relate to matters within FHWA's primary responsibilities (49 CFR 1.81(a)(5));

Whereas, the FHWA's NEPA implementing procedures (23 CFR part 771) list a number of categorical exclusions (CE) for certain actions that FHWA has determined do not individually or cumulatively have a significant effect on the human environment and therefore do not require the preparation of an EA or EIS;

Whereas, the Nebraska Department of Roads (NDOR) is a State agency that undertakes transportation projects using Federal funding received under the Federal-aid Highway Program and must assist FHWA in fulfilling its obligations under NEPA for the NDOR projects (23 CFR 771.109);

Whereas, Section 1318(d) of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405 (July 6, 2012), allows FHWA to enter into programmatic agreements with the States that establish efficient administrative procedures for carrying out environmental and other required project reviews, including agreements that allow a State to determine whether a project qualifies for a CE on behalf of FHWA;

Whereas, the FHWA developed regulations implementing the authorities in section 1318(d), effective November 6, 2014;

Now, therefore, the FHWA and NDOR enter into this Programmatic Agreement ("Agreement") for the processing of categorical exclusions.

A. PARTIES

The Parties to this Agreement are the Federal Highway Administration ("FHWA") and the Nebraska Department of Roads (hereinafter "NDOR").

B. PURPOSE

The purpose of this Agreement is to authorize NDOR to determine on behalf of FHWA whether a project qualifies for a CE specifically listed in 23 CFR 771.117 as listed in Appendix A and B of this Agreement.

C. AUTHORITIES

This agreement is entered into pursuant to the following authorities:

1. National Environmental Policy Act, 42 U.S.C. 4321 - 4370
2. Moving Ahead for Progress in the 21st Century Act, P.L. 112-141, 126 Stat. 405, Sec. 1318(d)
3. 40 CFR parts 1500 - 1508
4. DOT Order 5610.1C
5. 23 CFR 771.117

D. INTRODUCTION

The FHWA Nebraska Division follows the philosophy that the goal of the NEPA process is better decisions and not bigger documents. The primary purpose of this Agreement is to increase flexibility, streamline the environmental process, and reduce paperwork while maintaining appropriate consideration of projects' impacts on the human and natural environment. This Agreement provides for the expeditious processing of CE actions by NDOR, under the guidance and with the approval of FHWA. NDOR shall develop project documentation that demonstrates that project actions meet the CE criteria established under this Agreement and shall demonstrate that project actions meet the definition of a CE defined in 23 CFR 771.117(a) (see Council on Environmental Quality [CEQ] definition below) and have no unusual circumstances defined in 23 CFR 771.117(b) that would require the preparation of either an EA or EIS. The FHWA shall rely upon this documentation as a basis for any CE determinations it must make as part of consideration of notices to proceed to final design, right-of-way purchases, or construction.

NDOR will satisfy all conditions contained herein for all projects processed under this Agreement. This Agreement supersedes the December 17, 2008 CE processing agreement held between FHWA and NDOR, titled *Programmatic Agreement for the Review and Approval of NEPA Categorically Excluded Transportation Projects between the Federal Highway Administration Nebraska Division and the Nebraska Department of Roads*. This agreement applies to all projects that involve FHWA funding or approvals. This Agreement does not apply to 100% state funded projects that do not require FHWA approval.

In accordance with FHWA regulations [23 CFR 771.117(a)], CEs are actions which meet the definition contained in the CEQ regulations at 40 CFR 1508.4, and based on past experience with similar actions, do not involve significant environmental impacts and therefore are categorically excluded from the need to prepare an EA or EIS. They are actions which:

- Do not induce significant impacts to planned growth or land use for the area;
- Do not require the relocation of significant numbers of people;
- Do not have a significant impact on any natural, cultural, recreational, historic, or other resource;
- Do not involve significant air, noise or water quality impacts;
- Do not have significant impacts on travel patterns; or
- Do not otherwise, either individually or cumulatively, have any significant environmental impacts

The term "Significant" as used in NEPA is defined at 40 CFR 1508.27 and requires consideration of both context and intensity.

This agreement has been developed to be in conformance with the policy and procedures for the environmental processing of CE actions as defined in Section 23 CFR 771.117 (and as amended).

E. RESPONSIBILITIES

NDOR is responsible, as part of their processing proposed projects under this agreement, for:

1. Conducting appropriate environmental studies to determine if the CE classification is proper per 23 CFR 771.117(a) and (b), including considering unusual circumstances. Such unusual circumstances include, but are not limited to:
 - a. Significant environmental impacts;
 - b. Substantial controversy on environmental grounds;
 - c. Significant impacts on properties protected by Section 4(f) of the DOT Act or Section 106 of the National Historic Preservation Act; or,
 - d. Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.
2. Classifying all CE project actions as Level 1, or Level 2 CE Actions in accordance with 23 CFR 771.117 and this Agreement. The appropriate determination of a CE is based upon the type of action and project impacts; and,
3. Conducting environmental analyses and preparing documentation that serves as a basis for making a CE determination; and,
4. Coordinating with FHWA in the event cumulative effects may be of concern for an action; and,
5. Processing all CE project actions according to the terms of this agreement; and,
6. Preparing documentation in accordance with terms of this agreement utilizing NDOR's CE Determination Form, in agreement with FHWA Division office; *[NDOR is committed to developing electronic or "Smart Form" documentation tools for future incorporation into an online document production and storage system. These forms/systems will be incorporated, modified, and/or replaced as necessary with concurrence from with FHWA throughout the term(s) of this Agreement.]*; and,
7. Making CE determinations (CE approvals) on FHWA's behalf for Level 1 and Level 2 CE Actions; and,
8. Conducting quality control and quality assurance reviews to ensure that the provisions of this agreement are being appropriately followed; and,
9. Ensuring qualified staff perform all environmental reviews and documentation; and,
10. Assuring compliance with all applicable federal environmental and related requirements.

The FHWA Nebraska Division Office is responsible for:

1. Providing timely responses to request for reviews and approvals of items submitted by NDOR including but not limited to:
 - a. Questions on class of action
 - b. Reviews for Section 4(f), Section 106, Section 7 impacts
 - c. Review and approval of Level 3 CE Actions
2. Participating in any project level agency coordination, consultation, public involvement activity, or government to government consultation, as appropriate; and,
3. As part of its program oversight responsibility, conducting monitoring of NDOR's performance according to the terms of this agreement; and,
4. Determining whether a project should be classified as a Level 3 CE, EA or EIS

F. CE ACTION LEVELS

Activity types and environmental impact thresholds that define Level 1 and Level 2 CE actions for purposes of this agreement are defined in Appendices A and B. If a project does not meet the criteria for a Level 1 or Level 2 CE Action and a variance is not provided by FHWA, the project would be processed as either a Level 3 CE, an EA, or EIS as determined by FHWA. NDOR shall ensure that each project processed under this Agreement will be documented in accordance with the thresholds specified in the appendices of this Agreement.

CE determinations for Level 1 CE actions shall only be approved by a full-time equivalent NDOR Environmental Documents NEPA Analyst, the NDOR Environmental Document Unit Supervisor, or the NDOR Environmental Section Manager. CE determinations for Level 2 CE actions shall be only approved by the NDOR Environmental Documents Unit Supervisor or the Environmental Section Manager.

For projects that will likely exceed the Level 2 CE actions thresholds, NDOR will provide FHWA pertinent project scope and potential resource impact information using NDOR's *Probable Class of Action* form (or a successor form in agreement with FHWA) for FHWA to make the class of action determination. This will occur early in the environmental review process or during planning.

Level 3 CE actions can include projects with impacts greater than those listed as Level 1 or Level 2 CE actions. Level 3 CE actions must meet the intent of 23 CFR 771.117 in that they must satisfy the criteria for CE classification and cannot involve significant environmental impacts. Level 3 CE documentation shall be approved for content and accuracy by the NDOR Environmental Documents Unit Supervisor or the Environmental Section Manager prior to submittal to FHWA. FHWA retains approval authority for Level 3 CE actions.

This Agreement shall not preclude NDOR from requesting, or FHWA granting a CE review level *variance* when the project action results in a minor exceedance of the thresholds listed in Appendix A or B, on a case-by-case basis. NDOR shall provide FHWA pertinent project information and justification relevant to the *variance* request. In addition, the project action must qualify as a listed CE activity in 23 CFR 771.117 (c) or (d). Nothing in this Agreement diminishes FHWA's right to individually review any CE action, or prevent NDOR from requesting FHWA review of a Level 1 or Level 2 classified project.

G. DOCUMENTATION OF NDOR CE APPROVALS AND CERTIFICATIONS

NDOR shall ensure that it fulfills the following responsibilities for documenting CE approvals made by NDOR on behalf of FHWA, and State CE certifications for CE actions to be approved by FHWA:

1. For actions listed in Appendix A and B, NDOR will identify the applicable action, ensure any conditions specified in FHWA regulation are met, verify that unusual circumstances do not apply, address all other environmental requirements, and complete the review with a NDOR signature evidencing approval.
2. In addition, for actions listed in 23 CFR 711.117 (d), NDOR shall prepare documentation that supports the CE determination and that no unusual circumstances exist that would make the CE approval inappropriate.

NDOR shall maintain a project record for CE approvals it makes on FHWA's behalf and each CE submitted to FHWA for approval. This record should include at a minimum:

1. Any checklists, forms, or other documents and exhibits that summarize the consideration of project effects and unusual circumstances;
2. A summary of public involvement complying with the requirements of FHWA-approved public involvement policy;
3. Any stakeholder communication, correspondence, consultation, or public meeting documentation;
4. The name and title of the document approver and the date of NDOR's approval or FHWA's final approval; and
5. Documented re-evaluations (when required) or a statement that a re-evaluation was completed for the project (when documentation is not necessary).

Inherently governmental functions, such as CE approvals, must be performed by a government employee.

Any electronic or paper project records maintained by the NDOR shall be provided to FHWA at their request. NDOR will retain those records, including all letters and comments received from governmental agencies, the public, and others for a period of no less than three (3) years after completion of project construction. This 3-year retention provision does not relieve NDOR of its project or program recordkeeping responsibilities under 2 CFR § 200.333 or any other applicable laws, regulations, or policies.

H. REEVALUATIONS

It may become necessary for NDOR to re-evaluate the CE classification for projects having CE determinations. Re-evaluations shall be conducted by NDOR in accordance with 23 CFR 771.129. If there is a change in project scope or impacts, a written re-evaluation will be required prior to further approvals being granted. The re-evaluation of a CE shall be conducted by NDOR for the following circumstances:

1. If the project scope has changed since the last CE determination

2. If the project impacts have changed since the last CE determination
3. If regulatory changes occur that would influence the project or necessitate a reevaluation of impacts.

A reevaluation would be necessary if there are substantial changes in the proposed action that are relevant to social, economic or environmental concerns or if there are new circumstances or information relevant to social, economic, or environmental concerns with bearing on the proposed actions or its impacts.

NDOR shall document re-evaluations using a memorandum to the file or the reevaluation block on the CE form, commensurate with the action. The signature authority for re-evaluations will be the same as for the original CE document unless the re-evaluation indicates a change in the level of document is needed. It is the responsibility of NDOR to ensure that the conditions of the project have not changed and the NEPA determination remains valid for the action.

I. STATE DOT PERFORMANCE MEASURES

On a quarterly basis, NDOR will provide FHWA a list of Level 1 and Level 2 CE actions processed under this Agreement. The previous quarter's data will be provided to FHWA no later than the 10th of the first month after each consecutive quarter. At a minimum the list will contain the project number, control number, project name, date of NDOR approval, CE action level, and the corresponding (c) list or (d) list category used to approve the project.

For national reporting purposes, FHWA will periodically request NDOR to report the duration to complete CE processing. NDOR and FHWA Nebraska Division will mutually agree on the methodology used to measure CE processing duration.

NDOR must maintain adequate organizational and staff capability and expertise, or as appropriate, procure through consultant services some or all of the technical expertise needed, to effectively carry out the provisions of this Agreement. This includes:

1. Using appropriate technical and managerial expertise to perform the functions set forth under this Agreement; and
2. Devoting adequate financial and staff resources to carry out the certification and processing of projects under this Agreement

NDOR shall have written protocols to ensure that environmental commitments are fulfilled.

NDOR will continue to offer training as part of its environmental consultant prequalification process to ensure high quality standards in documentation preparation. A minimum of 3 training events during the five year Programmatic Agreement period will be held.

NDOR will monitor its processes relating to project approvals, environmental analysis and project file documentation and check for errors and omissions. NDOR shall take corrective action as needed and will document quality control activities and any corrective actions taken and will provide FHWA a summary of the findings upon request.

NDOR will utilize interim written QA/QC procedures effective on the signature date of this agreement. Final quality control process and written procedure will be provided to FHWA Nebraska Division no later than *June 2016*.

NDOR 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], NEPA, and consistent with applicable FHWA regulation, policy, and guidance.

J. MONITORING

Full compliance with the Agreement will be determined by FHWA through completion of process reviews on an annual basis for the first two years of this agreement, then every other year thereafter.

NDOR and FHWA will jointly conduct process reviews of all Level 1 and Level 2 CE actions, and prepare a report detailing the findings, recommendations and best practices. The results of such reviews will be used to determine what agreement modifications, if any, may be needed and a reasonable schedule to address process review action items shall be included in the report. FHWA shall review Level 3 CE actions at least once during the life of this 5 year agreement and as needed.

Nothing in this Agreement shall prevent FHWA from undertaking other monitoring or oversight actions, including process reviews, with respect to NDOR performance under this Agreement. FHWA may identify findings or observations, as a result of its oversight monitoring, that NDOR has not performed according to the provisions of this agreement. In such cases NDOR shall prepare and implement a corrective action plan to address such findings and observations. At its sole discretion, FHWA may require NDOR to perform other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with applicable Federal laws and regulations.

K. TERM, RENEWAL, TERMINATION, & MODIFICATIONS

This Agreement shall have a term of five (5) years, beginning on the date of the last signature. This Agreement is renewable for additional terms of five (5) years each, if NDOR requests renewal and FHWA determines that NDOR has satisfactorily carried out the provisions of this Agreement. In considering any renewal of this Agreement, FHWA will evaluate the effectiveness of the Agreement, compliance with the terms of the agreement, and its overall impact on the environmental review process.

NDOR shall post an executed copy of this Agreement on its web site, available to the public.

At least six (6) months prior to the end of each term, NDOR and FHWA shall meet to discuss the results under the Agreement and consider amendments to this Agreement. If the parties do not renew the Agreement, then it shall expire at the end of the term then in effect.

Either party may terminate this Agreement at any time by giving at least a 30 day written notice to the other party.

Any party to this Agreement may request that it or the Appendices be amended to reflect changes, whereupon the parties shall consult to consider such an amendment. If the parties agree to amend this Agreement or the Appendices, then FHWA and NDOR may execute an amendment with new signatures and dates after all necessary reviews are completed. The term of the Agreement shall remain unchanged unless otherwise expressly stated in the amended Agreement. Minor non-substantive changes to the Appendices may be made through

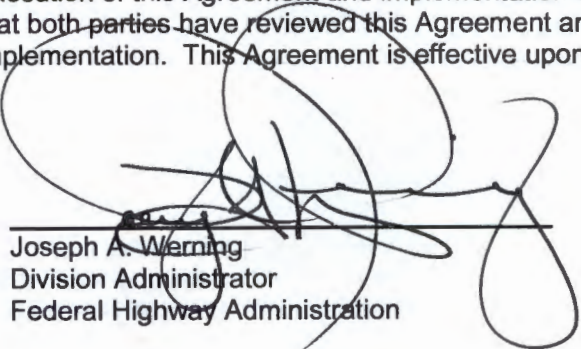
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appropriate clarification guidance to better refine implementation of the agreement based on experience. This will not require re-execution of the Agreement, but would require the written consent of both parties.

Expiration or termination of this Agreement shall mean that NDOR is not able to make CE approvals on FHWA's behalf.


Signatures

Execution of this Agreement and implementation of its terms by both parties provides evidence that both parties have reviewed this Agreement and agree to the terms and conditions for its implementation. This Agreement is effective upon the date of the last signature below.



Joseph A. Werning
Division Administrator
Federal Highway Administration

4-15-2015
Date



Randall D. Peters, P.E.
Director – State Engineer
Nebraska Department of Roads

4/14/15
Date

Appendix A: Level 1 CE Actions

Due to the limited scope of work for certain projects and based on NDOR and FHWA's past experience with similar actions, these actions meet the intent of CEQ regulation (Section 1508.4) and 23 CFR 771.117(a) and 771.117(c): some actions "...meet the criteria for CEs in the CEQ regulation and normally do not require any further NEPA reviews by the Administration."

These projects must have independent utility and logical termini and must not exceed any of the Level 1 project impact thresholds listed in the next section. Based on past experience, projects listed below will not result in any significant impacts to the human and/or natural environment. If environmental resources will be impacted, the level of documentation will need to be elevated.

The NDOR shall be ultimately responsible for ensuring that projects meet the criteria of a Level 1 CE action and do not require any further NEPA approvals. The following project actions correlate to the actions described in 23 CFR 771.117(c)(1) through (25) and have been determined to meet the criteria of a Level 1 CE action as defined by NDOR and FHWA:

- (1) Activities which do not involve or lead directly to construction, such as planning and research activities; grants for training; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system. Examples include:
 - Study type projects (i.e. feasibility studies, etc.).
 - Visual bridge inspection, including collection of physical samples (e.g. paint chips, timber pile cores, etc.), that is not part of a larger undertaking.
- (2) Approval of utility installations along or across a transportation facility. Examples include:
 - Tower lighting and street lighting projects.
 - Repair/replacement of intersection, underpass, overpass or other roadway lighting.
- (3) Construction of bicycle and pedestrian lanes, paths, and facilities. Examples include:
 - Walkways, sidewalks, re-construction of shared-use paths and facilities, construction of a bike path on an existing railroad bed, designations of certain highways as bike routes, painting of existing paved shoulders as bike lanes, ADA ramps.
 - Construction of new shared-use paths and facilities will require at least a Level 2 review.
- (4) Activities included in the State's "highway safety plan" under 23 U.S.C. 402.
- (5) Transfer of Federal lands pursuant to 23 U.S.C. 107(d) and/or 23 U.S.C. 317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA.

- (6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction. Examples include:
 - Maintenance and/or replacement of existing noise wall panels and/or posts
- (7) Landscaping. Examples include:
 - Beautification or facility improvement projects (i.e. landscaping, curb and gutter replacement, installation of park benches, decorative lighting, etc.)
- (8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur. Examples include:
 - The installation, replacement or maintenance of signs and signals, pavement markings/raised pavement markers/sensors, traffic calming activities, and/or new or replacement fencing.
 - General pavement marking or "line painting" projects, other than re-striping a roadway to increase capacity.
- (9) The following actions for transportation facilities damaged by an incident resulting in an emergency declared by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121):
 - (i) Emergency repairs under 23 U.S.C. 125; and
 - (ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:
 - (A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and
 - (B) Is commenced within a 2-year period beginning on the date of the declaration.
- (10) Acquisition of scenic easements. Examples include:
 - Land acquisition by a public agency/public park entity for passive recreational use.
- (11) Determination of payback under 23 CFR part 156 for property previously acquired with Federal-aid participation.

- (12) Improvements to existing rest areas and truck weigh stations. Examples include:
- Improvements to existing rest areas and weigh stations for minor maintenance (i.e. mill and resurfacing of existing ramp and parking areas, lighting or other enhancements to rest area facilities). Projects involving major construction may require a higher level of documentation.
 - Rest Area/Weigh Station electrification and construction/installation supporting alternative energy vehicles at existing facilities
- (13) Ridesharing activities. Examples include:
- Transportation corridor fringe parking facilities, park-and-ride lots and ridesharing activities
- (14) Bus and rail car rehabilitation.
- (15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.
- (16) Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.
- (17) The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a CE. Examples include: Purchase or conversion of vehicles to alternative fuel uses (CNG, E-85, etc.)
- (18) Track and railbed maintenance and improvements when carried out within the existing right-of-way.
- (19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.
- (20) [Deleted due to inapplicability in the NDOR Transportation Program].
- (21) Deployment of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience. Examples include, but are not limited to, traffic control and detector devices, lane management systems, electronic payment equipment, automatic vehicle locaters, automated passenger counters, computer-aided dispatching systems, radio communications systems, dynamic message signs, and security equipment including surveillance and detection cameras on roadways and in transit facilities and on buses. Other examples include:
- Replacement of existing or installation of new traffic signals, flashing beacons, railroad warning devices and the installation of ITS system components
 - Upgrade of existing tower lighting to new technologies that ensure a lesser impact than the current system.
 - Fiber optic trenching within the existing roadway ROW

- Implementation of other new safety or operations technologies.
- (22) Projects, as defined in 23 U.S.C. 101 that would take place entirely within the existing operational right-of-way. Operational right-of-way refers to right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose. This area includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, etc.) and other areas maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities. Portions of the right-of-way that have not been disturbed or that are not maintained for transportation purposes are not in the existing operational right-of-way. Example actions may include:
- General highway maintenance and improvements such as pavement repair, armor coat, chip/fog seal, crack/joint seal, grinding/resurfacing, microsurfacing, mill and inlay/overlay, shoulder surfacing, trench widening, shoulder reconstruction.
 - Culvert installation and maintenance activities including headwall, wingwall and other similar repair replacement or modification; installation or replacement of Flared End Sections (FES); in-kind replacement; new curb and flume installation (new locations), repair/replacement, etc.
 - Bridge maintenance and repair activities including bridge deck overlays; deck repairs (including Class III repairs); rail repair/replacement; abutment and wingwall repair, replacement or modification; approach slab replacement; painting; anti-icing system installation.
 - Guardrail replacement, repair and modification and associated surfacing where roadway ditches and back slopes will not be relocated, mail box turnouts, etc.
 - Sediment and erosion control work including slope/slide repair and reconstruction.
 - Construction of new or improvements to existing NDOR facilities when the actions occur within the existing operational right-of-way.
- (23) Federally-funded projects:
- (i) That receive less than \$5,000,000 of Federal funds; or
 - (ii) With a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated project cost.

(Note: Total project costs include all phases of work on a project, from preliminary engineering, to final design, right-of-way, construction, etc. The \$5,000,000 cumulative threshold includes all federal funds applied to the project, regardless of phase.)

Example actions may include:

- General highway maintenance and improvements such as pavement repair, armor coat, chip/fog seal, crack/joint seal, grinding/resurfacing, microsurfacing, mill and inlay/overlay, shoulder surfacing, trench widening, shoulder reconstruction.
- Culvert installation and maintenance activities including headwall, wingwall and other similar repair replacement or modification; installation or replacement of Flared End

- Sections (FES); in-kind replacement; new curb and flume installation (new locations), repair/replacement, etc.
 - Bridge maintenance and repair activities including bridge deck overlays; deck repairs (including Class III repairs); rail repair/replacement; abutment and wingwall repair, replacement or modification; approach slab replacement; painting; anti-icing system installation.
 - Guardrail replacement, repair and modification and associated surfacing where roadway ditches and back slopes will not be relocated, mail box turnouts, etc.
 - Sediment and erosion control work including slope/slide repair and reconstruction.
- (24) Localized geotechnical and other investigations to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.
- (25) Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. 1341; 1342)) carried out to address water pollution or environmental degradation. Examples include:
- Conservation/mitigation easements and fee simple.
- (26, 27, 28) These “(c)” listed activities cannot be processed as a Level 1 Action per 23 CFR 711.117(c)(26-28) and the provisions identified in MAP-21 (see Appendix B).
- (29) [Deleted due to inapplicability in the NDOR Transportation Program].
- (30) [Deleted due to inapplicability in the NDOR Transportation Program].

Level 1 CE Action - Impact Thresholds

Projects that exceed the following thresholds will not be considered eligible for processing as a Level 1 CE Action:

- Any acquisition of new temporary or permanent right-of-way for construction. All Level 1 CE actions must occur within existing right-of-way
- National Wild and Scenic River or National Recreational River corridor impacts. Upon written concurrence from the agency of jurisdiction, a finding of “no impact” would not preclude processing the action as a Level 1 CE.
- An action that causes greater than 1-foot rise in the Base Flood Elevation (BFE), any rise in a floodplain that potentially impacts an adjacent structure, or any rise in a floodway.
- Section 404 Nationwide Permit requiring Pre-Construction Notification or an Individual Permit or a Section 9 Coast Guard Permit.
- Impacts to wetlands greater than 0.50 acre, including isolated wetlands/waters of the state.
- Impacts to state or federally threatened or endangered species resulting in a “May Affect” determination per the Nebraska Biological Evaluation Process *Matrix* and requiring further review and resource agency concurrence.
- Impacts to historic properties or historic districts. All Level 1 CE Actions must result in a *No Potential to Affect* or a *No Historic Properties Affected* determination.

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- Hazardous material conflicts: If the project qualifies as an exemption per the Hazardous Material Manual and/or it has been determined by NDOR HazMat specialists there is low potential for conflict with hazardous materials it qualifies for Level 1.
- Section 4(f) use (temporary or permanent), determination of 4(f) exception, or a 6(f) conversion.
- Minor traffic disruption, including the use of a temporary road, detour or ramp closure unless the use of such facilities satisfy the following conditions:
 - Duration of the detour is less than 30 working days in length;
 - Designated detours would result in adverse (out-of-direction) travel less than 5 miles in urban areas or 25 miles in rural areas;
 - Provisions are made for access by local traffic and so posted;
 - Through-traffic dependent businesses will not be adversely affected;
 - The detour or ramp closure will not interfere with any local special event or festival;
 - The temporary road, detour or ramp closure does not substantially change the environmental consequences of the action;
 - There is no unresolved controversy associated with the temporary road, detour, or ramp closure
- The action will not result in the complete closure of access to residential properties greater than 5 working days, closure of business access during operational hours or access restrictions to emergency service facilities or providers.
- A Type I project as defined by NDOR's approved Traffic Noise Policy and 23 CFR 772, will not qualify as a Level 1
- Any adverse impact to minority or low income populations
- Unresolved public or agency controversy on environmental grounds. If NDOR identifies or receives notification of human, natural or economic impacts as a result of the project after all other issues have been addressed (e.g. permits, authorizations, agreements, etc. have been received), the action cannot be processed as a Level 1 CE action. NDOR shall coordinate with FHWA to determine the proper level of environmental review if unresolved controversy exists.

Appendix B: Level 2 CE Actions

Due to the limited scope of work for certain projects and based on NDOR and FHWA's past experience with similar actions, these actions meet the intent of CEQ regulations (Section 1508.4), and 23 CFR 771.117(a), (b), and (c). Furthermore, these actions satisfy the criteria for CE Classification and do not involve significant environmental impacts. These projects must have independent utility and logical termini and must not exceed any of the Level 2 CE action impact thresholds listed below. Level 2 CE actions require documentation to ensure no unusual circumstances are present (ex., significant environmental impacts; substantial controversy on environmental grounds; significant impact on properties protected by Section 4(f) of the DOT Act or Section 106 of the National Historic Preservation Act; or inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action) that would warrant a higher level of NEPA documentation.

Certain projects that exceed Level 1 CE action impact thresholds can be processed as a Level 2 CE project only if they meet the criteria of a Level 2 CE action and if they do not exceed Level 2 CE action impact thresholds. Those projects that do not meet the criteria for Level 2 shall be processed at the next appropriate higher level, whether it be a Level 3 CE, EA, or EIS.

The following project actions correlate to the actions described in 23 CFR 771.117(c) and have been determined to meet the criteria of a Level 2 CE action as defined by NDOR and FHWA. Level 1 Actions listed in Appendix A but not listed below are incorporated by reference to the list of Level 2 CE actions:

- (22) Projects, as defined in 23 U.S.C. 101 that would take place entirely within the existing operational right-of-way. For this agreement, Operational right-of-way includes the property rights necessary to build, operate and maintain the transportation facility (i.e. roadways, trails, bikeways, share use paths, etc.) and its appurtenances. Appurtenances include, for example, culverts, bridges, fencing, sidewalks, roadway approaches, shoulders, signing, ditches and backslopes. Operational right-of-way would not include non-economical remnants or existing ROW not necessary for the operation or maintenance of the transportation facility, or property acquired for environmental mitigation.

Based on previous experience with similar actions, examples may include:

- Reconstruction actions meeting the terms (operational right-of-way) and associated Level 2 CE resource impact thresholds.
 - Minor Realignment actions (less than one (1) mile in length) occurring within the Operational ROW.
 - Construction of new or improvements to existing NDOR facilities when the actions occur within the existing operational right-of-way.
- (23) Projects that receive less than \$5,000,000 of Federal funds or with a total estimated cost of not more than \$30,000,000 and with Federal funds that comprise less than 15 percent of the total estimated project cost (project costs would include preliminary engineering, right-of-way, etc. if Federal funds are used for those associated project actions).
- (26) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes), if the project meets the constraints listed in 23 CFR 771.117 (e).

Based on previous experience with similar actions, examples may include:

- Construction of bicycle lanes and pedestrian walkways, sidewalks, shared-use paths, or facilities and trailhead parking.
 - Beautification or facility improvement projects (i.e. landscaping, curb and gutter installation and replacement, ADA ramps/curb ramps, installation of park benches, decorative lighting, etc.).
 - Other project types based on past experience with similar actions with concurrence from FHWA.
- (27) Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints listed in CFR 23 771.117 (e).

Based on previous experience with similar actions, examples may include:

- Other project types based on past experience with similar actions with concurrence from FHWA.
 - If the project includes a roundabout, coordinate with FHWA to determine appropriate class of action.
- (28) Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings if the project meets the constraints listed in 23 CFR 771.117(e).

Based on previous experience with similar actions, examples may include:

- Construction of associated pedestrian crossings, grade-separated pedestrian crossings, and connecting pathways.
- Other project types based on past experience with similar actions with concurrence from FHWA.

Level 2 CE Action Impact Thresholds

The environmental resources listed below require documentation to illustrate that no significant impacts will occur. The Level 2 classification cannot be applied to projects when any of the thresholds below are exceeded:

- No addition of through-lane capacity. Auxiliary lanes and turn lanes less than a mile in length are not considered capacity-adding actions. Center turn lanes, regardless of length, are not considered capacity-adding actions.
- No acquisition of more than a minor amount of right-of-way or that would result in any residential or non-residential displacements. For this agreement, minor amounts of ROW are defined as less than 2 acres per linear mile, and no removal of major property improvements. Examples of Major improvements include residential and business structures, garages, or the removal of other features which would change the functional utility of the property. Removal of minor improvements, such as fencing, landscaping, sprinkler systems, and mailboxes would be allowed.
- No need for a bridge permit from the U.S. Coast Guard under Section 9 of the Rivers and Harbors Act.

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- No need for an Individual Section 404 permit under the Clean Water Act, or a Section 10 permit under the Rivers and Harbors Act, from the U.S. Army Corps of Engineers.
- No finding of adverse effect to any historic property considered under Section 106 of the National Historic Preservation Act.
- No Section 4(f) use resulting in greater than the following: de minimis impacts, an excepted use, or use of a programmatic evaluation.
- No finding of "may affect, likely to adversely affect" threatened or endangered species or critical habitat under the Endangered Species Act, and no use of unique conservation conditions requiring resource agency concurrence that are not included within the "Matrix" PA.
- No construction of temporary access, or the temporary or permanent closure of existing road, bridge, or ramps, that would result in major traffic disruptions,
 - A temporary traffic and access disruption would not be considered major if it meets the following conditions:
 - Duration of the detour or temporary access is less than a total of 135 working days (a typical construction season);
 - Designated detours would result in adverse (out-of-direction) travel less than 5 miles in urban areas or 25 miles in rural areas;
 - Provisions are made for access by local traffic and so posted;
 - Through-traffic dependent businesses will not be adversely affected;
 - The detour or ramp closure will not interfere with any local special event or festival;
 - The temporary road, detour or ramp closure does not substantially change the environmental consequences of the action;
 - The action will not result in the complete closure of access to residential properties greater than 10 working days, closure of business access during operational hours or access restrictions to emergency service facilities or providers.
 - There is no unresolved controversy associated with the temporary road, detour, or ramp closure
 - A permanent traffic and access disruption cannot
 - permanently close a roadway, roadway intersection, or interstate ramp
 - create new intersections
 - convert a local street into a higher classification of roadway
 - permanently change the functional utility of the property
- No Changes in access control that result in change to the functional utility of adjacent properties.
- No floodplain encroachment other than functionally dependent uses (e.g. bridges, wetlands) or actions that facilitate open space use (e.g. recreational trails, bicycle and pedestrian paths). For CE Level 1 actions listed in Appendix A that are elevated to a Level 2 CE review, an encroachment is allowed, but the action cannot cause greater than 1-foot rise in the BFE, any rise in a floodplain that impacts an adjacent structure, or any rise in a floodway.
- No construction activities in, across, or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers. For CE Level 1 actions listed in Appendix A that are elevated to a Level 2 CE review, the activity can

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occur in, across or adjacent to one of these resources, but the action cannot impact the resource. The presence of an impact is determined based upon coordination with the agency with jurisdiction.

- No unresolved public or agency controversy on environmental grounds. If NDOR identifies or receives notification of negative human, natural or economic impacts as a result of the project after all other issues have been addressed (e.g. permits, authorizations, agreements, etc. have been received), the action cannot be processed as a Level 2 CE action. NDOR shall coordinate with FHWA to determine the proper level of environmental review if unresolved controversy exists
- Actions that meet the Type I project as defined by NDOR's approved Traffic Noise Policy and 23 CFR 772.
- Actions that increase capacity in exceedance of 100,000 vehicles per day in the 20th year following the project construction (see DEQ MOU), projects that may result in high potential for Mobile Source Air Toxics effects (MSAT Level 3), or a project considered Regionally Significant within a designated non-attainment area.
- Projects occurring within the boundaries of an active Superfund site with soil disturbance below or beyond preexisting roadway fill, or projects with a high potential for encountering contaminants.
- The action cannot be processed as a Level 2 CE action if the project results in a potential for disproportionately high and adverse impacts as determined by the NDOR HCRS.
 - If mitigation is required to avoid disproportionately high and adverse impacts, or if protected populations or social service providers express project-related social or economic impact concerns, coordination will occur with FHWA to determine if the project will require a Level 3 CE or higher level NEPA review. This coordination should occur as early as possible, and must include enough information to reasonably anticipate the level of impact and make the NEPA class determination.

Appendix C: Level 3 CE Actions

Any proposed action that does not meet the criteria of Level 1 or Level 2, either due to an impact threshold or action type, will be processed as a Level 3 CE or higher level NEPA document. FHWA retains approval authority for Level 3 actions and approval of the associated Form. For projects that will likely exceed the Level 2 thresholds, NDOR will provide FHWA pertinent project scope and potential resource impact information using NDOR's *Probable Class of Action* form (or a successor form in agreement with FHWA) to make the proper class of action determination. This will occur early in the environmental review process or during planning. For Level 3 actions, NDOR shall provide appropriate documentation certifying the proposed action meets the criteria of 23 CFR 771.117(c) or 23 CFR 771.117(d) and Appendix C of this agreement using the Level 3 CE form.

**PROGRAMMATIC AGREEMENT
BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION, NEW MEXICO DIVISION
AND
THE NEW MEXICO STATE DEPARTMENT OF TRANSPORTATION
REGARDING THE PROCESSING OF ACTIONS CLASSIFIED AS CATEGORICAL
EXCLUSIONS FOR FEDERAL-AID HIGHWAY PROJECTS**

THIS PROGRAMMATIC AGREEMENT, made and entered into this ____ day of _____ 2015, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION and the STATE of NEW MEXICO acting by and through its DEPARTMENT OF TRANSPORTATION hereby provides as follows:

WITNESSETH:

Whereas, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370h (2014), and the Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500-1508) direct Federal agencies to consider the environmental impacts of their proposed major Federal actions through the preparation of an environmental assessment (EA) or environmental impact statement (EIS) unless a particular action is categorically excluded;

Whereas, the Federal Highway Administration's (FHWA) distribution and spending of Federal funds under the Federal-aid Highway Program and approval of actions pursuant to Title 23 of the U.S. Code are major Federal actions subject to NEPA;

Whereas, the Secretary of Transportation has delegated to FHWA the authority to carry out functions of the Secretary under NEPA as they relate to matters within FHWA's primary responsibilities (49 CFR 1.81(a)(5));

Whereas, the FHWA's NEPA implementing procedures (23 CFR part 771) list a number of categorical exclusions (CE) for certain actions that FHWA has determined do not individually or cumulatively have a significant effect on the human environment and therefore do not require the preparation of an EA or EIS;

Whereas, the New Mexico Department of Transportation is a State agency that undertakes transportation projects using Federal funding received under the Federal-aid Highway Program and must assist FHWA in fulfilling its obligations under NEPA for NMDOT projects (23 CFR 771.109);

Whereas, Section 1318(d) of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405 (July 6, 2012), allows FHWA to enter into programmatic agreements with the States that establish efficient administrative procedures for carrying out environmental and other required project reviews, including agreements that allow a State to determine whether a project qualifies for a CE on behalf of FHWA;

Whereas, the FHWA developed regulations implementing the authorities in section 1318(d), effective November 6, 2014;

Now, therefore, the FHWA and New Mexico Department of Transportation enter into this Programmatic Agreement ("Agreement") for the processing of categorical exclusions.

I. PARTIES

The Parties to this Agreement are the Federal Highway Administration New Mexico Division ("NM Division") and the New Mexico Department of Transportation (hereinafter "NMDOT").

II. PURPOSE

The purpose of this Agreement is to authorize NMDOT to determine on behalf of the NM Division whether a project qualifies for a CE specifically listed in 23 CFR 771.117 (listed in Appendix A and B of this Agreement). This Agreement also authorizes NMDOT to certify to the NM Division that an action not specifically listed in 23 CFR 771.117, but meeting the CE criteria in 40 CFR 1508.4 and 23 CFR 771.117(a), qualifies for a CE as long as there are no unusual circumstances present that would require the preparation of either an environmental assessment (EA) or an environmental impact statement (EIS).

III. AUTHORITIES

This agreement is entered into pursuant to the following authorities:

- A. National Environmental Policy Act, 42 U.S.C. 4321 - 4370
- B. Moving Ahead for Progress in the 21st Century Act, P.L. 112-141, 126 Stat. 405, Sec. 1318(d)
- C. 40 CFR parts 1500 - 1508
- D. DOT Order 5610.1C
- E. 23 CFR 771.117

IV. RESPONSIBILITIES

- A. The NMDOT is responsible for:

- 1. Ensuring the following process is completed for each project that qualifies for a CE:
 - a. For actions qualifying for a CE listed in Appendix A [CEs established in 23 CFR 771.117(c)] and Appendix B [CEs established in 23 CFR 771.117(d)], that do not exceed the thresholds in Section IV(A)(1)(b) below, the NMDOT may make a CE approval on behalf of FHWA. The NMDOT will identify the applicable listed CE, ensure any conditions or constraints are met, verify that unusual circumstances do not apply, address any and all other environmental requirements, and complete the review with a signature evidencing approval. Documentation is in the form of a Programmatic Categorical Exclusion (PCE) letter and an example can be found in Appendix C. No additional review or approval of the CE by FHWA is required.

b. For actions listed in Appendices A-B that exceed any of the thresholds listed below, NMDOT will certify [and include the information in IV(2) below] that the project meets the definition of a CE and that no unusual circumstances exist that would require the preparation of an EA or EIS. This certification is based upon information contained in a Categorical Exclusion (CE) Checklist (see Appendix D for an example) that NMDOT will provide to the FHWA for CE review and approval.

- i. Public or agency controversy on environmental grounds, as determined by NMDOT with concurrence by NM Division due to unusual media coverage or correspondence to either NMDOT or NM Division;
- ii. A request by a NMDOT for NM Division involvement/facilitation in a project's environmental review;
- iii. Involves acquisitions of more than a minor amount of right-of-way. A minor amount of right-of-way is defined as less than five acres or in a specific case, if the NMDOT consults with the NM Division, discusses the scenario, and the NM Division concurs with the conclusion in writing;
- iv. Involves acquisitions that result in any residential or non-residential displacements;
- v. Results in capacity expansion of a roadway by addition of through lanes;
- vi. Involves the construction of temporary access, or the closure of existing road, bridge, or ramps, that would result in major traffic disruptions. Major traffic disruption is defined on a case-by-case scenario, when the NMDOT, in consultation with NM Division, agree that the project scope will interrupt traffic patterns beyond normal project conditions. The NM Division requires a concurrence for such a NMDOT request in writing.
- vii. Involve the changes in access control that pertain to Interstate or in a case where the NMDOT concluded that an access modification may have wide reaching ramifications. Such a case will be coordinated by the Chairperson of the Access Management Committee for consideration by the NM Division;
- viii. Results in a determination of adverse effect on historic properties pursuant to Section 106 the National Historic Preservation Act;
- ix. Requires the use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. 303) that cannot be documented with a NM Division *de minimis* determination, or a programmatic Section 4(f) evaluation other than the programmatic evaluation for the use of historic bridges;

- x. Requires the acquisition of lands under the protection of Section 6(f) of the Land and Water Conservation Act of 1965, the Federal Aid in Fish Restoration Act, the Federal Aid in Wildlife Restoration Act, or other unique areas or special lands that were acquired in fee or easement with public-use money and have deed restrictions or covenants on the property;
- xi. Requires a U.S. Army Corps of Engineers Section 404 permit other than a Nationwide Permit or a General Permit;
- xii. Requires a U.S. Coast Guard bridge permit;
- xiii. Requires work encroaching on a regulatory floodway or work affecting the base floodplain (100-year flood) elevations of a water course or lake, pursuant to Executive Order 11988 and 23 CFR §650 subpart A;
- xiv. Requires construction in, across, or adjacent to a river designated as a component of, or proposed for inclusion in, the National System of Wild and Scenic Rivers published by the U.S. Department of the Interior/U.S. Department of Agriculture;
- xv. Is defined as a "Type I project" per 23 CFR 772.5 and any NMDOT noise manual for purposes of a noise analysis;
- xvi. May affect federally listed or candidate species, or proposed or designated critical habitat or projects with impacts subject to the conditions of the Bald and Golden Eagle Protection Act;
- xvii. Includes acquisition of land for hardship or protective purposes, or early acquisition pursuant to Federal acquisition project (23 U.S.C. 108(d));
- xviii. Does not conform to the State Implementation Plan which is approved or promulgated by the U.S. Environmental Protection Agency in air quality non-attainment areas;
- xix. Is not included in or is inconsistent with the statewide transportation improvement program, and in applicable urbanized areas, the transportation improvement program.

c. The NMDOT may not approve actions not specifically listed as CEs in 23 CFR 771.117, but meet the requirements of a CE under 40 CFR 1508.4 and 23 CFR 771.117(a). Instead, the NMDOT shall certify that an action will not result in significant environmental impacts if the NMDOT concludes that the action qualifies for a CE and the action does not involve unusual circumstances that warrant the preparation of an EA or EIS. The NMDOT shall submit this certification to the NM Division for approval prior to the time the NM Division contemplates its next approval or grant action for the project.

- i. If requested by the Division Office, the NMDOT shall provide a copy of the CE documentation prepared for the actions(s) in accordance with Section V of this Agreement.
 - ii. If any project requires a Section 4(f) *de minimis* determination or programmatic evaluation, the NMDOT shall submit the 4(f) documentation for the NM Division determination and approval.
 - iii. The NMDOT may request notice to proceed with final design, acquisition of right-of-way, or construction from the NM Division once NMDOT has completed its certification that a project is a CE.
 - iv. The Division Office's objection to a NMDOT certification may not constitute a disapproval of the action, but signifies that NM Division will need to engage in project-specific review to verify that the certification is adequate, which may include consultation with other agencies.
- 2. Providing a list of certified actions, pursuant to this Agreement to the Division Office quarterly and allow the Division Office [14] business days to either agree that some or all certifications are a basis for the NM Division's approval of a CE for these actions, or to object to the certification(s). The list of actions certified will contain the following information:
 - a. The NMDOT project number and a project name; including the route number or facility name where the project will occur
 - b. Identify the CE action listed in the regulation, or if the action is not listed in 23 CFR 771.117, identify the process as "CE not categorized."
 - c. Consultations or technical analyses that are pending (if applicable); and
 - d. Whether the project included a 4(f) *de minimis* or programmatic evaluation.
- 3. Consulting with the NM Division for actions that involve unusual circumstances (23 CFR §771.117(b)), to determine the appropriate class of action for environmental analysis and documentation. The NMDOT may decide or the NM Division may require additional studies to be performed prior to making a CE approval, or the preparation of an EA or EIS.
- 4. Meeting applicable documentation requirements in Section V for State CE approvals on the NM Division's behalf and State CE certifications to the NM Division, applicable approval and re-evaluation requirements in Section VI, and applicable quality control/quality, monitoring, and performance requirements in Section VII.
- 5. Relying only upon employees directly employed by the State to make CE approvals or certifications submitted to the NM Division under this agreement. The NMDOT may not

delegate its responsibility for CE approvals or certifications to third parties (i.e., consultants, local government staff, and other State agency staff).

B. The NM Division is responsible for:

1. Providing timely advice and technical assistance on CEs to the NMDOT, as requested.
2. Providing timely input and review of certified actions. The NM Division will base its approval of CE actions on the project documentation and certifications prepared by NMDOT under this Agreement.
3. Overseeing the implementation of this Agreement in accordance with the provisions in Section VII, including applicable monitoring and performance provisions.

V. DOCUMENTATION OF NMDOT CE APPROVALS AND CERTIFICATIONS

A. For State CE approvals and State CE certifications to the NM Division for approval, the NMDOT shall insure that it fulfills the following responsibilities for documenting the project-specific determinations made:

1. For actions listed in Appendix A and B, the NMDOT shall identify the applicable action, ensure any conditions specified in the NM Division regulation are met, verify that unusual circumstances do not apply, address all other environmental requirements, and complete the review with a NMDOT signature evidencing approval.
2. In addition, for actions listed in 23 CFR 711.117 (d), the NMDOT shall prepare documentation that supports the CE determination and that no unusual circumstances exist that would make the CE approval inappropriate.

B. The NMDOT shall maintain a project record for CE approvals it makes on the NM Division's behalf and each CE submitted to the NM Division for approval. This record shall include at a minimum:

1. Any checklists, forms, or other documents and exhibits that summarize the consideration of project effects and unusual circumstances;
2. A summary of public involvement complying with the requirements of the NM Division-approved public involvement policy;
3. Any stakeholder communication, correspondence, consultation, or public meeting documentation;
4. The name and title of the document approver and the date of NMDOT's approval or the NM Division's final approval; and

5. For cases involving re-evaluations, any documented re-evaluation (when required) or a statement that a re-evaluation was completed for the project (when documentation is not necessary).
- C. Any electronic or paper project records maintained by the NMDOT shall be provided to the NM Division at their request. The NMDOT shall retain those records, including all letters and comments received from governmental agencies, the public, and others for a period of no less than three (3) years after completion of project construction. This 3-year retention provision does not relieve NMDOT of its project or program recordkeeping responsibilities under 2 CFR § 200.333 or any other applicable laws, regulations, or policies.

VI. AUTHORITY AND DELEGATIONS

- A. The NMDOT's CE approvals and CEs submitted to the NM Division for approval may only be made by officers or offices specifically identified below:
 1. Approval of Appendix A CEs is delegated to the NMDOT Environmental Program Manager.
 2. Approval of Appendix B CEs is delegated to the NMDOT Environmental Program Manager.
 3. Certification of CEs is delegated to the NMDOT Environmental Program Manager.
- B. In accordance with 23 CFR 771.129, the NMDOT shall re-evaluate its determinations and certifications for projects, consult with the NM Division, and as necessary, prepare additional documentation to ensure that determinations are still valid.

VII. QUALITY CONTROL/QUALITY ASSURANCE, MONITORING & PERFORMANCE

A. NMDOT Quality Control & Quality Assurance

The NMDOT agrees to carry out regular quality control and quality assurance activities to ensure that its CE approvals and CE submissions to the NM Division for approval, are made in accordance with applicable law and this Agreement.

B. NMDOT Performance Monitoring and Reporting.

1. The NM Division and the NMDOT shall cooperate in monitoring performance under this Agreement and work to assure quality performance.
2. The NMDOT shall annually submit to the NM Division (electronically or hard copy) a report summarizing its performance under this Agreement. The report will identify any areas where improvement is needed and what measures NMDOT is taking to implement those improvements. The report will include a description of actions taken by NMDOT as part of its quality control efforts under Section VII(a).

C. The NM Division Oversight and Monitoring

1. Monitoring by the NM Division will include consideration of the technical competency and organizational capacity of NMDOT, as well as NMDOT's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of NMDOT's CE approvals, CE submissions to the NM Division for approval, adequacy and capability of NMDOT staff and consultants, and the effectiveness of NMDOT's administration of its internal CE approvals.
2. The NM Division will conduct one or more program reviews as part of its oversight activities, during the term of this Agreement. The NMDOT shall prepare and implement a corrective action plan to address any findings or observations identified in the NM Division review. The NMDOT should draft the corrective action plan within 45 days of the NM Division finalizing its review. The results of that review and corrective actions taken by the NMDOT shall be considered at the time this Agreement is considered for renewal.
3. Nothing in this Agreement prevents the NM Division from undertaking other monitoring or oversight actions, including audits, with respect to NMDOT's performance under this Agreement. The NM Division may require NMDOT to perform such other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with applicable Federal laws and regulations.
4. The NMDOT agrees to cooperate with the NM Division in all oversight and quality assurance activities.

VIII. AMENDMENTS

This Agreement shall not be altered, changed, or amended except by an instrument in writing and executed by the Parties hereto with new signatures and dates of the signatures. The term of the Agreement shall remain unchanged unless otherwise expressly stated in the amended Agreement.

IX. TERM, RENEWAL, AND TERMINATION

- A. This Agreement shall have a term of five (5) years, effective on the date of the last signature. The NMDOT shall post and maintain an executed copy of this Agreement on its website, available to the public.
- B. This Agreement is renewable for additional five (5) year terms if NMDOT requests renewal and the NM Division determine that NMDOT has satisfactorily carried out the provisions of this Agreement. In considering any renewal of this Agreement, the NM Division will evaluate the effectiveness of the Agreement and its overall impact on the environmental review process.
- C. Either party may terminate this Agreement at any time only by giving at least 30 days written notice to the other party.

D. Expiration or termination of this Agreement shall mean that the NMDOT is not able to make CE approvals on the NM Division's behalf.

X. NOTICES:

Except as otherwise specified herein, all notices hereunder shall be in writing (including, without limitation, notice by facsimile) and shall be given to the relevant party at its address or facsimile number set forth below, or such other address or facsimile number as such party may hereafter specify by notice to the other given by courier, by United States certified or registered mail, by facsimile or by other telecommunication device capable of creating a written record of such notice and its receipt.

Notices hereunder shall be addressed:

to NM Division at:
FHWA – NM Division
Attn: Environmental Program Manager
4001 Office Court Drive, STE 801
Santa Fe, NM 87507
Facsimile (505) 820-2040
E-Mail: greg.heitmann@dot.gov

to NMDOT at:
New Mexico Dept. of Transportation
Attn: Environmental Section Manager
PO Box 1149
Santa Fe, NM 87504
Facsimile (505) 827-3243
E-Mail: blake.roxlau@state.nm.us

Each such notice, request or other communication shall be effective (i) if given by facsimile, when such facsimile is transmitted to the facsimile number specified in this Section and a confirmation of such facsimile has been received by the sender, (ii) if given by mail, five (5) days after such communication is deposited in the mail, certified or registered with return receipt requested, addressed as aforesaid or (iii) if given by any other means, when delivered at the addresses specified in this Section.

XI. INDEPENDENCE OF PARTIES

In the exercise of their respective rights and obligations as the signatories to this Agreement, each signatory shall act in an independent capacity, consistent with each signatory's own statutes, regulations and fiscal constraints, and none of the signatories are to be considered the officer, agent or employee of the other.

XII. SEVERABILITY:

In the event that any portion of this Agreement is determined to be void, unconstitutional or otherwise unenforceable, the remainder of this Agreement shall remain in full force and effect.

XIII. SCOPE OF THE AGREEMENT:

This Agreement incorporates all the agreements, covenants, and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, agreements, and understandings have been merged into this written Agreement. No prior agreements or understandings, verbal or otherwise, of the Parties or their agents shall become valid or enforceable unless embodied in this Agreement.

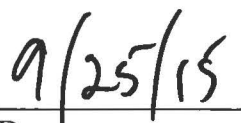
XIV. CONSTRUCTION:

In constructing this Agreement, all headings and titles are for the convenience of the parties only and shall not be considered a part of this Agreement. Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, and vice versa, unless the context requires otherwise. This Agreement shall not be construed as if prepared by one of the Parties, but rather according to its fair meaning as a whole, as if all Parties had prepared it.

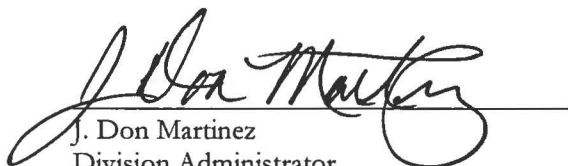
Execution of this Agreement and implementation of its terms by both parties provides evidence that both parties have reviewed this Agreement and agree to the terms and conditions for its implementation. This Agreement is effective upon the date of the last signature below.



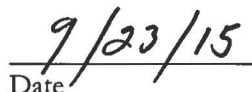
Tom Church
New Mexico Department of Transportation
Cabinet Secretary



Date



J. Don Martinez
Division Administrator
New Mexico Division
Federal Highway Administration



Date

Appendix A: CEs listed in 23 CFR 771.117(c)

(c) The following actions meet the criteria for CEs in the CEQ regulations (40 CFR 1508.4) and § 771.117(a) and normally do not require any further NEPA approvals by the FHWA:

- (1) Activities which do not involve or lead directly to construction, such as planning and research activities; grants for training; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system.
- (2) Approval of utility installations along or across a transportation facility.
- (3) Construction of bicycle and pedestrian lanes, paths, and facilities.
- (4) Activities included in the State's *highway safety plan* under 23 U.S.C. 402.
- (5) Transfer of Federal lands pursuant to 23 U.S.C. 107(d) and/or 23 U.S.C. 317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA.
- (6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.
- (7) Landscaping.
- (8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.
- (9) The following actions for transportation facilities damaged by an incident resulting in an emergency declared by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121):(i) Emergency repairs under 23 U.S.C. 125; and(ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:(A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and(B) Is commenced within a 2-year period beginning on the date of the declaration.
- (10) Acquisition of scenic easements.
- (11) Determination of payback under 23 U.S.C. 156 for property previously acquired with Federal-aid participation.
- (12) Improvements to existing rest areas and truck weigh stations.
- (13) Ridesharing activities.
- (14) Bus and rail car rehabilitation.
- (15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.
- (16) Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.
- (17) The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a CE.
- (18) Track and railbed maintenance and improvements when carried out within the existing right-of-way.
- (19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.
- (20) Promulgation of rules, regulations, and directives.
- (21) Deployment of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency

or safety of a surface transportation system or to enhance security or passenger convenience. Examples include, but are not limited to, traffic control and detector devices, lane management systems, electronic payment equipment, automatic vehicle locaters, automated passenger counters, computer-aided dispatching systems, radio communications systems, dynamic message signs, and security equipment including surveillance and detection cameras on roadways and in transit facilities and on buses.

(22) Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. Existing operational right-of-way refers to right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose. This area includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, etc.) and other areas maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities. Portions of the right-of-way that have not been disturbed or that are not maintained for transportation purposes are not in the existing operational right-of-way.

(23) Federally-funded projects:

(i) That receive less than \$5,000,000 of Federal funds; or

(ii) With a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated project cost.

(24) Localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.

(25) Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. 1341; 1342) carried out to address water pollution or environmental degradation.

(26) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes), if the action meets the constraints in paragraph (e) of this section. [Note: Previously 771.117(d)(1).]

(27) Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints in paragraph (e) of this section. [Note: Previously 771.117(d)(2).]

(28) Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings, if the actions meet the constraints in paragraph (e) of this section. [Note: Previously 771.117(d)(3).]

(29): Purchase, construction, replacement, or rehabilitation of ferry vessels(including improvements to ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities which themselves are within a CE.

(30): Rehabilitation or reconstruction of existing ferry facilities that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in the existing facility's capacity. Example actions include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals

Appendix B: CEs listed in 23 CFR 771.117(d)

(d) Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after the FHWA approval. The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to:

- (1) Moved to (c) list.
- (2) Moved to (c) list.
- (3) Moved to (c) list.
- (4) Transportation corridor fringe parking facilities.
- (5) Construction of new truck weigh stations or rest areas.
- (6) Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.
- (7) Approvals for changes in access control.
- (8) Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.
- (9) Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.
- (10) Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.
- (11) Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.
- (12) Acquisition of land for hardship or protective purposes. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.
 - (i) Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.
 - (ii) Protective acquisition is done to prevent imminent development of a parcel which may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

Appendix C: Example PCE Letter



NEW MEXICO DEPARTMENT OF
TRANSPORTATION

<DATE>

J. Don Martinez, Division Administrator
Federal Highway Administration
4001 Office Court Dr., Suite 801
Santa Fe, NM 87507

District:
Control No.:
Project No.:
T/LGA:

Susana Martinez
Governor

Tom Church
Interim Cabinet Secretary

SUBJECT: Programmatic Categorical Exclusion

Dear Mr. Martinez:

The New Mexico Department of Transportation (NMDOT) staff has reviewed the following project. The project meets the conditions stipulated in the agreement approved February 8, 2006, for completing the requirements of 23 CFR § 771 and it qualifies for the NMDOT and Federal Highway Administration Programmatic Categorical Exclusion.

Commissioners

Pete K. Rahn
Chairman
District 3

Ronald Schmeits
Vice Chairman
District 4

Dr. Kenneth White
Secretary
District 1

Robert R. Wallach
Commissioner
District 2

Butch Mathews
Commissioner
District 5

Jackson Gibson
Commissioner
District 6

<u>District</u>	<u>County</u>	<u>Project Number</u>	<u>Termini Description</u>
<u>Project Scope:</u>			

In addition, a review of the project has been completed in accordance with the requirements of the National Historic Preservation Act of 1966, as amended through 1992 and 36 CFR 800 (August 5, 2004). We have determined that the proposed project does not include any activities or programs that can result in changes in the character or use of historic properties. The undertaking has no potential to cause effects on historic properties as defined in 36 CFR § 800.3(a)(1). There are no biological or natural resource concerns associated with this project.

NMDOT files contain documentation supporting this determination. The files are available for FHWA review. We will continue to monitor project design and development to ensure the applicability of the Programmatic Categorical Exclusion.

The aforementioned project meets all of the conditions stipulated in the Programmatic Categorical Exclusion. No further coordination is necessary for environmental approval. The following environmental commitments shall be followed:

<u>Environmental Commitments:</u>
1.

Sincerely,

Blake Roxlau, Manager
Environmental Development Section

Cc: Greg Heitmann, FHWA

Appendix D: Example CE Checklist

Form No. A-1291
New 01/13



NEW MEXICO DEPARTMENT OF TRANSPORTATION CATEGORICAL EXCLUSION

Project Number:	Control Number:	NMDOT District:
Title of Proposed Project:		
Location (Route and Milepost):		County:
Land Ownership:		
Engineer or Project Proponent:	Environmental Section Staff or T/LG Project Manager:	
Engineer Contact and Company:		
Environmental Consultant:		
Federal Funding for Project: <input type="checkbox"/> No <input type="checkbox"/> Yes		

This document has been prepared pursuant to 23 CFR 771.117, FHWA Technical Advisory T6640.8, and the latest Programmatic Categorical Exclusion agreement between FHWA and NMDOT. The proposed project will have no significant impact on the quality of the human or natural environment, either singularly or cumulatively, provided stipulations identified during this analysis are met. Supporting documentation is available at the NMDOT Environmental Section.

_____ Environmental Specialist	_____ Date	_____ NMDOT Project Engineer	_____ Date
		Project Proponent	
		Tribal/Local Government Authority	
_____ Environmental Section Manager	_____ Date	_____ FHWA NM Division Administrator	_____ Date

- ☐ Project location map with aerial photography as background layer attached as following page.
- ☐ STIP page attached.
- ☐ Project area photos attached.
- ☐ Environmental Commitments included in this project.



**NEW MEXICO DEPARTMENT OF TRANSPORTATION
CATEGORICAL EXCLUSION**

Project Number:

Control Number:

NMDOT District:

PROJECT PURPOSE & NEED:

DESCRIPTION OF PROPOSED PROJECT:

DESCRIPTION OF EXISTING FACILITY: Include the Functional Classification of the roadway and the current infrastructure conditions.

DESCRIPTION OF CURRENT, OBSERVED RIGHT-OF-WAY AND ENVIRONMENTAL SURROUNDINGS:



NEW MEXICO DEPARTMENT OF TRANSPORTATION CATEGORICAL EXCLUSION

Project Number:	Control Number:	NMDOT District:
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1. **OTHER LAND JURISDICTION(S):** Select the appropriate land management entity from the list below. The appropriate land management agency shall be contacted to address the potential impacts, alternatives and possible mitigating measures for the proposed action. The Environmental Commitments section should reflect any mutually agreed upon stipulations or mitigation measures determined through coordination with the land management entity.

- ☐ Bureau of Land Management, BLM Field Office:
- ☐ U.S. Forest Service, USFS Forest and Ranger District:
- ☐ Bureau of Indian Affairs
- ☐ Tribal Entity:
- ☐ U.S. Fish and Wildlife Service
- ☐ National Park Service
- ☐ Bureau of Reclamation
- ☐ Department of Defense
- ☐ New Mexico State Land Office
- ☐ New Mexico Department of Game and Fish
- ☐ New Mexico State Parks
- ☐ Federal Aviation Administration
- ☐ Private
- ☐ Other:

Provide additional information regarding communication with land management entities below.

2. **CULTURAL RESOURCE INVESTIGATIONS:** Conduct cultural resource investigations as directed by the NMDOT Environmental Section.

NMCRIS records check date:

Cultural resource inventory conducted? ☐ No ☐ Yes Concurrence date:

- ☐ The proposed project would have no potential to affect cultural resources. (See attached letter or email from NMDOT Environmental Section.)
- ☐ The proposed project would have no effect to cultural resources. (See attached letter or email from NMDOT Environmental Section.)
- ☐ The proposed project would have no adverse effect to cultural resources. (See attached concurrence letter.)
- ☐ The proposed project would have an adverse effect to cultural resources. (See attached concurrence letter.)
 - ☐ MOA for mitigation has been developed under Section 106 of NHPA.
 - ☐ A project-specific Programmatic Agreement has been developed under Section 106 of NHPA.
- ☐ Special properties of concern (listed SRCP or NRHP properties, historic districts, historic bridges, etc) are present. Specify:
- ☐ Refer to the Environmental Commitments section for cultural resource treatment measures.



NEW MEXICO DEPARTMENT OF TRANSPORTATION CATEGORICAL EXCLUSION

Project Number:

Control Number:

NMDOT District:

3. TRADITIONAL CULTURAL PROPERTIES: Contact the NMDOT Native American/Tribal Coordinator in the Environmental Section.

- ☐ The proposed project has no potential to impact Traditional Cultural Properties based on coordination with NMDOT Native American/Tribal Coordinator.
- ☐ Traditional Cultural Properties identified, management recommendations developed, and coordination with land management agencies and Tribal/State Historic Preservation Officer completed.
- ☐ See attached documentation from the NMDOT Native American/Tribal Coordinator.
- ☐ Refer to the Environmental Commitments section for cultural resource treatment measures.

4. BIOLOGICAL COMMUNITY: Conduct biological investigations as directed by the NMDOT Environmental Section.

Biological report prepared? ☐ No ☐ Yes Date:

If no, explain:

Federally listed threatened, endangered, or proposed species and/or critical habitat or proposed critical habitat present within or adjacent to the project area? ☐ No ☐ Yes

- ☐ The proposed project would have no effect to federally listed threatened, endangered, or proposed species and/or modify critical habitat or proposed critical habitat.
- ☐ The proposed project may affect, is not likely to adversely affect federally threatened, endangered, or proposed species and/or adversely modify critical habitat or proposed critical habitat.
- ☐ The proposed project may affect, is likely to adversely affect federally threatened, endangered, or proposed species and/or adversely modify critical habitat or proposed critical habitat. (If selected, verify NEPA level of effort with NMDOT.)
- ☐ Consultation with regulatory agencies completed (see attached correspondence).
Describe consultation process:

Is the proposed project expected to impact state-listed species, tribal-listed species, or other agency species? ☐ No ☐ Yes If yes, explain:

Are there migratory bird concerns associated with the proposed project? ☐ No ☐ Yes

If yes, explain:

Are there wildlife issues associated with the proposed project? ☐ No ☐ Yes

If yes, explain:

Are noxious weeds, as recognized by the NM Dept. of Agriculture, present? ☐ No ☐ Yes

If yes, identify noxious weed species, classification (A, B, C), and explain mitigation measures:

Are New Mexico Rare Plants present within the project area? ☐ No ☐ Yes

Is revegetation of the project area needed after construction is completed? ☐ No ☐ Yes

If no, explain:

☐ Revegetation plan developed. Date:

Additional information regarding the biological community:

- ☐ Refer to the Environmental Commitments section for biological community mitigation measures.



NEW MEXICO DEPARTMENT OF TRANSPORTATION CATEGORICAL EXCLUSION

Project Number:

Control Number:

NMDOT District:

5. WATER RESOURCES: Evaluate impacts to water resources within and adjacent to the project area.

Are floodplains present within the project area? ☐ No ☐ Yes

If yes, explain:

Is a designated Wild and Scenic River present within the project area? ☐ No ☐ Yes

If yes, explain:

Is an acequia or irrigation ditch present within the project area? ☐ No ☐ Yes

If yes, explain:

Are Outstanding National Resource Waters or Impaired Surface Waters present within the project area?

☐ No ☐ Yes

If yes, explain:

Clean Water Act (CWA) Permitting: Determine if Waters of the United States, subject to jurisdictional authority under the CWA, would be impacted by the proposed project.

Are wetlands present within the proposed project area? ☐ No ☐ Yes

Are the wetlands expected to be impacted? ☐ No ☐ Yes

If yes to either question above, explain:

☐ Wetland determination and delineation report prepared. Date of report:

☐ U.S. Army Corps of Engineers CWA §404 Maintenance Exemption applies to the proposed project.

☐ CWA §404 Nationwide Permit applies: Pre-construction Notification required? ☐ No ☐ Yes

☐ CWA §404 Individual Permit required (If selected, verify NEPA level of effort with NMDOT.)

☐ CWA §401 certification required from: ☐ NMED ☐ EPA ☐ Tribal Entity:

Additional CWA permitting information:

Are there any impacts to non-jurisdictional waterway within the project area? ☐ No ☐ Yes

If yes, explain:

Erosion and Sediment Control: Determine if the provisions of the NPDES Construction General Permit (CGP) issued by the EPA applies to the proposed project. Contact the NMDOT Drainage Section with questions regarding CWA §402.

☐ The proposed project would disturb less than 1 acre of land, CGP does not apply.

☐ The proposed project would disturb less than 1 acre of land, but the project area is located near a perennial stream, therefore, a Temporary Erosion and Sediment Control Plan is being developed.

☐ The proposed project would disturb more than 1 acre of land, therefore a Stormwater Pollution Prevention Plan will be prepared in accordance with the CGP.

☐ Action area map is attached.

☐ Map of identified federally-listed species and/or critical habitat is attached.

Applicable Endangered Species Protection Criterion (for the 402 permit application):

Are there portions of the project area that should be avoided for BMP implementation? ☐ No ☐ Yes

If yes, explain:

☐ Refer to the Environmental Commitments section for water resources mitigation measures.



NEW MEXICO DEPARTMENT OF TRANSPORTATION CATEGORICAL EXCLUSION

Project Number:

Control Number:

NMDOT District:

- 6. RIGHT-OF-WAY REQUIREMENTS:** Determine if new NMDOT rights-of-way, construction maintenance easements (CME), temporary construction permits (TCP), work permits, federal land transfers, or acquisitions are necessary.

Are any of the above types of right-of-way required for the proposed project? ☐ No ☐ Yes
If yes, complete the table below.

Estimated number of -	Quantity	Property Details
Parcels affected		
Acres required for CME(s)		
Acres required for TCP(s)		
Acres required for work permit(s)		
Acres required for acquisition		
Acres required for federal land transfer		
Relocations (residential or business) If selected, verify level of effort with NMDOT.		

- ☐ Proposed right-of-way map attached (required).
Additional right-of-way information:

- 7. AIR QUALITY ANALYSIS:** Determine if the proposed project would impact air quality.

Is a Fugitive Dust Control Permit required for the proposed project? ☐ No ☐ Yes

Is the proposed project area within any of the following areas?

- ☐ Bernalillo County
☐ Sunland Park
☐ Anthony
☐ A non-attainment or maintenance area not listed above. If checked, explain:
If none of the four boxes above are checked, air quality conformity requirements are met.

If one of the geographic areas above is checked, complete the section below.

Is hotspot analysis required for the proposed project? ☐ No ☐ Yes

Describe the extent of project level air quality analysis that has been conducted for the proposed project and attach pertinent correspondence.

- ☐ Refer to the Environmental Commitments section for air quality mitigation measures.



NEW MEXICO DEPARTMENT OF TRANSPORTATION CATEGORICAL EXCLUSION

Project Number:	Control Number:	NMDOT District:
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- 8. NOISE ANALYSIS:** Determine if noise levels associated with the proposed project would impact receptors on nearby properties and determine if local noise abatement ordinances apply.

Is the proposed project considered Type 1 as defined by NMDOT's current Design Directive for Abatement of Highway Traffic Noise? ☐ No ☐ Yes

Are receptors (existing or permitted) present in the project area? ☐ No ☐ Yes

Based on consultation with NMDOT a traffic noise analysis is required. ☐ No ☐ Yes

If no, explain:

If no, noise analysis is complete.

If yes, traffic noise analysis has been completed. Date of report:

Does the noise analysis identify noise impacts from the proposed project? ☐ No ☐ Yes

If yes, include applicable information in Section 17 Public Involvement.

If yes, have noise abatement measures been determined to be reasonable and feasible? ☐ No ☐ Yes

If no, explain:

☐ Refer to Environmental Commitments section for noise mitigation measures.

- 9. SECTION 4(f):** Section 4(f) refers to situations where transportation projects use parks, recreation areas, wildlife and waterfowl refuges, and historic sites.

Will the proposed project use a Section 4(f) property? ☐ No ☐ Yes (If yes, verify the level of 4(f) documentation with the NMDOT Environmental Section.)

☐ Programmatic Section 4(f) evaluation has been signed and is in the project record.

Additional Section 4(f) information:

- 10. LAND USE:** For proposed projects that add new, or substantially modify existing, transportation infrastructure, verify whether the proposed project is compatible with urban policy and/or land use plans. For proposed projects that cross federal lands, check with the land management agency for applicable land use plan(s).

Is the proposed project consistent with land use plans or zoning? ☐ No ☐ Yes

If no, explain:

- 11. HAZARDOUS MATERIALS ANALYSIS:** Determine if hazardous materials are located within or adjacent to the proposed project area.

- ☐ The EPA EnviroMapper database has been consulted and no additional investigations are required.
☐ The EPA EnviroMapper database has been consulted and additional investigations are required.
☐ The EGB has determined no additional investigations are required.
☐ The EGB has determined additional investigations are required. The EGB will coordinate the effort.



NEW MEXICO DEPARTMENT OF TRANSPORTATION CATEGORICAL EXCLUSION

Project Number:	Control Number:	NMDOT District:
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12. SOCIOECONOMICS: Determine potential impacts to social and economic resources resulting from the proposed project.

Would the proposed project result in an adverse impact to social or economic resources? ☐ No ☐ Yes
(If yes, verify NEPA level of effort with NMDOT Environmental Section.)

Are relocations or displacements necessary to build the proposed project? ☐ No ☐ Yes

Would the proposed project result in a permanent change in access or access control? ☐ No ☐ Yes

Is the project expected to impact neighborhood continuity and/or community cohesion? ☐ No ☐ Yes

If yes to any of the questions above, explain:

13. ENVIRONMENTAL JUSTICE: Refer to FHWA Order 6640.23A to review key Environmental Justice definitions and policies. U.S. Census data may be a source to determine population characteristics.

Based on the definitions provided in FHWA Order 6640.23A, are the following populations located in or adjacent to the project area?

- ☐ Low income
- ☐ African American
- ☐ Hispanic or Latino
- ☐ Asian American
- ☐ American Indian or Alaskan Native
- ☐ Native Hawaiian and Other Pacific Islander

Would the proposed project cause disproportionately high and adverse effects on minority and/or low income populations? ☐ No ☐ Yes (If yes, verify NEPA level of effort with NMDOT Environmental Section.)

If yes, explain:

14. VISUAL RESOURCES: Determine whether the project would result in adverse impacts to visual resources, such as the landscape's foreground and background.

Would the proposed project require major cut/fills, bridges, or large retaining walls? ☐ No ☐ Yes

Would the proposed project change the vertical profile of an existing road or bridge? ☐ No ☐ Yes

Is the proposed project located along a designated Scenic Byway? ☐ No ☐ Yes

Would the proposed project result in an adverse impact to visual resources? ☐ No ☐ Yes

Additional visual resource information:

☐ Refer to the Environmental Commitments section for visual resource mitigation measures.

15. MULTI-MODAL TRANSPORTATION: Determine whether the project would impact pedestrians, bicyclists, or transit facilities.

Is the proposed project located along a proposed or designated bicycle route? ☐ No ☐ Yes

Would the proposed project impact pedestrian and/or bicycle access? ☐ No ☐ Yes

Would the proposed project impact transit facilities? ☐ No ☐ Yes

If yes to any question above, explain:

Is there an opportunity to improve multi-modal access with the proposed project? ☐ No ☐ Yes

If yes, explain:

☐ Refer to the Environmental Commitments section for pedestrian/bicyclist mitigation measures.



NEW MEXICO DEPARTMENT OF TRANSPORTATION CATEGORICAL EXCLUSION

Project Number:

Control Number:

NMDOT District:

16. OTHER INFORMATION AND ANALYSIS: Determine if any other resource issues apply to the proposed project that are not addressed in the previous sections.

- ☐ No other resource issues are identified and no additional coordination required.
- ☐ Paleontological resources (for projects on federal land only)
- ☐ Prime and Unique Farmland
- ☐ Properties protected by Section 6(f) of the Land and Water Conservation Act
- ☐ Other resource issues:

Additional resource analysis:

17. PUBLIC INVOLVEMENT: Determine the level of public involvement necessary for the proposed project. The determination should be based on the resource issues identified in the previous sections and the answers to the questions listed below.

Would the project add through traffic lanes, substantially change the layout or the function of the transportation facility or connected transportation facilities, including access limitations? ☐ No ☐ Yes

Would the project have an adverse impact on abutting property? ☐ No ☐ Yes

Would the project result in noise impacts? ☐ No ☐ Yes

Would the project result in socioeconomic, visual, environmental, or other impacts? ☐ No ☐ Yes

If the answer to any of the questions above is yes, a public meeting or an opportunity for a public meeting should be considered in consultation with NMDOT.

Were scoping letters mailed for this project? ☐ No ☐ Yes

If no, explain:

What type of public involvement has been provided? Select the appropriate item(s) below. Attach documentation identifying the notice of opportunity for a public meeting, date and location of the meeting, a summary of comments, and responses to substantive comments.

- ☐ Public notice attached. Date published:
- ☐ Formal public meeting. Date:
- ☐ Open house. Date:
- ☐ Neighborhood meeting. Date:
- ☐ Agency coordination and/or meeting. Date:
- ☐ City Council Meeting. Date:
- ☐ Other:
- ☐ Public meeting notes attached.
- ☐ Summary of public and/or agency comments attached.

Additional public involvement information:



NEW MEXICO DEPARTMENT OF TRANSPORTATION CATEGORICAL EXCLUSION

Project Number:

Control Number:

NMDOT District:

18. ENVIRONMENTAL COMMITMENTS

The following environmental commitments shall be included in the final construction plans for the project:

END OF CHECKLIST

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

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

WITNESSETH

Whereas, Section 327 of Title 23 of the U.S. Code (U.S.C.) establishes the Surface Transportation Project Delivery Program (hereinafter "Program") that allows the Secretary of the United States Department of Transportation (hereinafter "USDOT Secretary") to assign and States to assume the USDOT Secretary's responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321, et seq.) (hereinafter "NEPA"), and all or part of the USDOT Secretary's responsibilities for environmental review, consultation, or other actions required under any Federal environmental law with respect to highway, public transportation, railroad, and multimodal projects within the State; and

Whereas, 23 U.S.C. 327(b)(2) requires a State to submit an application in order to participate in the Program; and

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

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

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

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

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

Now, therefore, FHWA and ODOT agree as follows:

PART 1. PURPOSE OF MEMORANDUM OF UNDERSTANDING

1.1 Purpose

- 1.1.1 This MOU officially approves ODOT's application to participate in the Program and is the written agreement required pursuant to 23 U.S.C. 327(a)(2)(A) and 327(c) under which the USDOT Secretary may assign, and ODOT may assume, the responsibilities of the USDOT Secretary for Federal environmental laws with respect to one or more highway projects within the State of Ohio.
- 1.1.2 The FHWA's decision to execute this MOU is based upon the information, representations, and commitments contained in ODOT's May 27, 2015 application. As such, this MOU incorporates the Application Package. However, this MOU shall control to the extent there is any conflict between this MOU and the Application Package.
- 1.1.3 This MOU shall be effective 10 business days after execution by both parties (hereinafter the "Effective Date").
- 1.1.4 Pursuant to 23 U.S.C. 327(c)(3)(B)-(C), and subpart 4.3 of this MOU, third parties may challenge ODOT's actions in carrying out environmental review responsibilities assigned under this MOU. Otherwise, this MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the State of Ohio, its departments, agencies, or entities, its officers, employees, or agents. This MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the United States, its departments, agencies, or entities, its officers, employees, or agents.

PART 2. [RESERVED]

PART 3. ASSIGNMENTS AND ASSUMPTIONS OF RESPONSIBILITY

3.1 Assignments and Assumptions of NEPA Responsibilities

- 3.1.1 Pursuant to 23 U.S.C. 327(a)(2)(A), on the Effective Date, FHWA assigns, and ODOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the USDOT Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq. with respect to the highway projects specified under subpart 3.3. This includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for Federal highway projects such as 23 U.S.C. 139, 40 CFR parts 1500-1508, DOT Order 5610.1 C, and 23 CFR part 771 as applicable.
- 3.1.2 On the cover page of each environmental assessment (EA), finding of no significant impact (FONSI), environmental impact statement (EIS), and record of decision (ROD) prepared under the authority granted by this MOU, and for any memorandum corresponding to any categorical exclusion (CE) determination it makes, ODOT shall insert the following language in a way that is conspicuous to the reader or include it in a CE project record:

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

Dec. 11, 2015
- 3.1.3 ODOT shall disclose to the public and agencies, as part of agency outreach and public involvement procedures,

including any notice of intent or scoping meeting notice, the disclosure in subpart 3.1.2 above.

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

- 3.2.1 Pursuant to 23 U.S.C. 327(a)(2)(B), on the Effective Date, FHWA assigns and ODOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the USDOT Secretary's responsibilities for environmental review, reevaluation, consultation, or other action pertaining to the review or approval of highway projects specified under subpart 3.3 required under the following Federal environmental laws:

Air Quality

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

Noise

- Noise Control Act of 1972, 42 U.S.C. 4901-4918
- Airport Noise and Capacity Act of 1990, 49 U.S.C. 47521-47534
- Compliance with the noise regulations at 23 CFR part 772

Wildlife

- Section 7 of the 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., with Essential Fish Habitat requirements at 1855(b)(2)

Hazardous Materials Management

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

Historic and Cultural Resources

- Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. 306101 et seq.
- 23 U.S.C. 138 and Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303 and implementing regulations at 23 CFR Part 774
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm

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

Social and Economic Impacts

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

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. 1251-1387
 - Section 404, 33 U.S.C. 1344
 - Section 401, 33 U.S.C. 1341
 - Section 319, 33 U.S.C. 1329
- Coastal Barrier Resources Act, 16 U.S.C. 3501-3510
- Coastal Zone Management Act, 16 U.S.C. 1451-1466
- Safe Drinking Water Act (SDWA), 42 U.S.C. 300f - 300j-26
- General Bridge Act of 1946, 33 U.S.C. 525 – 533
- Rivers and Harbors Act of 1899, 33 U.S.C. 401-406
- Wild and Scenic Rivers Act, 16 U.S.C. 1271-1287
- Emergency Wetlands Resources Act, 16 U.S.C. 3901 and 3921
- Wetlands Mitigation, 23 U.S.C. 119(g) and 133(b)(14)
- FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777
- Flood Disaster Protection Act, 42 U.S.C. 4001-4130

Parklands

- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. 138, 49 U.S.C. 303 and implementing rules at 23 C.F.R. 774.
- Land and Water Conservation Fund (LWCF) Act, 54 U.S.C. 200302 – 200310

FHWA-Specific

- Planning and Environmental Linkages, 23 U.S.C. 168, 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

Executive Orders Relating to Highway Projects

- E.O. 11990, Protection of Wetlands
- E.O. 11988, Floodplain Management
- E.O. 13690, Federal Flood Risk Management Standard (FFRMS)
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13112, Invasive Species

- 3.2.2 Any FHWA environmental review responsibility not explicitly listed above and assumed by ODOT shall remain the responsibility of FHWA unless the responsibility is added by written agreement of the parties through the amendment process established in Part 14 and pursuant to 23 CFR 773.113(b). This provision shall not be interpreted to abrogate ODOT's responsibilities to comply with the requirements of any Federal environmental law that apply directly to ODOT independent of FHWA's involvement (through Federal assistance or approval).
- 3.2.3 The USDOT Secretary's responsibilities for government-to-government consultation with Indian tribes as defined in 36 CFR 800.16(m) are not assigned to or assumed by ODOT under this MOU. The FHWA remains responsible for all government-to-government consultation, including initiation of government-to-government consultation, unless otherwise agreed as described in this Part. A notice from ODOT to an Indian tribe advising the tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 CFR 800.16(m), and is related to NEPA or another Federal environmental law for which ODOT has assumed responsibilities under this MOU, and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by ODOT, then FHWA may withdraw the assignment of all or part of the responsibilities for processing the project. In this case, the provisions of subpart 9.1 concerning FHWA initiated withdrawal of assignment shall apply. This MOU is not intended to abrogate, or prevent future entry into, any agreement among ODOT, FHWA, and a tribe under which the tribe agrees to permit ODOT to administer government-to-government consultation activities for FHWA. However, such agreements are administrative in nature and do not relieve the FHWA of its legal responsibility for government-to-government consultation.
- 3.2.4 Nothing in this MOU shall be construed to permit ODOT's assumption of the USDOT Secretary's responsibilities for conformity determinations required under Section 176 of the Clean Air Act (42 U.S.C. 7506) or any responsibility under 23 U.S.C. 134 or 135, or under 49 U.S.C. 5303 or 5304.
- 3.2.5 On the cover page of each biological evaluation or assessment, historic properties or cultural resources report, section 4(f) evaluation, or other analyses prepared under the authority granted by this MOU, ODOT shall insert the following language in a way that is conspicuous to the reader or include in a CE project record:
- "The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried-out by ODOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated [TO BE FILLED], and executed by FHWA and ODOT."
- Dec. 11, 2015*
- 3.2.6 ODOT shall disclose to the public and agencies, as part of agency outreach and public involvement procedures, the disclosure in stipulation 3.2.5 above.
- 3.2.7 ODOT will continue to adhere to the original terms of Biological Opinions (BOs) issued by the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) or both USFWS and NMFS prior to the effective date of this MOU, so long as the original BO terms are not amended or revised. Any revisions or

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

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

3.3 Highway Projects

- 3.3.1 Except as provided by subpart 3.3.2 below or otherwise specified in this subpart, the assignments and assumptions of the USDOT Secretary's responsibilities under subparts 3.1 and 3.2 above shall apply to the environmental review, consultation, or other action pertaining to the environmental review or approval of the following classes of highway projects located within the State of Ohio. The definition of "highway project" is found at 23 CFR 773.103, and for purposes of this MOU, "highway project" includes eligible preventative maintenance activities. The State shall conduct any reevaluations required under 23 CFR 771.129 for projects for which construction is not completed prior to the date of this MOU, in accordance with the provisions of this MOU. Prior to approving any CE determination, FONSI, final EIS, or final EIS/ROD, the State shall ensure and document that for any proposed project the design concept, scope, and funding are consistent with the current Transportation Improvement Plan (TIP), Regional Transportation Plan (RTP), or Metropolitan Transportation Plan (MTP) as applicable.
- A. Projects requiring an EIS, both on the state highway system (SHS) and local government projects off the SHS that are funded by FHWA or require FHWA approvals.
 - B. Projects qualifying for CEs, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals.
 - C. Projects requiring EAs, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals.
 - D. Projects funded by other Federal agencies [or projects without any Federal funding] that also require FHWA approvals. For these projects, ODOT would not assume the NEPA responsibilities of other Federal agencies. However, ODOT may use or adopt other Federal agencies' NEPA analyses consistent with 40 CFR parts 1500 -1508, and USDOT and FHWA regulations, policies, and guidance.
- 3.3.2 The following are specifically excluded from the list in subpart 3.3.1 of highway projects and classes of highway projects.
- A. Any highway projects authorized under 23 U.S.C. 202 and 203;
 - B. Any highway projects authorized under 23 U.S.C. 204 unless such projects will be designed and constructed by ODOT.
 - C. Any project that crosses State boundaries and any project that crosses or is adjacent to international boundaries. For purposes of this agreement a project is considered "adjacent to international boundaries" if it requires the issuance of a new, or the modification of an existing, Presidential Permit by the U.S. Department of State. Current projects meeting these criteria are:

1. HAM-50/State Line Road Improvements, PID 93507- Addition of left/right turn lanes and widening.
2. HAM-IR 71/IR 75-0.00/0.22, PID 75119- Brent Spence Bridge.
3. SCI-US23-0.00, PID 98150- Bridge deck overlay/resurfacing.
4. JEF-Wellsburg Bridge, PID 79353- Project is a new bridge over Ohio River to WV.

3.4 Limitations

- 3.4.1 As provided at 23 U.S.C. 327(e), ODOT shall be solely responsible and solely liable for carrying out all of the responsibilities it has assumed under this Part.
- 3.4.2 As provided at 23 U.S.C. 327(a)(2)(D), any highway project or responsibility of the USDOT Secretary that is not explicitly assumed by ODOT under subpart 3.3.1 in this MOU remains the responsibility of the USDOT Secretary.

PART 4. CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

4.1 Certifications

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

4.2 State Commitment of Resources

- 4.2.1 As provided at 23 U.S.C. 327(c)(3)(D), ODOT will maintain the financial resources necessary to carry out the responsibilities it is assuming. ODOT believes, and FHWA agrees, that the summary of financial resources contained in ODOT's application, dated May 27, 2015 appears to be adequate for this purpose. Should FHWA determine, after consultation with ODOT, that ODOT's financial resources are inadequate to carry out the USDOT Secretary's responsibilities, ODOT will take appropriate action to obtain the additional financial resources needed to carry out these responsibilities. If ODOT is unable to obtain the necessary additional financial resources, ODOT shall inform FHWA, and this MOU will be amended to assign only the responsibilities that are commensurate with ODOT's financial resources.
- 4.2.2 ODOT will maintain adequate organizational and staff capability, including competent and qualified consultants where necessary or desirable, to effectively carry out the responsibilities it has assumed under this MOU. This includes, without limitation:
- A. Using appropriate environmental, technical, legal, and managerial expertise;
 - B. Devoting adequate staff resources; and

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

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

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

4.3 Federal Court Jurisdiction

- 4.3.1 As provided at 23 U.S.C. 327(c)(3)(B), and pursuant to Ohio Revised Code Section 5531.30(B), ODOT hereby expressly consents, on behalf of the State of Ohio, to accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary assumed by ODOT under this MOU. This consent to Federal court jurisdiction shall remain valid after termination of this MOU, or FHWA's withdrawal of assignment of the USDOT Secretary's responsibilities for any decision or approval made by ODOT pursuant to an assumption of responsibility under this MOU. ODOT understands and agrees that, in accordance with 23 U.S.C. 327, this acceptance constitutes a waiver of the State of Ohio's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of carrying out the USDOT Secretary's responsibilities that have been assumed under this MOU.

PART 5. APPLICABILITY OF FEDERAL LAW

5.1 Procedural and Substantive Requirements

- 5.1.1 As provided at 23 U.S.C. 327(a)(2)(C), in assuming the USDOT Secretary's responsibilities under this MOU, ODOT shall be subject to the same procedural and substantive requirements that apply to the USDOT Secretary in carrying out these responsibilities. Such procedural and substantive requirements include, but are not limited to, Federal statutes and regulations, Executive Orders issued by the President of the United States, USDOT Orders, Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500 -1508), FHWA Orders, official guidance and policy issued by the CEQ, Office of Management and Budget (OMB), USDOT, or the FHWA (e.g. Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects), and any applicable Federal court decisions, and, subject to subpart 5.1.4 below, interagency agreements such as programmatic agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process [e.g., the 2015 Red Book – Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects, etc.].

A. ODOT has reviewed the 2014 MOA between the US Coast Guard (USCG) and FHWA and

understands that by accepting FHWA's NEPA responsibilities, it also agrees to perform FHWA's obligations set forth in the MOU between the USDOT and the USCG and the MOA between FHWA and the USCG.

- 5.1.2 Official USDOT and FHWA formal guidance and policies relating to environmental review are posted on the FHWA's website, contained in the FHWA Environmental Guidebook, published in the Federal Register, or may be sent to ODOT electronically or in hard copy.
- 5.1.3 After the Effective Date of this MOU, FHWA will use its best efforts to ensure that any new or revised Federal policies and guidance that are final and applicable to FHWA's responsibilities under NEPA and other environmental laws that are assumed by ODOT under this MOU are communicated to ODOT within 10 calendar days of issuance. Delivery may be accomplished by e-mail, web posting (with email or mail to ODOT notifying of web posting), mail, or publication in the Federal Register (with email or mail to ODOT notifying of publication). If communicated to ODOT by e-mail or mail, such material will be sent to ODOT's Administrator of Environmental Services. In the event that a new or revised FHWA policy or guidance is not made available to ODOT as described in the preceding sentence, and if ODOT had no actual knowledge of such policy or guidance, then a failure by ODOT to comply with such Federal policy or guidance will not be a basis for termination under this MOU.
- 5.1.4 ODOT will work with all other appropriate Federal agencies concerning the laws, guidance, and policies that such other Federal agencies are responsible for administering. For interagency agreements that involve signatories in addition to FHWA and ODOT, within six months after the effective date of this MOU, FHWA and ODOT will contact the relevant third party or parties to determine whether any action should be taken with respect to such agreement. Such actions may include:
 - A. Consulting with the third party to obtain written consent to the continuation of the interagency agreement in its existing form, but with the substitution through assignment of ODOT for FHWA; or
 - B. Negotiating with the third party to amend the interagency agreement as needed so that the interagency agreement continues but that ODOT assumes FHWA's responsibilities.

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, ODOT will carry out the assumed 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.

- 5.1.5 Upon termination of this MOU, FHWA and ODOT shall contact the relevant third party to any interagency agreement and determine whether the interagency agreement should be amended or reinstated as it was on the effective date of this MOU.

5.2 Rulemaking

- 5.2.1 As provided at 23 U.S.C. 327(f), nothing in this MOU permits ODOT to assume any rulemaking authority of the USDOT Secretary. Additionally, ODOT may not establish policy and guidance on behalf of the USDOT Secretary or FHWA for highway projects covered in this MOU. ODOT's authority to establish State regulations, policy, and guidance concerning the State environmental review of State highway projects shall not supersede applicable Federal environmental review regulations, policy, or guidance established by or applicable to the USDOT Secretary or FHWA.

5.3 Effect of Assumption

- 5.3.1 For purposes of carrying out the responsibilities assumed under this MOU, and subject to the limitations

contained in 23 U.S.C. 327 and this MOU, ODOT shall be deemed to be acting as FHWA with respect to the environmental review, consultation, and other action required under those responsibilities.

5.4 Other Federal Agencies

- 5.4.1 As provided at 23 U.S.C. 327(a)(2)(E), nothing in this MOU preempts or interferes with any power, jurisdiction, responsibility, or authority of an agency other than the USDOT (including FHWA), under applicable statutes and regulations with respect to a project.

PART 6. LITIGATION

6.1 Responsibility and Liability

- 6.1.1 As provided in 23 U.S.C. 327(e), ODOT shall be solely liable and solely responsible for carrying out the responsibilities assumed under this MOU. The FHWA and USDOT shall have no responsibility or liability for the performance of the responsibilities assumed by ODOT, including any decision or approval made by ODOT in the course of participating in the Program.

6.2 Litigation

- 6.2.1 Nothing in this MOU affects the United States Department of Justice's (hereinafter "DOJ") authority to litigate claims, including the authority to approve a settlement on behalf of the United States if either FHWA or another agency of the United States is named in such litigation or if the United States intervenes pursuant to 23 U.S.C. 327(d)(3). In the event FHWA or any other Federal agency is named in litigation related to matters under this MOU or the United States intervenes in the litigation, ODOT agrees to coordinate with DOJ in the defense of that action.
- 6.2.2 ODOT shall defend all claims brought in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, ODOT shall provide qualified and competent legal counsel, including outside counsel if necessary. ODOT shall provide the defense at its own expense, subject to 23 U.S.C. 327(a)(2)(G) concerning Federal-aid participation in attorney's fees for ODOT's counsel. ODOT shall be responsible for opposing party's attorney's fees and court costs if a court awards those costs to an opposing party, or in the event those costs are part of a settlement agreement.
- 6.2.3 ODOT will notify the FHWA's Ohio Division Office and DOJ's Assistant Attorney General for the Environment and Natural Resources Division of any Notice of Intent to sue (NOI) received pursuant to the citizen suit provisions of an applicable environmental law prior to initiation of litigation in connection with ODOT's performance or non-performance of any responsibility assumed or discharged under this MOU. ODOT shall provide to FHWA and DOJ a copy of any such NOI within 7 calendar days after the ODOT's receipt. The transmission of such copy may be made by electronic or regular mail.
- 6.2.4 ODOT shall notify the FHWA's Ohio Division Office and DOJ of any service of a complaint concerning ODOT's performance or non-performance of any responsibility assumed or discharged under this MOU within 7 calendar days of the receipt of service of process. ODOT's notification to FHWA and DOJ shall include a copy of the complaint and be made prior to its response to the complaint. No later than 30 calendar days from the notification and transmission of the complaint (unless otherwise agreed to by the parties), ODOT, FHWA, and DOJ will hold a conference call to discuss the merits of the complaint, potential strategies to address the matter, and to determine if the case is one of "Federal interest." The final decision that a case is of "Federal interest" will be made by FHWA and DOJ. FHWA and DOJ agree to notify ODOT as soon as possible if a case

previously determined not to be of "Federal interest" changes to a case of "Federal interest" in the course of the litigation.

- 6.2.5 For all cases, ODOT agrees to insert the following email addresses for FHWA at FHWA_assignment_lit@dot.gov and for DOJ at Efile_nrs.enrd@usdoj.gov to the distribution list in the court's electronic filing system (e.g., PACER) so that FHWA and DOJ may receive electronic copies of any motions, pleadings, briefs, and other such documents filed in any action concerning ODOT's discharge of any responsibility assumed under this MOU. For "Federal interest" cases, ODOT agrees to consult with FHWA and DOJ prior to filing or opposing any dispositive motion.
- 6.2.6 ODOT agrees to notify FHWA's Division Office and DOJ prior to settling any lawsuit, in whole or in part, and shall provide FHWA and DOJ at least 30 calendar days to review and comment on the proposed settlement. ODOT will not execute any settlement agreement until FHWA and DOJ have provided comments on the proposed settlement, indicated that they will not provide comments on the proposed settlement, or the 30-day review period has expired, whichever occurs first.
- 6.2.7 ODOT hereby consents to intervention by FHWA in any action or proceeding arising out of, or relating to ODOT's discharge of any responsibility assigned to the State under this MOU.
- 6.2.8 Within 7 calendar days of receipt by ODOT, ODOT will provide notice to FHWA's Division Office and DOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities ODOT has assumed under this MOU. If ODOT intends to appeal a court decision, ODOT shall notify FHWA's Division Office and DOJ and provide FHWA and DOJ 20 calendar days to comment on ODOT's intention to appeal. If either FHWA or DOJ objects in writing to ODOT's intention to appeal any aspect of an adverse court decision before the 20-day deadline, then ODOT will not file an appeal of such aspect. If neither FHWA nor DOJ objects in writing to ODOT's intention to appeal before the 20-day deadline, then ODOT may file the notice of appeal. However, ODOT agrees to withdraw its appeal of any aspect of an adverse court decision if FHWA and DOJ provide a written objection to the appeal of that aspect within 30 days of the filing of the notice of appeal.
- 6.2.9 ODOT's notification to FHWA and DOJ in subparts 6.2.3, 6.2.4, 6.2.6, and 6.2.8 shall be made by electronic mail to FHWA_assignment_lit@dot.gov and NRS DOT.enrd@usdoj.gov unless otherwise specified by FHWA and DOJ. FHWA and DOJ's comments under subpart 6.2.6 and written objections under subpart 6.2.8 shall be made by electronic mail to Tim.Hill@dot.ohio.gov unless otherwise specified by ODOT. In the event that regular mail is determined necessary, mail should be sent to:

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

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

6.3 Conflict Resolution

- 6.3.1 In discharging any of the USDOT Secretary's responsibilities under this MOU, ODOT agrees to comply with any applicable requirements of USDOT and FHWA statute, regulation, guidance or policy regarding conflict resolution. This includes the USDOT Secretary's responsibilities for issue resolution under 23 U.S.C. 139(h), with the exception of the USDOT Secretary's responsibilities under 23 U.S.C. 139(h)(6) regarding financial penalties.

- 6.3.2 ODOT agrees to follow 40 CFR part 1504 in the event of pre-decision referrals to CEQ for Federal actions determined to be environmentally unsatisfactory. ODOT also agrees to coordinate and work with CEQ on matters brought to CEQ with regards the environmental review responsibilities for Federal highway projects ODOT has assumed.

PART 7. INVOLVEMENT WITH OTHER AGENCIES

7.1 Coordination

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

7.2 Processes and Procedures

- 7.2.1 ODOT will ensure that it has appropriate processes and procedures in place that provide for proactive and timely consultation, coordination, and communication with all appropriate Federal agencies in order to carry out any of the responsibilities assumed under this MOU, including the submission of all environmental impact statements together with comments and responses to the Environmental Protection Agency as required at 40 CFR 1506.9 and for EPA's review as required by section 309 of the Clean Air Act. These processes and procedures shall be formally documented. Such formal documentation may be in the form of a formal executed interagency agreement or in other such form as appropriate.

PART 8. INVOLVEMENT WITH FHWA

8.1 Generally

- 8.1.2 Except as specifically provided otherwise in this MOU, FHWA will not provide any project-level assistance to ODOT in carrying out any of the responsibilities it has assumed under this MOU. Project-level assistance shall include any advice, consultation, or document review with respect to the discharge of such responsibility for a particular highway project. However, project-level assistance does not include process or program level assistance as provided in subpart 8.1.5, discussions concerning issues addressed in prior projects, interpretations of any applicable law contained in 23 U.S.C. or 49 U.S.C, interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance.
- 8.1.3 The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving ODOT's consultation or coordination with another Federal agency with respect to ODOT's discharge of any of the responsibilities assumed under this MOU for any particular highway project. However, the FHWA may attend meetings between ODOT and other Federal agencies. Further, FHWA may submit comments to ODOT and the other Federal agency in the following extraordinary circumstances:
- A. FHWA reasonably believes that ODOT is not in compliance with this MOU;
 - B. FHWA determines that an issue between ODOT and the other Federal agency concerns emerging national policy issues under development by the USDOT; or
 - C. Upon request by either ODOT or the Federal agency and agreement by FHWA.

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

- 8.1.4 Other Federal agencies may raise concerns regarding the compliance with this MOU by ODOT and may communicate these concerns to the FHWA. The FHWA will review the concerns and any information provided to FHWA by such other Federal agency. If, after reviewing these concerns, FHWA and such other Federal agency still have concerns regarding ODOT'S compliance, FHWA will notify ODOT of the potential compliance issue and will work with both ODOT and the relevant Federal agency to resolve the issue and, if necessary, take appropriate action to ensure compliance with this MOU.
- 8.1.5 At ODOT's request, FHWA may assist ODOT in evaluating its environmental program and developing or modifying any of its processes or procedures to carry out the responsibilities it has assumed under this MOU, including, but not limited to, those processes and procedures concerning ODOT'S consultation, coordination, and communication with other Federal agencies.
- 8.1.6 ODOT's obligations and responsibilities under 23 CFR 1.5 are not altered in any way by executing this MOU.

8.2 MOU Monitoring and Oversight

- 8.2.1 The FHWA will provide necessary and appropriate monitoring and oversight of ODOT's compliance with this MOU. The FHWA's monitoring and oversight activities under this MOU in years 1 through 4 of this MOU's term will primarily consist of auditing as provided at 23 U.S.C. 327(g) and Part 11 of this MOU, and evaluating attainment of the performance measures listed in Part 10 of this MOU. After the fourth year of ODOT's participation in the Project Delivery Program, the FHWA will monitor ODOT's compliance with the MOU, including the provision by ODOT of financial resources to carry out the MOU. The FHWA's monitoring and oversight may also include submitting requests for information to ODOT and other relevant Federal agencies, verifying ODOT's financial and personnel resources dedicated to carrying out the responsibilities assumed, and reviewing documents and other information.
- 8.2.2 Pursuant to 23 U.S.C. 327(c)(4), ODOT is responsible for providing FHWA any information FHWA considers necessary to ensure that ODOT is adequately carrying out the responsibilities assigned. When requesting information subject to section 327(c)(4), FHWA will provide the request to ODOT in writing, and the request will identify with reasonable specificity the information required. FHWA will also indicate in the request a deadline for the information to be provided. ODOT will, in good faith, work to ensure the information requested is provided by the deadline. ODOT's response to an information request under this paragraph will include, where appropriate, making relevant employees and consultants available at their work location (including in-person meeting, teleconference, videoconference or other electronic means as may be available).
- 8.2.3 ODOT shall make project files and general administrative files pertaining to its discharge of the responsibilities it has assumed under this MOU reasonably available for inspection by FHWA at the files' locations upon reasonable notice, which is not less than 5 business days. These files shall include, but are not limited to, all letters and comments received from governmental agencies, the public, and others with respect to ODOT's discharge of the responsibilities assumed under this MOU.
- 8.2.4 In carrying out the responsibilities assumed under this MOU, ODOT agrees to carry-out regular quality control and quality assurance activities to ensure that the assumed responsibilities are being conducted in accordance with applicable law and this MOU. At a minimum, ODOT's quality control/quality assurance activities will include the review and monitoring of its processes and performance relating to project decisions, environmental analysis, project file documentation, checking for errors and omissions, legal sufficiency reviews, and taking appropriate corrective action as needed. Within 3 months of the effective date of this MOU, ODOT shall finalize a quality control and quality assurance (QA/QC) process that satisfies the requirements of this subpart. In developing and implementing the QA/QC process, ODOT shall consult with the FHWA Ohio Division Office. ODOT agrees to cooperate with FHWA to incorporate recommendations FHWA may have with respect to its QA/QC process.

- 8.2.5 ODOT shall perform regular self-assessments of its QA/QC process and performance to determine whether its process is working as intended, to identify any areas needing improvements in the process, and to timely take any corrective actions necessary to address the areas needing improvement. At least 1 month prior to the date of a scheduled FHWA audit, ODOT shall transmit a summary of the previous year's self-assessment(s) to the FHWA Ohio Division Office. The summary shall include a description of the scope of the self-assessment(s) conducted and the areas reviewed, a description of the process followed in conducting the self-assessment, a list of the areas identified as needing improvement, any corrective actions that have been or will be implemented, a statement from the Administrator of ODOT's Office of Environmental Services concerning whether the processes are ensuring that the responsibilities ODOT has assumed under this MOU are being carried-out in accordance with this MOU and all applicable Federal laws and policies, and a summary of ODOT's progress toward attaining the performance measures listed in Part 10 of this MOU. After a period of 2 years from the Effective Date of this MOU, ODOT shall conduct its self-assessments no less frequently than annually.
- 8.2.6 ODOT will provide FHWA Ohio Division Office with access to its electronic system for environmental documentation and develop a query that creates a report of real time data, the listing of any approvals and decisions ODOT has made with respect to the responsibilities ODOT has assumed under this MOU.

8.3 Record Retention

- 8.3.1 Except as provided in 8.3.2, ODOT will retain project files and general administrative files pertaining to its discharge of the responsibilities it has assumed under this MOU in accordance with the FHWA Records Disposition Manual (Field Offices) Chapter 4, FHWA Order No. 1324.1 B, issued July 29, 2013, or in accordance with any subsequent order that supersedes or replaces Order No. 1324.1 B.
- 8.3.2 For the following record types ODOT will ensure that the following retention periods are maintained in the following manner:
- A. **FHWA-ODOT Environment Correspondence Files:** Correspondence between FHWA and ODOT relative to the interpretation, administration, and execution of this MOU and the environmental aspects of the Federal-aid Highway Program, as established in 8.1.2 and 8.1.5, shall be maintained by ODOT for a period of 6 years after the resolution of the particular issue or after the guidance has been superseded. After 6 years ODOT may follow the State records disposition process for these records.
 - B. **National Environmental Policy Act (NEPA) and Related Documents:** For a period of 8 years after approval of the final construction voucher ODOT shall maintain Final NEPA Documents (Draft EISs, Final EISs, Supplemental EISs, RODs, EAs, FONSI, CE documentation and determinations), Supporting Materials (documentation supporting the Sec. 139 environmental review process [i.e., coordination plans that include project schedules, evidence for opportunities for public/agency input in purpose and need, alternatives], scoping, public and agency comments; meeting minutes; NOI, Public Involvement Plans, public meeting summaries, public hearing certifications and transcripts, mitigation reports/tracking, technical reports; correspondence; studies and reports; references; errata sheets; and reevaluation documents); NEPA Reference Documents (written statements and supporting documents needed for reference); and official documents and correspondence related to reviews under other environmental requirements (e.g., ESA, CWA, Section 4(f), Section 106). After 8 years ODOT may follow the State records disposition process for these records except that ODOT will permanently store the above referenced records for Significant Transportation Projects as they are defined in Order No. 1224.1B.

Drafts and working copies of paper or electronic documents should be kept until the final version of a

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

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

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

8.4 Federal Register

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

8.5 Participation in Resource Agency Reports

8.5.1 ODOT agrees to provide data and information requested by the FHWA and resource agencies for the preparation of national reports to the extent that the information relates to determinations, findings, and proceedings associated with projects processed under this MOU. Such reports include but are not limited to:

- A. Information on the completion of and duration to complete environmental documentation of all NEPA types (EIS, EA, CE);
- B. Archeology Reports requested by the National Park Service;
- C. Endangered Species Act Expenditure Reports requested by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service;
- D. Project schedules and other project information for nationwide infrastructure transparency initiatives;
- E. NEPA Litigation Reports requested by CEQ; and
- F. Environmental Conflict Resolution reports requested by the Office of Management and Budget and CEQ.

8.6 Conformity Determinations

8.6.1 Pursuant to 23 U.S.C. 327(a)(2)B)(iv)(II), for any project requiring a project-level conformity determination

under the Federal Clean Air Act and its implementing regulations, the FHWA's Ohio Division Office will document the project level conformity determination. FHWA's Ohio Division Office will restrict its review to only that data, analyses, applicable comments and responses, and other relevant documentation that enable FHWA to make the project-level conformity determination.

8.7 Certification of NEPA Compliance

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

8.8 Enforcement

- 8.8.1. Should FHWA determine that ODOT is not in compliance with this MOU, then FHWA shall take appropriate action to ensure ODOT's compliance, including appropriate remedies provided at 23 CFR 1.36 for violations of or failure to comply with Federal law or the regulations at 23 CFR with respect to a project, withdrawing assignment of any responsibilities that have been assumed as provided in Part 9 of this MOU, or terminating ODOT's participation in the Project Delivery Program as provided in Part 13 of this MOU.

PART 9. WITHDRAWAL OF ASSIGNED RESPONSIBILITIES

9.1 FHWA-Initiated Withdrawal of Assigned Projects

- 9.1.1 The FHWA may, at any time, withdraw the assignment of all or part of the USDOT Secretary's responsibilities that have been assumed by ODOT under this MOU for any highway project or highway projects upon FHWA's determination that:
- A. With respect to that particular highway project or those particular highway projects, ODOT is not in compliance with a material term of this MOU or applicable Federal laws or policies, and ODOT has not taken sufficient corrective action to the satisfaction of FHWA;
 - B. The highway project or highway projects involve significant or unique national policy interests for which ODOT's assumption of the USDOT Secretary's responsibilities would be inappropriate; or
 - C. ODOT cannot satisfactorily resolve an issue or concern raised in a government-to-government consultation process, as provided in subpart 3.2.3.
- 9.1.2 Upon the FHWA's determination to withdraw assignment of the USDOT Secretary's responsibilities under subpart 9.1.1, FHWA will informally notify ODOT of FHWA's determination. After informally notifying ODOT of its determination, FHWA will provide ODOT written notice of its determination including the reasons for its determination. Upon receipt of this notice, ODOT may submit any comments or objections to FHWA within 30 calendar days, unless FHWA agrees to an extended period of time. Upon receipt of ODOT's comments or objections, FHWA will make a final determination within 30 calendar days, unless extended by FHWA for cause, and notify ODOT of its decision. In making its determination, FHWA will consider ODOT's comments or objections, the effect the withdrawal of assignment will have on the Program, the amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.
- 9.1.3 The FHWA shall withdraw assignment of the responsibilities ODOT has assumed for any highway project when

the preferred alternative that is identified in the categorical exclusions, environmental assessment, or final environmental impact statement is a highway project that is specifically excluded in subpart 3.3.2. In such case, subpart 9.1.2 shall not apply.

9.2 ODOT-Initiated Withdrawal of Assignment of Projects

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

PART 10. PERFORMANCE MEASURES

10.1 General

- 10.1.1 Both FHWA and ODOT have determined that it is desirable to mutually establish a set of performance measures that FHWA can take into account in its evaluation of ODOT's administration of the responsibilities it has assumed under this MOU.
- 10.1.2 ODOT's attainment of the performance measures indicated in this Part 10 will be considered during the FHWA audits, which are required under 23 U.S.C. 327(g).
- 10.1.3 ODOT shall collect and maintain all necessary and appropriate data related to the attainment of the performance measures. In collecting this data, ODOT shall monitor its progress toward meeting the performance measures and include its progress in the self-assessment summary provided under subpart 8.2.5 of this MOU. The summary shall be made available to the FHWA as provided in subpart 8.2.5.

10.2 Performance Measures

- 10.2.1 The performance measures applicable to ODOT in carrying-out the responsibilities it has assumed under this MOU are as follows:

A. Compliance with NEPA and other Federal environmental statutes and regulations:

- i. Maintain documented compliance with procedures and processes set forth in this MOU for the environmental responsibilities assumed under the Program.
- ii. Maintain documented compliance with requirements of all applicable Federal statutes and regulations for which responsibility is assumed (Section 106, Section 7, etc.).

B. Quality Control and Assurance for NEPA decisions:

- i. Maintain and apply internal quality control and assurance measures and processes, including a record of:
 - a. Legal sufficiency determinations made by counsel; this shall include the legal sufficiency reviews of Notices of Intent and Notices of Final Agency Action as required by law, policy, or guidance; and,
 - b. Compliance with FHWA's and ODOT's environmental document content standards and procedures, including those related to QA/QC; and,
 - c. Completeness and adequacy of documentation of project records for projects done under the Program.

C. Relationships with agencies and the general public:

- i. Assess change in communication among ODOT, Federal and State resource agencies and the public resulting from assumption of responsibilities under this MOU.
- ii. Maintain effective responsiveness to substantive comments received from the public, agencies and interest groups on NEPA documents and environmental concerns.
- iii. Maintain effective NEPA conflict resolution processes whenever appropriate.

D. Increased efficiency and timeliness in completion of NEPA process:

- i. Compare time of completion for NEPA approvals before and after assumption of responsibilities under this MOU.
- ii. Compare time to completion for key interagency consultation formerly requiring FHWA participation (e.g., Section 7 biological opinions, Section 106 resolution of adverse effects) before and after assumption of responsibilities under this MOU.

PART 11. AUDITS

11.1 General

- 11.1.1 As required at 23 U.S.C. 327(g), FHWA will conduct audits of ODOT's discharge of the responsibilities it has assumed under this MOU. Audits will be the primary mechanism used by FHWA to oversee ODOT's compliance with this MOU ensure compliance with applicable Federal laws and policies, evaluate ODOT's progress toward achieving the performance measures identified in Part 10, and collect information needed for the USDOT Secretary's annual report to Congress.
- 11.1.2 Pursuant to 23 U.S.C. 327(c)(4), ODOT is responsible for providing FHWA any information FHWA considers necessary to ensure that ODOT is adequately carrying out the responsibilities assigned. ODOT will make documents and records available for review by FHWA in conducting audits and shall provide FHWA with copies of any such documents and records as may be requested by FHWA. In general, all documents and records will be made available to FHWA at their normal place of repository. However, ODOT will work with FHWA to provide documents through e-mail, CD-ROM, mail, or facsimile to the extent it does not create an undue burden.
- 11.1.3 ODOT agrees to cooperate with FHWA in conducting audits, including providing access to all necessary

information, making all employees available to answer questions (including consultants hired for the purpose of carrying out the USDOT Secretary's responsibilities), and providing all requested information (including making employees available) to FHWA in a timely manner. Employees will be made available either in-person at their normal place of business or by telephone, at the discretion of FHWA.

11.1.4 ODOT and the FHWA Ohio Division Office will each designate an audit coordinator who will be responsible for coordinating audit schedules, requests for information, and arranging audit meetings.

11.1.5 The FHWA audits will include, but not be limited to, consideration of ODOT's technical competency and organizational capacity, adequacy of the financial resources committed by ODOT to administer the responsibilities assumed, quality control and quality assurance process, attainment of performance measures, compliance with this MOU's requirements, and compliance with applicable Federal laws and policies in administering the responsibilities assumed.

11.2 Scheduling

11.2.1 As provided at 23 U.S.C. 327(g), FHWA will conduct semiannual audits during each of the first 2 years after the Effective Date of this MOU and an annual audit during the third and fourth years after the Effective Date. In the event the frequency of the audits is modified by amendments to 23 U.S.C. 327(g), then the frequency established by the statutory amendments will control and apply to this subpart. After the fourth year of ODOT's participation in the Program, FHWA will monitor ODOT's compliance with the MOU, including the provision by ODOT of financial resources to carry-out the MOU, but will not conduct additional audits under this Part 11.

11.2.2 For each semiannual and annual audit, the designated audit coordinators for FHWA and ODOT will work to establish general audit schedules at least three months prior to the semiannual or annual anniversary dates of the Effective Date of this MOU. The general audit schedules shall include the dates that FHWA will conduct the audit. To the maximum extent practicable, the general audit schedule will identify all employees (including consultants) and documents and other records that ODOT will make available to FHWA during the audit. ODOT agrees to work with FHWA to specifically identify each employee. With respect to documents and other records, ODOT and FHWA agree to try to be as specific as possible, although a general description of the types of documents will be acceptable.

11.2.3 ODOT's audit coordinator shall make all reasonable efforts to ensure all necessary employees (including consultants) are available to FHWA during the specified dates on the general audit schedule. ODOT will also ensure that all of its documents and records are made reasonably available to FHWA as needed during the general audit schedule.

11.2.4 After the general audit schedule is established, the audit coordinators shall work to establish specific audit schedules at least two weeks prior to the scheduled audit. The specific audit schedules shall include the dates, times, and place for which FHWA will talk to ODOT's employees (including consultants) and review documents and records.

11.2.5 To the maximum extent practicable, the specific audit schedule will identify all employees (including consultants) and documents and other records that ODOT will make available to FHWA during the audit. Should FHWA determine that it needs access to an employee, document or other record that is not identified in the specific audit schedule, ODOT agrees to make reasonable efforts to produce such employee, document or other record on the specified dates. With respect to employees, ODOT agrees to work with FHWA to specifically identify each employee. With respect to documents and other records, ODOT and FHWA agree to try to be as specific as possible, although a general description of the types of documents will be acceptable.

11.3 Other Agency Involvement

- 11.3.1. The FHWA may invite other Federal or State agencies as deemed appropriate, including State Historic Preservation Officers (SHPO), to assist FHWA in conducting an audit under this MOU by sitting in on interviews, reviewing documents obtained by FHWA, and making recommendations to FHWA. In any case, FHWA will ensure ODOT is aware of the role that any such other agency plays in the audit process.

11.4 Audit Report and Findings

- 11.4.1 Upon completing each audit, FHWA will transmit to ODOT a draft of the audit report and allow ODOT a period of 14 calendar days within which to submit written comments to FHWA. The FHWA will grant any reasonable request by ODOT to extend its deadline to respond in writing to a draft audit report not to exceed a total review period of 30 days. The FHWA will review the comments and revise the draft audit report as may be appropriate. The FHWA will then prepare the draft audit report for public comment.
- 11.4.2 As required at 23 U.S.C. 327(g)(2), FHWA will make the draft audit report available for public comment. In carrying out this requirement, FHWA will, after receipt and incorporation of ODOT comments as provided in subpart 11.4.1, publish the audit report in the Federal Register and allow a comment period of 30 calendar days. The FHWA will then address and respond to the public comments by incorporating the comments and response into the final audit report. The final audit report will be published in the Federal Register not later than 60 calendar days after the comment period closes.

PART 12. TRAINING

- 12.1 The FHWA will provide ODOT available training, to the extent FHWA and ODOT deem necessary, in all appropriate areas with respect to the environmental responsibilities that ODOT has assumed. Such training may be provided by either FHWA or another Federal agency or other parties as may be appropriate. ODOT agrees to have all appropriate employees (including consultants hired for the purpose of carrying out the USDOT Secretary's responsibilities) attend such training.
- 12.2 Within 90 days after the effective date of this MOU, ODOT and FHWA, in consultation with other Federal agencies as deemed appropriate, will assess ODOT's need for training and develop a training plan. The training plan will be updated by ODOT and FHWA, in consultation with other Federal agencies as appropriate, annually during the term of this MOU. While ODOT and FHWA may take other agencies' recommendations into account in determining training needs, ODOT will be responsible for the final development and implementation of the training program.

PART 13. TERM, TERMINATION AND RENEWAL

13.1 Term

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

13.2 Termination by the FHWA

- 13.2.1 As provided at 23 U.S.C. 327(i)(2), FHWA may terminate ODOT's participation in the Program, in whole or in part, at any time subject to the procedural requirements in 23 U.S.C. 327(i)(2)(B) and subpart 13.2.2 below, if FHWA determines that ODOT is failing to adequately carry out its responsibilities under this MOU. Failure to adequately carry out the responsibilities may include, but not be limited to:

- A. Persistent neglect of, or noncompliance with, any Federal laws, regulations, and policies;

- B. Failure to cooperate with FHWA in conducting 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, as well as SHPOs, into account in carrying out the responsibilities assumed.

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

- A. The FHWA shall provide to ODOT a written notification of its determination;
- B. The FHWA shall provide ODOT a period of at least 30 calendar days to take such corrective action as the FHWA determines is necessary to comply with this MOU; and
- C. If ODOT, after notification and the period provided under subpart 13.2.2(B), fails to take satisfactory corrective action, FHWA shall provide notice to ODOT of its determination whether or not to implement the FHWA-initiated termination. Any responsibilities identified to be terminated in the notice that have been assumed by ODOT under this MOU shall transfer to FHWA.

13.3 Termination by ODOT

- 13.3.1 ODOT may terminate its participation in the Program, in whole or in part, at any time by providing to FHWA a notice at least ninety (90) calendar days prior to the date that ODOT seeks to terminate its participation in this program, and subject to such terms and conditions as FHWA may provide.
- 13.3.2. The Ohio Legislature and Governor may, at any time, terminate ODOT's authority granted to participate in this Program. In that event, FHWA and ODOT shall develop a plan to transition the responsibilities that ODOT has assumed back to FHWA so as to minimize disruption to projects, minimize confusion to the public, and minimize burdens to other affected Federal, State, and local agencies. The plan shall be approved by both FHWA and ODOT.
- 13.3.3. Any such withdrawal of assignment which FHWA and ODOT have agreed to under a transition plan shall not be subject to the procedures or limitations provided for in Part 9 of this MOU and shall be valid as agreed to in the transition plan.

13.4 Validity of ODOT Actions

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

13.5 Renewal

This MOU is renewable in accordance with 23 U.S.C. 327 and implementing regulations, as in effect at the time of the renewal.

PART 14. AMENDMENTS

14.1 Generally


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

14.2 Additional Projects, Classes of Projects and Environmental Review Responsibilities

- 14.2.1 The FHWA may assign, and ODOT may assume, responsibility for additional projects and additional environmental review responsibilities beyond those identified in Part 3 of this MOU by executing an amendment to this MOU.
- 14.2.2 Should ODOT decide to request this MOU to be amended to add responsibility for additional projects or classes of projects, or additional environmental review responsibilities beyond those identified in Part 3 of this MOU, such request shall be treated as an amendment to ODOT's original application that was submitted to FHWA pursuant to 23 U.S.C. 327(b) and 23 C.F.R. part 773. In developing the application supplement, ODOT shall identify the additional projects, classes of projects, and environmental review responsibilities it wishes to assume and make any appropriate adjustments to the information contained in ODOT's original application, including the verification of personnel and financial resources.

IN WITNESS THEREOF, the parties hereto have caused this MOU to be duly executed in duplicate as of the date of the last signature written below.

FEDERAL HIGHWAY ADMINISTRATION

By: 
Gregory G. Nadeau
Administrator
Federal Highway Administration

Dated: 12/11/15

STATE OF OHIO

Recommended by:


Jerry Wray,
Director
Ohio Department of Transportation

Dated: 12.1.15

**PROGRAMMATIC AGREEMENT
BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION, OREGON DIVISION
AND
THE OREGON DEPARTMENT OF TRANSPORTATION
REGARDING APPROVAL OF ACTIONS CLASSIFIED AS CATEGORICAL EXCLUSIONS FOR FEDERAL-
AID HIGHWAY PROJECTS**

Whereas, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370h (2014), and the regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500-1508) direct Federal agencies to consider the environmental impacts of their proposed major Federal actions through the preparation of an environmental assessment (EA) or environmental impact statement (EIS) unless a particular action is categorically excluded from those requirements;

Whereas, the Federal Highway Administration's (FHWA) distribution and spending of Federal funds under the Federal-aid Highway Program and approval of actions pursuant to Title 23 of the U.S. Code are major Federal actions subject to NEPA;

Whereas, the Secretary of Transportation has delegated to FHWA the authority to carry out functions of the Secretary under NEPA as they relate to matters within FHWA's primary responsibilities (49 CFR 1.81(a)(5));

Whereas, the FHWA's NEPA implementing procedures (23 CFR part 771) list a number of categorical exclusions (CE) for certain actions that FHWA has determined do not individually or cumulatively have a significant effect on the human environment and therefore do not require the preparation of an EA or EIS;

Whereas, the Oregon Department of Transportation (ODOT) is a State agency that undertakes transportation projects using Federal funding received under the Federal-aid Highway Program and must assist FHWA in fulfilling its obligations under NEPA for the ODOT projects (23 CFR 771.109);

Whereas, Section 1318(d) of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405 (July 6, 2012), allows FHWA to enter into programmatic agreements with the States that establish efficient administrative procedures for carrying out environmental and other required project reviews, including agreements that allow a State to determine whether a project qualifies for a CE on behalf of FHWA;

Whereas, the FHWA developed regulations implementing the authorities in section 1318(d), effective November 6, 2014, allowing States to determine and approve whether an action qualifies for a listed CE on behalf of FHWA without further FHWA review and approval;

Now, therefore, the FHWA and the Oregon Department of Transportation enter into this Programmatic Categorical Exclusion Agreement ("Agreement") for the processing of categorical exclusions.

I. PARTIES

The Parties to this Agreement are the Federal Highway Administration ("FHWA") and the Oregon Department of Transportation ("ODOT").

II. PURPOSE

The purpose of this Agreement is to authorize ODOT to determine and approve on behalf of FHWA whether a project qualifies for a CE listed in 23 CFR 771.117 provided it does not exceed the thresholds described in Section IV.A.1.b [hereinafter "programmatic categorical exclusion" (PCE) approvals].

This Agreement does not delegate any other FHWA responsibility under environmental or other Federal laws. This Agreement applies to all ODOT projects using Federal-aid funds.

III. AUTHORITIES

This agreement is entered into pursuant to the following authorities:

- A. National Environmental Policy Act, 42 U.S.C. 4321 - 4370
- B. Moving Ahead for Progress in the 21st Century Act, P.L. 112-141, 126 Stat. 405, Sec. 1318(d)
- C. 40 CFR parts 1500 - 1508
- D. DOT Order 5610.1C
- E. 23 CFR 771.117
- F. ORS 190.010
- G. ORS 366.558

IV. RESPONSIBILITIES

A. The ODOT is responsible for:

1. Ensuring the following process is completed for each project that qualifies for a PCE:
 - a. The ODOT may approve on behalf of FHWA those PCEs specifically listed in 23 CFR 771.117 (c) and (d), that do not exceed the thresholds in Section IV.A.1.b. of this Agreement. The ODOT will identify the applicable listed CE from 771.117 (c) and/or (d), ensure any conditions or constraints are met, verify that unusual circumstances do not apply, address any and all other environmental requirements, and complete the review with a signature evidencing approval. No separate review or approval of the PCE by FHWA is required.

- b. If the following thresholds are met or exceeded, notwithstanding the listing of the action in 23 CFR 771.117 (c) or (d), ODOT may not approve the PCE and must instead defer to FHWA to review and approve the action.
 - i. Involves unusual circumstances as described in 23 CFR 771.117(b);
 - ii. Involves use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. 303) that require preparation of an Individual Section 4(f) Evaluation;
 - iii. Results in a determination of "Adverse Effect" on historic properties protected by Section 106 of the National Historic Preservation Act (NHPA) by FHWA;
 - iv. Requires a U.S. Coast Guard permit;
 - v. Requires an Individual Permit under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act;
 - vi. Results in an increase in the designated regulatory floodway elevation, or an increase of more than 1 foot of surface water elevation in the 100-year floodplain when no regulatory floodway is designated;
 - vii. Requires a Wild and Scenic River Section 7 determination from the river-administering agency;
 - viii. Results in changes that substantially affect traffic patterns temporarily or permanently;
 - ix. Requires the acquisition of more than minor amounts of right-of-way or displacement of owners and/or tenants;
 - x. Does not conform to the Air Quality State Implementation Plan;
 - xi. Requires an individual project-level formal consultation under Section 7 of the Endangered Species Act because the project cannot be processed with the Federal-Aid Highway Programmatic Biological Opinion with USF&WS and NMFS;
 - xii. Requires an exception to Oregon Statewide Planning Goals; or
 - xiii. Is controversial. In cases when controversy is anticipated, ODOT will discuss the potential for controversy with FHWA to determine if the project can be processed under this Agreement.
 - xiv. Is identified subsequent to the execution of this agreement by FHWA via written notification to ODOT.

2. Consulting with FHWA for actions that involve unusual circumstances (23 CFR §771.117(b)) to determine the appropriate class of action for environmental analysis and documentation. The ODOT may decide, or FHWA may require, additional studies to be performed prior to making a PCE approval, CE approval, or preparation of an EA or EIS.
3. Ensuring that the PCE Determination Form is completed prior to the ODOT request for FHWA right-of-way authorization and that the PCE Approval Document is completed prior to the ODOT request for FHWA construction authorization.
4. Meeting applicable documentation requirements in Section V for PCE approvals on FHWA's behalf, applicable approval and re-evaluation requirements in Section VI, and applicable quality control/quality assurance, monitoring, and performance requirements in Section VII.
5. Relying only upon employees directly employed by the ODOT to make PCE approvals. The ODOT may not delegate its responsibility for PCE approvals to third parties (i.e., consultants, local government staff, and other State agency staff).
6. Maintaining adequate organizational and staff capability and expertise to effectively carry out the provisions of this Agreement. This includes, without limitation:
 - a. Using appropriate technical and managerial expertise to perform the functions set forth under this Agreement.
 - b. Devoting adequate financial and staff resources for processing and approving of projects under this Agreement.
7. Providing for quality assurance and quality control of consultant-produced documents. The ODOT may procure through consultant services environmental and other technical expertise needed for compliance with this Agreement.
8. Ensuring that the ODOT individuals who prepare and/or approve PCE documentation will, at a minimum:
 - a. Be knowledgeable with and follow the appropriate subsections 23 CFR 771 through 774, and FHWA and ODOT procedures for environmental analysis and NEPA compliance.
 - b. Have completed Introduction to NEPA and Transportation Decision-making web-based course FHWA-NHI-142052.
 - c. Have adequate experience addressing NEPA compliance for transportation projects or until such time, have their work reviewed by staff having the necessary experience.

9. Providing credentials of individuals responsible for the NEPA documentation to FHWA every year, as part of the annual report. Information to be supplied includes: (1) Date individual completed course FHWA-NHI-142052; (2) Brief statement of the individual's experience.

B. The FHWA is responsible for:

1. Providing timely advice and technical assistance on PCEs to the ODOT, as requested.
2. Overseeing the implementation of this Agreement in accordance with the provisions in Section VII. C.

V. DOCUMENTATION OF ODOT PCE APPROVALS

- A. For PCE approvals, the ODOT shall identify in its Quarterly Programmatic Categorical Exclusion (PCE) Report (Appendix A) provided to FHWA the applicable actions from 23 CFR 771.117 (c) and/or (d) , ensure any conditions specified in FHWA regulation are met, verify that unusual circumstances do not apply, and address all other environmental requirements. Completed PCE Determination Forms and PCE Approval Documents will be accessible via an electronic link in the quarterly report, each with an ODOT signature evidencing approval. Electronic links associated with each project will include all underlying NEPA support documentation.
- B. The ODOT shall maintain a project record for PCE approvals it makes on FHWA's behalf. This record should include at a minimum:
 1. Any checklists, forms, or other documents and exhibits that summarize the consideration of project effects and unusual circumstances;
 2. A summary of public involvement complying with the requirements of FHWA-approved public involvement policy;
 3. Stakeholder communication, correspondence, consultation, or public meeting documentation that supports project and environmental decisions;
 4. The name and title of the document approver and the date of ODOT's approval; and
 5. For cases involving re-evaluations, any documented re-evaluation.
- C. Any electronic or paper project records maintained by the ODOT shall be provided to FHWA upon request. The ODOT shall retain those records, including all letters and comments received from governmental agencies, the public, and others for a period of no less than three (3) years after completion of project construction. This three-year retention provision does not relieve ODOT of its project or program recordkeeping responsibilities under 2 CFR § 200.333 or any other applicable laws, regulations, or policies, including ORS 192.420—192.505.

VI. NEPA APPROVAL AUTHORITY AND RE-EVALUATIONS

- A. The ODOT's PCE approvals may only be made by qualified ODOT Geo-Environmental Managers, ODOT Region Environmental Managers or their qualified designees.
- B. These approvals will be indicated in a state-defined field in FMIS, and will also be reported in the ODOT Quarterly PCE Report to FHWA. FHWA will use ODOT's reporting in FMIS, to determine whether to approve right-of-way or construction phases for projects that meet the conditions of this Agreement.
- C. In accordance with 23 CFR 771.129, the ODOT shall re-evaluate its determinations and approvals for projects, consult with FHWA, and as necessary, prepare additional documentation to ensure that determinations are still valid.
- D. If FHWA does not approve the project authorization for right-of-way or construction due to concerns with NEPA compliance, then FHWA will immediately inform ODOT of the reasons for its decision not to approve these phases.

VII. QUALITY CONTROL/QUALITY ASSURANCE, MONITORING & PERFORMANCE

- A. ODOT Quality Control and Quality Assurance
 - 1. The ODOT agrees to develop, carry out and report on regular quality control and quality assurance activities to ensure that its PCE approvals are made in accordance with applicable law and this Agreement. Within six months of the execution date of this agreement, ODOT, in coordination with FHWA, will develop QA/QC procedures that ensure ODOT PCE documentation meets all legal requirements, and that ODOT provides appropriate QA/QC oversight of PCEs. The QA/QC procedures will be described in a document that will be submitted to FHWA by October 1, 2015. FHWA will provide a written response within thirty (30) calendars of the submission, regarding the acceptability of the procedures.
- B. ODOT Performance Monitoring and Reporting.
 - 1. The FHWA and ODOT will cooperate in monitoring performance under this Agreement and work to assure quality performance.
 - 2. The ODOT will submit to FHWA, ODOT Quarterly Programmatic Categorical Exclusion (PCE) Report (Appendix A) summarizing approvals made under this Agreement. The report will also identify any areas where improvement is needed and what measures ODOT is taking to implement those improvements. The report will include a description of actions taken by ODOT as part of its quality control and quality assurance efforts under Section VII.A.
 - 3. The ODOT PCE Quarterly Report (Appendix A) will be provided to FHWA no later than 15 calendar days following the end of each Federal Fiscal Year quarter. Performance gaps that have been noted by the ODOT or the FHWA in the performance quarter will be captured in the Quarterly Report.

4. The ODOT will provide to the FHWA an Annual Report that summarizes ODOT's performance under this Agreement no later than 45 calendar days following the end of each Federal Fiscal Year. The annual report will include:
 - i. follow-up from prior years' reports recommendations;
 - ii. state-wide quality control and assurance activities that were undertaken in the past year;
 - iii. the results from implementing quality control and assurance activities;
 - iv. corrective actions taken and results of those actions;
 - v. identification of training needs and training provided;
 - vi. program changes that have occurred due to the review(s); and
 - vii. program changes that should be considered.

C. FHWA Oversight and Monitoring

1. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of ODOT, as well as ODOT's performance of its PCE processing functions. Performance considerations include, without limitation, the quality and consistency of ODOT's PCE approvals, project environmental documentation, CE submissions to FHWA for approval, adequacy and capability of ODOT staff and consultants, and the effectiveness, quality and consistency of ODOT's administration of its internal PCE approvals.
2. FHWA will conduct one or more program reviews as part of its oversight activities, during the term of this Agreement. The ODOT shall prepare and implement a corrective action plan to address any findings or observations identified in the FHWA review. The ODOT shall draft the corrective action plan within 45 calendar days of FHWA finalizing its review. The results of that review and corrective actions taken by the ODOT shall be considered at the time this Agreement is considered for renewal.
3. Nothing in this Agreement prevents FHWA from undertaking other monitoring or oversight actions, including audits, with respect to ODOT's performance under this Agreement. The FHWA may require ODOT to perform other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with applicable Federal laws and regulations.
4. The ODOT agrees to cooperate with FHWA in all oversight and quality assurance activities.

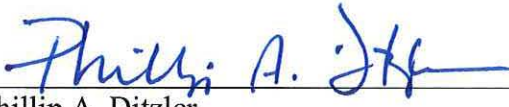
VIII. AMENDMENTS

If the parties agree to amend this Agreement, then FHWA and ODOT may execute an amendment with new signatures and dates of the signatures. The term of the Agreement shall remain unchanged unless otherwise expressly stated in the amended Agreement.

IX. TERM, RENEWAL, AND TERMINATION

- A. This agreement, upon signature by all parties, terminates and replaces the existing Programmatic Categorical Exclusion Agreement between the Federal Highway Administration (FHWA) and the Oregon Department of Transportation (ODOT) For Federal Actions with Minor Impacts in Compliance with the National Environmental Policy Act, the Council on Environmental Quality Regulations and FHWA Regulations (23 CFR 771), executed on June 28, 1999.
- B. This Agreement shall have a term of five (5) years, effective on the date of the last signature. The ODOT shall post and maintain an executed copy of this Agreement on its website, available to the public.
- C. This Agreement is renewable for additional five (5) year terms if ODOT requests renewal and FHWA determines that ODOT has satisfactorily carried out the provisions of this Agreement. In considering any renewal of this Agreement, FHWA will evaluate the effectiveness of the Agreement and its overall impact on the environmental review process.
- D. At least six (6) months prior to the end of each five year term, ODOT and the FHWA will meet to discuss the results under the Agreement and consider amendments to this Agreement. This meeting may be combined with a meeting to discuss performance under the monitoring provisions of this Agreement.
- E. Either party may terminate this Agreement at any time only by giving at least 30 days written notice to the other party.
- F. Expiration or termination of this Agreement shall mean that the ODOT is not able to make CE approvals on FHWA's behalf.

Execution of this Agreement and implementation of its terms by both parties provides evidence that both parties have reviewed this Agreement and agree to the terms and conditions for its implementation. This Agreement is effective upon the date of the last signature below.


 Phillip A. Ditzler
 Oregon Division Administrator
 Federal Highway Administration

3/10/15
 Date


 Matthew Garrett
 Director
 Oregon Department of Transportation

3-11-15
 Date

APPENDIX A

ODOT Quarterly Programmatic Categorical Exclusion (PCE) Report										
ODOT Key #	Federal-Aid #	Project Name	PCE Type (s)	PCE Start Date	PCE Determination Date	PCE Approval Date	PCE Completion Time (in days)	Cost to Complete PCE	Link to Environmental File	Comments (as necessary)
Project Information Organized by Region										
PCE Start Date – Project Kick-off Date										
PCE Determination Date - Date at which Region finalizes and signs PCE Determination Form										
PCE Approval Date - Date ODOT finalizes and signs the PCE Approval Document										
PCE Completion Time - Time from Project Kick-off to PCE Approval Date (in calendar days)										
Cost to Complete PCE - Cost from Project Scoping to PCE Approval Date										
Comments - Include information related to why a PCE has transitioned to a FHWA-approved CE (i.e., scope change; Section 106 effect is now “adverse, etc.) or other information as needed.										

CERTIFICATION:

The projects included in this quarterly report have been reviewed under the provisions of the 2015 FHWA and ODOT Programmatic Categorical Exclusion Agreement and ODOT has determined that these projects meet the requirements of that Agreement; and that projects submitted in this report are consistent with 23 CFR 771.117 (a) and (b). If circumstances change and a project will no longer meet the conditions of the 2015 PCE, ODOT will provide that updated information to FHWA in a subsequent quarterly report.

ODOT Geo-Environmental Official

Date

ODOT Region 1 Environmental Manager

Date

ODOT Region 2 Environmental Manager

Date

ODOT Region 3 Environmental Manager

Date

ODOT Region 4 Environmental Manager

Date

ODOT Region 5 Environmental Manager

Date

PROGRAMMATIC AGREEMENT
BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION
AND THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION
FOR BRIDGE, ROADWAY AND NON-COMPLEX PROJECTS

The Federal Highway Administration, Pennsylvania Division, hereinafter FHWA, and the Pennsylvania Department of Transportation, hereinafter PennDOT, have developed this Programmatic Agreement, hereinafter PA, to outline the policy and procedures for environmental processing of certain federally funded bridge and roadway projects which are found to have no significant social, economic or environmental effects. In addition, this PA shall be applicable for the environmental clearance for specific 100% state-funded projects meeting the conditions herein, in accordance with Pennsylvania Act 120.

The FHWA hereby concurs that those types of bridge and roadway projects listed in Parts A, B, and C of this PA, and which satisfy the conditions and criteria in stipulations presented in Parts A, B, C and D as more fully described herein, will not result in significant environmental impacts, and are therefore excluded from the requirement to prepare an Environmental Assessment (EA) or Environmental Impact Statement (EIS) pursuant to 23 CFR 771.115(b).

As outlined in the PA, PennDOT will individually determine the applicability of this PA and certify that an activity will not result in significant environmental impacts and document accordingly.

WHEREAS, the Division Administrator, FHWA, is the “Agency Official” responsible for compliance with the National Environmental Policy Act (NEPA) and implementing regulations (23 CFR 771);

WHEREAS, PennDOT and FHWA participated in the consultation and have jointly been invited to concur in this PA;

WHEREAS, PennDOT, as the statewide recipient of the federal-aid program, is responsible for compliance with all federal laws and regulations;

WHEREAS, this PA is consistent with the Statewide Long Range Transportation Plan, the Statewide Transportation Improvement Program (STIP), and applicable Metropolitan or Rural Planning Organizations’ Transportation Improvement Programs (TIPs) and Long Range Transportation Plans, and is exempt from regional air quality conformity determinations (40 CFR parts 51 and 93);

WHEREAS, the FHWA has delegated approval authority of certain Categorical Exclusion (CE) activities as prescribed in the PennDOT Design Manual 1B, Publication 10B;

WHEREAS, these projects are a subset of Level 1a and Level 1b CE Projects, and therefore delegated approval authority resides within the PennDOT District(s);

WHEREAS, project conditions, which define approval authority, are contained in Publication 10B, and apply to this PA;

WHEREAS, the FHWA will monitor the approval of bridge and roadway projects using this PA, as described within, and retains the authority to revoke approval authority upon discovery of the misapplication of the PA or non-compliance with any federal law or regulation;

NOW, THEREFORE, the FHWA and PennDOT agree that bridge and roadway projects consisting of activities defined in this PA, which are not part of a larger undertaking, shall be administered in accordance with the following in order to satisfy FHWA's NEPA and Pennsylvania Act 120 responsibilities.

This Agreement establishes a procedure that will reduce the paperwork and processing time for certain federal actions that do not have significant impacts on the human and natural environment. PennDOT and FHWA concur in advance that certain bridge and roadway projects (identified in Stipulation 1 of Part A, Stipulations 1, 2, and 4 of Part B, and Stipulation 1 of Part C of this Agreement) normally are found to have no significant social, economic and environmental effect. PennDOT agrees that all the conditions stated in this PA will be satisfied for all projects processed under this Agreement.

In accordance with FHWA regulations (23 CFR 771, "Environmental Impact and Related Procedures"), actions performed under this PA meet the definition contained in the Council on Environmental Quality regulations, 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental impacts. They are actions which:

- Do not induce significant impacts to planned growth or land use for the area,
- Do not require the relocation of significant numbers of people,
- Do not have a significant impact on any natural, cultural, recreational, historic, or other resource,
- Do not involve significant air, noise or water quality impacts,
- Do not have significant impacts on travel patterns,
- Do not otherwise, either individually or cumulatively, have any significant environmental impacts, and are, therefore, excluded from the requirement to prepare an EA or EIS, and
- Do not involve unusual circumstances including: significant environmental impacts; substantial controversy on environmental grounds; significant impact on properties protected by Section 4(f) of the USDOT Act of 1966/Section 2002 of PA Act 120 or Section 106 of the National Historic Preservation Act; or inconsistencies with any Federal, State or local law, requirement or administrative determination relating to the environmental aspects of the action.

STIPULATIONS

PART A: ROADWAY REHABILITATION AND PAVEMENT PRESERVATION

Stipulation 1

Due to the limited scope of work for certain projects whose entire scope can be defined as rehabilitating and maintaining the roadway, and based on past experience with similar actions, FHWA and PennDOT will not require additional NEPA documentation for the projects listed below, provided conditions and criteria in Stipulations 2 of Part A and the Stipulations of Part D herein are satisfied. These actions meet the intent of 23 CFR 771.117 (a), (b) and (d).

The signatories to this PA agree that the project types listed below (provided the projects are limited to the activities specified and are not part of a larger undertaking), by their nature and definition, constitute undertakings that have no potential to cause significant effects on environmental resources.

The following five (5) categories of activities shall therefore be approved under this Agreement with no further NEPA documentation required provided the conditions and stipulations are met:

1. Interstate and Expressway Pavement Preservation including: overlay projects, mill and overlay projects, micro surfacing, ultra thin friction course, concrete patching and joint rehabilitation, diamond grinding, and dowel bar retrofit. This includes the construction of crossovers in previously disturbed medians.
2. Non-Expressway Pavement Preservation including: overlay projects, mill and overlay projects, micro surfacing, ultra thin friction course, cold in-place recycling, seal coat, ultra thin white topping, concrete patching and joint rehabilitation, diamond grinding, and dowel bar retrofit. This includes the construction of crossovers in previously disturbed medians.
3. Maintenance Betterments/Roadway Rehabilitation (3R) (Resurfacing, Restoration, and Rehabilitation) including pipe replacement, guiderail replacement, paving and overlays on existing alignment, and minor widening.
4. Reconstruction within same approximate footprint including Replacement, Crack and Seal, and Rubblizing.
5. Minor widening provided such widening does not extend more than 12-feet from the existing edge of pavement.

Stipulation 2

Projects meeting the activity descriptions in Part A, Stipulation 1 shall also meet the following criteria in order to be approved under this PA. The term "Project", as used here, includes the totality of work activities required for pavement preservation:

1. The project is designed using the latest guidance for each project type and follows the Pavement Policy Manual, Publication 242.

2. The proposed work does not include new interchanges, new ramps, or new rest areas.
3. The permanent acquisition of additional right-of-way is limited to that which is minimally necessary to allow for the activity authorized herein. Additional temporary easements which are minimally necessary to facilitate construction are also permitted
4. Pavement Rehabilitation is limited to structural enhancements that extend the service life of an existing pavement and/or improve its load carrying capacity.
5. The project does not result in a significant impact on travel patterns based on detours for the traveling public, including bicycle/pedestrian users.
6. Impacts to jurisdictional wetlands resulting from the activities in Stipulation 1 of this Part shall not exceed 0.05 acres of permanent impact, nor shall the projects result in the relocation of any stream channels.

PART B: BRIDGE REPLACEMENT, REHABILITATION, PRESERVATION, and REMOVAL

Stipulation 1 (Bridge Replacement/Rehabilitation)

Due to the limited scope of work for certain bridge projects and based on past experience with similar actions, FHWA and PennDOT will not require additional NEPA documentation for the bridge actions listed below provided the conditions and criteria in Stipulation 3 of this Part, and the Stipulations of Part D herein are satisfied. These actions meet the intent of 23 CFR 771.117 (a), (b) and (d).

The signatories of this PA agree that the project types listed below (provided the projects are limited to the activities specified and are not part of a larger undertaking), by their nature and definition, constitute undertakings that have no potential to cause significant effects on environmental resources.

The following ten (10) categories of bridge rehabilitation/replacement activities shall therefore be approved under this Agreement with no further NEPA documentation required provided the conditions in Stipulation 3 of this Part, and the Stipulations of Part D herein are met (for purposes of this PA, the term “bridge” includes bridges as well as culverts (box, metal and concrete pipe, arch, etc.):

1. Bridge replacement activities including but not limited to in-kind replacement, within the same approximate footprint and reconstruction of bridge superstructure and/or substructure.
2. Bridge decking and/or bridge barrier (parapet) replacements or modifications and substructure repair and modifications.
3. Replacement or strengthening of beams and other structural components of the bridge to extend the longevity of the structure.
4. In-kind replacement, reconstruction or ordinary repair or modification of existing bridge-mounted lighting, guiderails, curbs and gutters, sidewalks, noise barriers, signing, utility supports, fencing, etc. on the bridge.

5. Overlay, milling, grooving, repairing (concrete or asphalt patching), striping, or resurfacing of existing bridges; or addition of pavement markings (normal and raised), and snow and ice detectors to the same.
6. Other bridge related maintenance and repair actions, including but not limited to: overlay of existing approach roads for all bridges (not to exceed 500-feet of approach work (including pavement, guiderail and shoulder work) on either side of the bridge); seismic retrofits; in-kind replacement or repair of pedestals or bearing seats, bearings, shear blocks, diaphragms, structural steel, bridge and off-structure drainage, slope protection, steel caps, protective jackets, and dolphins; installation of external post-tensioning; and other similar routine actions.
7. Any remedial activity to an existing culvert or concrete rigid frame structure less than 20 feet in length, or pipe, so long as the remedial work is aesthetically and functionally in-kind and in the same footprint (no new elements or expansion).
8. General highway maintenance on bridges, including filling potholes, crack sealing, mill and resurfacing, joint grinding/milling, shoulder reconstruction, minimal bank stabilization, etc. within the right-of-way associated with the bridge.
9. Bridge beautification or facility improvement projects (e.g., curb and gutter replacement, decorative lighting, etc.) that are covered by other Agreements.
10. Construction of bicycle and pedestrian lanes, paths and facilities on existing bridges provided any required widening does not extend more than 12-feet on either side of the structure.

Stipulation 2 (Bridge Preservation)

It is understood that by their nature, the activities listed below are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experiences with similar actions, do not involve significant environmental impacts. The following twelve (12) bridge preservation activities are designated as CEs under this PA pursuant to 23 CFR 771.117 (a), (b), and (d) without further approval or NEPA documentation, and are hereby approved provided the conditions and criteria in PA General Stipulations of Part D herein are satisfied:

1. Expansion dams: Repair, replace or install new expansion dams to ensure leak proof joints. Repairs to deck drainage or down spouting may also be included. Replacement of seals is also permitted, provided other items, if any, relative to leakage are also addressed.
2. Beam end repairs and restoration: restore steel, concrete or P/S concrete beam-ends to extend their service life.
3. Bridge bearings and supports: Restore or replace the existing bearings to make them functional and repair or rehabilitate substructure units to extend service life.
4. Approach slabs: Repair the approach slab as necessary where the condition of the approach slab is affecting the performance of the bridge. Where practical and needed, repair or replace approach slabs, pavement relief joints, and other high spots adjacent to bridge to restore functionality and/or improve rideability.

5. Deck restoration and overlays: concrete deck patching (Repair Types I, II, or III) and/or waterproofing overlays (i.e., latex concrete, bituminous with membrane) needed to extend deck life and improve rideability.
6. Spot/Zone painting: spot/zone painting can be used as a stand-alone measure or with other steel repair items. Cleaning and waste disposal is included in this item.
7. Painting: full overcoats or complete repaintings, with cleaning, waste disposal, and steel repairs.
8. Fatigue and Fracture Retrofits: retrofits or repairs to fatigue-prone details of steel bridges.
9. Scour Countermeasures: scour countermeasures including underpinning, riprap placement, stream bed paving, grout bags, sediment deposition and debris removal, etc. properly designed for predicted scour.
10. Concrete repairs, concrete sealing, crack sealing.
11. Guiderail updates or repair.
12. Bridge washing and cleaning activities including waste disposal.

Stipulation 3

Projects meeting the activity descriptions in Stipulations 1 and 4 of this Part shall also meet the following criteria in order to be approved under this PA. The term “Project”, as used here, includes the totality of work activities required for replacement or rehabilitation of the structure, including but not limited to the structure itself, appurtenant works including walls, wingwalls and bank protection, and any approach roadway work:

1. Widening of existing structures (within the same approximate footprint) cannot exceed 12-feet on each side of the structure.
2. Changes in horizontal and vertical alignment (within the same approximate footprint) are permitted so long as those changes do not result in substantial impacts to area resources.
3. The permanent acquisition of additional right-of-way is limited to that which is minimally necessary to allow for any widening of the structure authorized herein. Additional temporary easements which are minimally necessary to facilitate construction are also permitted.
4. Impacts to jurisdictional wetlands resulting from the activities in Stipulations 1, 2, and 4 of this Part for the project shall not exceed 0.05 acres of permanent impact.
5. Stream realignment shall be limited to that which is incidental to the replacement of the structure, and occurs immediately adjacent to the structure. This limitation shall also apply to temporary diversions required to facilitate construction.
6. Use of temporary crossings, causeways, cofferdams, and associated roadways that are consistent with the criteria contained in this PA to facilitate construction are allowed. Construction of these features shall be coordinated closely with the US Army Corps of Engineers (USACE), Pennsylvania Department of Environmental Protection (DEP) or other regulatory entities. Upon completion of construction, all areas disturbed by these features shall be restored to their preconstruction condition.
7. No significant floodplain encroachments as defined at 23 CFR 650.105(q)(1-3) shall occur as a result of the project.

8. There shall be no permanent reduction in hydraulic capacity as a result of any proposed work.
9. The project would not result in negative impacts to environmental justice populations, community facilities/services, and/or emergency services.

Stipulation 4 (Bridge Removal)

It is understood that by their nature, certain bridge removals are actions which meet the definition contained in 40 CFR 1508.4, and based on past experiences with similar actions, do not involve significant environmental impacts. Bridge removal projects that meet the following criteria are designated as CEs under this PA pursuant to 23 CFR 771.117 (a), (b), and (d) without further approval or NEPA documentation, and are hereby approved provided the following conditions and criteria, and those in PA General Stipulations of Part D herein, are satisfied:

1. The bridge will not be replaced with another bridge or culvert.
2. The removed bridge is not replaced with fill.
3. The removal is not performed as an emergency project.
4. The removal is not part of a larger project.
5. Slope reprofiling is not to exceed 12-feet on each side of the footprint of the structure to be removed.
6. The permanent acquisition of additional right-of-way for the construction of cul-de-sacs or hammerheads is limited to what is minimally necessary.
7. The removal of a historic bridge is part of an agreed upon relocation following the Secretary of Interior's Standards, resulting in a finding of "no adverse effect."

PART C: NON-COMPLEX PROJECTS

Stipulation 1 (Non-Complex Projects)

Due to the limited scope of work for certain non-complex projects and based on past experience with similar actions, FHWA and PennDOT will not require additional NEPA documentation for the actions listed below provided the conditions and criteria in Stipulation 2 of this Part, and the Stipulations of Part D herein are satisfied. These actions meet the intent of 23 CFR 771.117 (a), (b) and (d).

The signatories of this PA agree that the project types listed below (provided the projects are limited to the activities specified and are not part of a larger undertaking), by their nature and definition, constitute undertakings that have no potential to cause significant effects on environmental resources.

The following ten (10) categories of non-complex (minor) projects shall therefore be approved under this Agreement with no further NEPA documentation required provided the conditions in Stipulation 2 of this Part, and the Stipulations of Part D herein are met:

1. Intersection improvement projects with minor or no signal layout changes, or unsignalized.
2. Construction of turn lanes at intersections.

3. Construction or replacement of sign structures including Dynamic/Variable Message Sign structures.
4. Guiderail/barrier installation, elimination, replacement or updating.
5. Traffic operations activities with minor or no roadway work including signalization, signing, pavement markings (including raised pavement markers (RPM), and roadway lighting.
6. 23 U.S.C. Sections 130 and 148 Highway 130 Safety Projects (relating to railroad grade crossings).
7. Transportation Enhancement Projects designed to address pedestrian and bicycle facilities.
8. Transportation corridor fringe parking areas and park and ride facilities located within previously disturbed right-of-way.
9. ADA curb cuts in areas that involve no disturbance outside of the existing right-of-way or no disturbance beyond the existing curb/sidewalk limits.
10. Slope restoration/slide repairs that involve no disturbance outside of the existing right-of-way.

Stipulation 2

Projects meeting the activity descriptions in Stipulation 1 of this part shall also meet the following criteria in order to be approved under this PA.

1. All work shall occur within existing right-of-way.
2. Impacts to jurisdictional wetlands resulting from these projects shall not exceed 0.05 acres of permanent impact.
3. Projects shall not result in or require relocation of any stream channels or other jurisdictional waterways.
4. There shall be no public controversy on environmental grounds.

PART D: OTHER STIPULATIONS

Stipulations presented in Part D are applicable to all actions and activities meeting the criteria identified in Parts A (Roadway), B (Bridge), and/or C (Non-Complex Projects) of this PA.

Stipulation 1

Projects applicable under this PA must be funded in part by state or Federal funds.

Stipulation 2

Projects meeting the activity descriptions in Stipulation 1 of Part A (Roadway), Stipulations 1, 2, and 4 of Part B (Bridge), or Stipulation 1 or Part C (Non-Complex Projects) shall be consistent with one of the following:

1. Meet the requirements of Appendix C of the Programmatic Agreement among the FHWA, PennDOT, the Pennsylvania State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding Implementation

of the Federal Aid Highway Program in Pennsylvania (Section 106 Delegation PA).

2. Have a finding of either No Historic Properties Affected or No Adverse Effect under the Section 106 Delegation PA.

Stipulation 3

Projects under this PA will be coordinated, as required (refer to Publication 546, the Threatened and Endangered Species Desk Reference), with the U.S. Fish and Wildlife Service (USFWS), Pennsylvania Game Commission (PGC), Pennsylvania Fish and Boat Commission (PFBC), and the Pennsylvania Department of Conservation and Natural Resources' (DCNR) Pennsylvania Natural Diversity Inventory (PNDI) using the Heritage Geographic Information System (HGIS) to determine the potential presence of state listed or federally candidate or listed threatened or endangered species and if approved activities have the potential to affect threatened or endangered species. This may include, but is not limited to, those activities involving ground disturbance in undisturbed areas, areas outside existing right-of-way or potentially affecting water quality. If it has been determined that an activity "may affect - likely to adversely affect" a federal proposed, candidate, or listed threatened or endangered species, or state listed threatened or endangered species, then formal consultation with USFWS pursuant to the Endangered Species Act (ESA) (16 U.S.C. Section 1531, as amended) and 50 CFR 402 for federal species or coordination with the agency with jurisdiction for species that are state listed, is appropriate, and this PA does not apply.

Stipulation 4

If at any time the project requires additional Federal permits or approvals (beyond a Section 404 permit) other than from FHWA, this PA is no longer applicable. Examples include a U.S. Coast Guard permit or Section 7 formal consultation with or an incidental take permit from the USFWS.

Stipulation 5

Projects meeting the scope descriptions in Stipulation 1 of Part A (Roadway), Stipulations 1, 2, or 4 of Part B (Bridge) and/or Stipulation 1 of Part C (Non-Complex Projects) of this Agreement require completion of the *Bridge and Roadway Programmatic Agreement CE Applicability Matrix* (Appendix A).

Stipulation 6

Upon successful review and approval by PennDOT of the *Bridge and Roadway Programmatic Agreement CE Applicability Matrix* (Appendix A), in accordance with the stipulations contained herein, the approval date of the PA shall be the designated CE approval date for the subject project. Projects meeting the scope and condition descriptions in this PA do not require review and approval by FHWA.

Stipulation 7

Documentation assembled by PennDOT to support any environmental findings resulting from anticipated impacts, including the *Bridge and Roadway Programmatic Agreement CE Applicability Matrix* (Appendix A) will be maintained in the respective project file. This includes, but is not limited to documentation related to the National Historic Preservation Act (NHPA) (36 CFR 800), Endangered Species Act (50 CFR 402), the Clean Water Act, Section 4(f) of the US DOT Act of 1966/Section 2002 of PA Act 120, and all applicable permits.

Stipulation 8

If the scope of the proposed roadway, bridge, or non-complex project activity/ies change, or previously unidentified environmental resources are identified in final design, the PennDOT District Environmental Manager shall be notified, and will evaluate the need for additional environmental studies, the continued applicability of this PA to the project, and the need for other environmental documentation. All findings shall be documented in the project file and coordinated with FHWA, if necessary, for full NEPA compliance.

Stipulation 9

If previously unidentified environmental resources are identified during construction, those work activities that could potentially impact the resources will be stopped. The PennDOT District Environmental Manager shall be notified, and will evaluate the need for additional environmental studies, the continued applicability of this PA to the project, and the need for other environmental documentation. All findings shall be documented in the project file.

Stipulation 10

If at any time the PennDOT District Environmental Manager establishes that this PA no longer applies to a specific project due to changes in scope of work activities or environmental impacts, the appropriate individual project environmental document (CE, EA or EIS) will be completed.

Stipulation 11

The continued applicability of this PA to each individual project shall be re-evaluated according to the criteria contained in the FHWA Regulations at 23 CFR 771.129 which requires a confirmation of the continued applicability prior to “requesting any major approvals or grants” from the FHWA.

Stipulation 12

In an individual Section 4(f) evaluation is required for a project (excluding *de minimis*), this PA is not applicable to the project.

ADMINISTRATIVE CONDITIONS

1. **Applicability.** Applicable activities are defined as those specified in Stipulation 1 of Part A, Stipulations 1, 2, and 4 of Part B, and Stipulation 1 of Part C of this PA, including any areas necessary to support implementation of the project including, but not limited to staging areas, dewatering basins, stormwater facilities and temporary construction easements that are necessary to carry out the activity so long as those areas are depicted on the project plans being reviewed to determine applicability with this PA. Applicable activities shall include those administered by PennDOT and funded by the FHWA, as well as activities administered and 100% state-funded by PennDOT. This PA may not be applied to activities that are part of a larger action not covered under this PA.
2. **Prior Agreements.** This PA shall supersede the previous Bridge Preservation Program PA distributed under SOL 430-05-17, and the Bridge Preservation/Replacement PA distributed under SOL 438-09-01.
3. **Other Permits.** The use of this PA does not alleviate the need to obtain any necessary Federal or State permits including, but not limited to, Section 404, Chapter 105 and NPDES.
4. **Documentation.** For those bridge, roadway, and non-complex projects comprising the activity/ies and meeting the conditions defined in this PA, the PennDOT Environmental Managers or Designees shall, in reviewing the documentation provided, exercise their best judgment that the above conditions are being met, and shall document that no further NEPA compliance review shall be necessary other than the *Bridge and Roadway Programmatic Agreement CE Applicability Matrix* (Appendix A) as part of the appropriate NEPA project file. The NEPA project file shall contain supporting documentation (i.e., Bike/Ped Checklist, etc.). All projects shall be scoped and documented in the Categorical Exclusion Expert System utilizing the current scoping form or format. For purposes of this PA, Designee shall be defined to include the Assistant Environmental Manager, Assistant District Executive or District Executive. PennDOT shall maintain a list of projects reviewed by PennDOT under this PA.
5. **Monitoring.** FHWA shall conduct process reviews of a sampling of Districts on a triennial basis for compliance with the PA.
6. **Amendments.** Either party to this PA may request that it be amended, whereupon the FHWA shall consult with PennDOT to consider such an amendment. Any party to this Agreement may request that it be amended, and the request will be addressed within 30 days.
7. **Re-evaluation.** The FHWA and PennDOT may from time to time re-evaluate the list of undertakings (Stipulation 1 of Part A (Roadway), Stipulations 1, 2, and 4 of Part B (Bridge), and Stipulation 1 of Part C (Non-Complex Projects) of this PA) for possible new inclusions and/or deletions.
8. **Freedom of Information Act (FOIA).** Any information furnished to the FHWA by PennDOT under this instrument is subject to the Freedom of Information Act (5 U.S.C. 552).

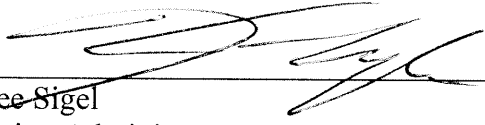
- 9. Disputes.** Objections to any actions carried out by either party under this Agreement shall be raised in writing by the objecting party. The FHWA and PennDOT shall consult to resolve those objections.
- 10. Resolution of Objections by the Public.** At any time during the implementation of the activities stipulated in this PA, should any objection pertaining to any such activities or its manner of implementation be raised by a member of the public, the FHWA shall notify PennDOT and take the objection into account, consulting with the objector and, should the objector so request, with PennDOT to resolve the objection.
- 11. Review of Implementation.** If the process of this Agreement has not been initiated within three (3) years after execution of this PA, the parties to the Agreement shall review the Agreement to determine whether revisions are needed. If revisions are needed, the parties to this Agreement shall consult to make such revisions.
- 12. Termination.** Any party to this PA may terminate it by providing thirty (30) days notice to the other party, provided that the parties will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, FHWA shall consult with PennDOT to develop a new PA or request comments from PennDOT. PennDOT shall have forty-five (45) days to respond with comments.

Bridge and Roadway Programmatic Agreement

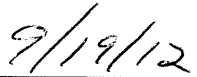
PROGRAMMATIC AGREEMENT:

An Agreement for Bridge, Roadway and Non-Complex Projects:

FEDERAL HIGHWAY ADMINISTRATION (FHWA)

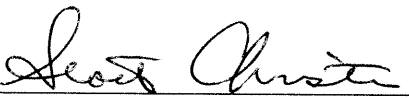


Renee Sigel
Division Administrator



Date

PENNSYLVANIA DEPARTMENT OF TRANSPORTATION (PennDOT)



R. Scott Christie, P.E.
Deputy Secretary for Highway Administration



Date

APPROVED AS TO LEGALITY AND FORM

BY _____
For Chief Counsel

Date

BY _____
Deputy General Counsel

Date

BY _____
Deputy Attorney General

Date

APPENDIX A

Bridge and Roadway Programmatic Agreement CE Applicability Matrix

Bridge and Roadway Programmatic Agreement (BRPA)

Applicability Matrix

for Bridge, Roadway and Non-Complex Projects

CEES Package Number:

1

Project Scoping

7

Project Evaluation

9

Project Re-Evaluation (original approval date _____)

Project Information			
MPMS	BMS	BRKEY	SR/Sec
County:	Municipality:	Seg/Offset Start	Seg/Offset End
Project:			
Date of the Scoping Field View:			
Project Description			
Project Purpose			
Why the project is needed? — Project Need(s)			
Description of Activity			
Identify activity from Stipulation 1 of Part A and/or Stipulations 1, 2 and/or 4 of Part B and/or Stipulation 1 of Part C of the PA with a note specifying the activity (ex. Act B2-4 = Part B, Stipulation 2, Activity 4 — Approach slab repair). If the proposed activity is not included in Stipulation 1 of Part A, or Stipulation 1, 2, or 4 of Part B, or Stipulation 1 of Part C, the PA is not applicable. Identify multiple activities, if appropriate.			

Are temporary easements required? ☐ Yes ☐ No

Will there be any permanent right-of-way acquisition? ☐ Yes ☐ No

Resource Analysis

Answer YES to indicate that a resource is present. If YES, briefly discuss potential impacts and related commitments to avoid, minimize or mitigate. Attach additional documentation as required to document project impacts and any mitigation measures. Answer NO to indicate that a resource is not present.

1. Wild or Stocked Trout Streams	<input type="checkbox"/> Yes <input type="checkbox"/> No
2. High Quality/EV Streams	<input type="checkbox"/> Yes <input type="checkbox"/> No
3. Wetlands	<input type="checkbox"/> Yes <input type="checkbox"/> No
4. Federally Proposed, Candidate, or Listed; or State Listed Threatened & Endangered Species	<input type="checkbox"/> Yes <input type="checkbox"/> No
5. Agricultural Resources	<input type="checkbox"/> Yes <input type="checkbox"/> No
6. Historic Properties or Archaeological Resources	<input type="checkbox"/> No Adverse Effect or No Historic Properties Affected Standard Treatment (if applicable): <input type="checkbox"/> Meet the requirements of Appendix C of the Section 106 Delegation Programmatic Agreement Exempt Project Activity(s): Individual Making Exemption: Date of Exemption: Exemption Comments:
7. Public Controversy on Environmental Grounds	<input type="checkbox"/> Yes <input type="checkbox"/> No
8. Resources protected under Section 4(f)/Section 2002. (If an Individual Section 4(f)/Section 2002 Evaluation is required (excluding de minimis), this PA does not apply.)	<input type="checkbox"/> Yes <input type="checkbox"/> No
9. Water Trails	<input type="checkbox"/> Yes <input type="checkbox"/> No
10. Hazardous, Residual, or Municipal Waste Sites	<input type="checkbox"/> Yes <input type="checkbox"/> No

11. Regulated floodplain within or beyond the project limits. If there is a significant floodplain encroachment which requires a Floodplain Finding, the PA does not apply.	<input type="checkbox"/> Yes <input type="checkbox"/> No	
12. Navigable watercourses which require U.S. Coast Guard coordination or a waterway which requires an Aid to Navigation Plan.	<input type="checkbox"/> Yes <input type="checkbox"/> No	
DEP/USACE Permit Required?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Mitigation or other commitments included?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
The projects identified on this form are in full compliance with the Bridge and Roadway Programmatic Agreement dated September 2012, and found not to have significant social, economic or environmental impacts, and therefore qualify as a CE under 23 CFR 771.117(a) and (b).		
Prepared by:		
	Name/Title	Date
Reviewed for Applicability by:		
	Name/Title	Date
Additional Information — Remarks, Footnotes, Supplemental Data		

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

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

WITNESSETH

Whereas, Section 327 of Title 23 of the U.S. Code (U.S.C.) establishes the Surface Transportation Project Delivery Program (hereinafter "Program") that allows the Secretary of the United States Department of Transportation (hereinafter "USDOT Secretary") to assign and States to assume the USDOT Secretary's responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321, et seq.) (hereinafter "NEPA"), and all or part of the USDOT Secretary's responsibilities for environmental review, consultation, or other actions required under any Federal environmental law with respect to highway, public transportation, railroad, and multimodal projects within the State; and

Whereas, 23 U.S.C. 327(b)(2) requires a State to submit an application in order to participate in the Program; and

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

Whereas, on March 14, 2014, prior to submittal of its application to FHWA, TxDOT published notice of and solicited public comment on its intended application to the Program as required by 23 U.S.C. §327(b)(3), and revised the application based on comments received; and

Whereas, on May 29, 2014, the State of Texas, acting by and through the TxDOT, submitted its application to FHWA for participation in the Program with respect to highway projects; and

Whereas, on July 3, 2014, TxDOT submitted supplemental information making clarifications to its request based on FHWA's input on the application; and

Whereas, on October 10, 2014, FHWA published a notice and provided an opportunity for comment on its preliminary decision to approve TxDOT's request and solicited the views of other appropriate Federal agencies concerning TxDOT's application as required by 23 U.S.C. 327(b)(5); and

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

Now, therefore, FHWA and TxDOT agree as follows:

PART 1. PURPOSE OF MEMORANDUM OF UNDERSTANDING

1.1 Purpose

- 1.1.1 This MOU officially approves TxDOT's application to participate in the Program and is the written agreement required pursuant to 23 U.S.C. 327(a)(2)(A) and (c) under which the USDOT Secretary may assign, and TxDOT may assume, the responsibilities of the USDOT Secretary for Federal environmental laws with respect to one or more highway projects within the State of Texas.
- 1.1.2 The FHWA's decision to execute this MOU is based upon the information, representations, and commitments contained in TxDOT's May 29, 2014, application and supplemental information received on July 3, 2014 (hereinafter "Application Package"). As such, this MOU incorporates the Application Package. However, this MOU shall control to the extent there is any conflict between this MOU and the Application Package.
- 1.1.3 This MOU shall be effective upon final execution by both parties (hereinafter the "Effective Date").
- 1.1.4 On the Effective Date, the MOU between TxDOT and FHWA dated December 6, 2013, concerning State Assumption of Responsibility for Categorical Exclusions under 23 U.S.C. 326 will terminate, and be supplanted by this MOU. The Programmatic Agreement between TxDOT and FHWA dated November 7, 2011, concerning the processing of categorical exclusions (hereinafter "PCE agreement") will be suspended for the duration of this MOU. The PCE agreement may be reinstated upon the termination of this MOU if FHWA determines that the PCE agreement continues to be valid pursuant to applicable statutory and regulatory authorities in effect at the time of the MOU termination.
- 1.1.5 Pursuant to 23 U.S.C. 327(c)(3)(B)-(C), and subpart 4.3 of this MOU, third parties may challenge TxDOT's actions in carrying out environmental review responsibilities assigned under this MOU. Otherwise, this MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the State of Texas, its departments, agencies, or entities, its officers, employees, or agents. This MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the United States, its departments, agencies, or entities, its officers, employees, or agents.

PART 2. [RESERVED]

PART 3. ASSIGNMENTS AND ASSUMPTIONS OF RESPONSIBILITY

3.1 Assignments and Assumptions of NEPA Responsibilities

- 3.1.1 Pursuant to 23 U.S.C. 327(a)(2)(A), on the Effective Date, FHWA assigns, and TxDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the USDOT Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969

(NEPA), 42 U.S.C. 4321 et seq. with respect to the highway projects specified under subpart 3.3. This includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for Federal highway projects such as 23 U.S.C. 139, 40 CFR parts 1500-1508, DOT Order 5610.1C, and 23 CFR part 771 as applicable.

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

"The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried-out by TxDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 16, 2014, and executed by FHWA and TxDOT."

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

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

- 3.2.1 Pursuant to 23 U.S.C. 327(a)(2)(B), on the Effective Date, FHWA assigns and TxDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the USDOT Secretary's responsibilities for environmental review, reevaluation, consultation, or other action pertaining to the review or approval of highway projects specified under subpart 3.3 required under the following Federal environmental laws:

Air Quality

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

Noise

- Noise Control Act of 1972, 42 U.S.C. 4901-4918
- Compliance with the noise regulations in 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 et seq., with Essential Fish Habitat requirements at 16 U.S.C. 1855(b)(1)(B)

Historic and Cultural Resources

- National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470f, et seq.
- Archeological Resources Protection Act , 16 U.S.C. 470aa–mm
- Archeological and Historic Preservation Act of 1966, as amended, 16 U.S.C. 469 – 469c

- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001–3013; 18 U.S.C. 1170.

Social and Economic Impacts

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

Water Resources and Wetlands

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

Parklands and Other Special Land Uses

- 23 U.S.C. 138 and 49 U.S.C. 303 (Section 4(f)) and implementing regulations at 23 CFR part 774.
- Land and Water Conservation Fund (LWCF) Act, 16 U.S.C. 4601–4 – 4601–11

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

Executive Orders Relating to Highway Projects

- E.O. 11990, Protection of Wetlands
- E.O. 11988, Floodplain Management
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13112, Invasive Species

- 3.2.2 Any FHWA environmental review responsibility not explicitly listed above and assumed by TxDOT shall remain the responsibility of FHWA unless the responsibility is added by written agreement of the parties through the amendment process established in Part 14 and pursuant to 23 CFR 773.113(b). This provision shall not be interpreted to abrogate TxDOT's responsibilities to comply with the requirements of any Federal environmental law that apply directly to TxDOT independent of FHWA's involvement (through Federal assistance or approval).
- 3.2.3 The USDOT Secretary's responsibilities for government-to-government consultation with Indian tribes as defined in 36 CFR 800.16(m) are not assigned to or assumed by TxDOT under this MOU. The FHWA remains responsible for all government-to-government consultation, including initiation of government-to-government consultation, unless otherwise agreed as described in this Part. A notice from TxDOT to an Indian tribe advising the tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If a

project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 CFR 800.16(m), and is related to NEPA or another Federal environmental law for which TxDOT has assumed responsibilities under this MOU, and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by TxDOT, then FHWA may withdraw the assignment of all or part of the responsibilities for processing the project. In this case, the provisions of subpart 9.1 concerning FHWA initiated withdrawal of assignment shall apply. This MOU is not intended to abrogate, or prevent future entry into, any agreement among TxDOT, FHWA, and a tribe under which the tribe agrees to permit TxDOT to administer government-to-government consultation activities for FHWA. However, such agreements are administrative in nature and do not relieve the FHWA of its legal responsibility for government-to-government consultation.

3.2.4 Nothing in this MOU shall be construed to permit TxDOT's assumption of the USDOT Secretary's responsibilities for conformity determinations required under Section 176 of the Clean Air Act (42 U.S.C. 7506) or any responsibility under 23 U.S.C. 134 or 135, or under 49 U.S.C. 5303 or 5304.

3.2.5 On the cover page of each biological evaluation or assessment, historic properties or cultural resources report, section 4(f) evaluation, or other analyses prepared under the authority granted by this MOU, TxDOT shall insert the following language in a way that is conspicuous to the reader or include in a CE project record:

"The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried-out by TxDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 16, 2014 and executed by FHWA and TxDOT."

3.2.6 TxDOT shall disclose to the public and agencies, as part of agency outreach and public involvement procedures, the disclosure in stipulation 3.2.5 above.

3.2.7 TxDOT will continue to adhere to the original terms of Biological Opinions (BOs) coordinated between FHWA, TxDOT, and either the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) or both USFWS and NMFS prior to the effective date of this MOU, so long as the original BO terms are not amended or revised. Any revisions or amendments to a BO made after the effective date of this MOU would be TxDOT's responsibility. TxDOT agrees to assume FHWA's environmental review role and responsibilities as identified in existing interagency agreements among TxDOT, USFWS, and FHWA, such as the Programmatic Agreement for Biological Evaluations, or negotiate new agreements with USFWS, if needed. TxDOT agrees to assume FHWA's ESA Section 7 responsibilities of consultations (formal and informal) ongoing as of the date of the MOU execution.

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

3.3 Highway Projects

3.3.1 Except as provided by subpart 3.3.2 below or otherwise specified in this subpart, the assignments and assumptions of the USDOT Secretary's responsibilities under subparts 3.1 and 3.2 above shall apply to the environmental review, consultation, or other action pertaining to the

environmental review or approval of the following classes of highway projects located within the State of Texas. The definition of "highway project" is found at 23 CFR 773.103, and for purposes of this MOU, "highway project" includes eligible preventative maintenance activities. The State shall conduct any reevaluations required under 23 CFR 771.129 for projects for which construction is not completed prior to the date of this MOU, in accordance with the provisions of this MOU. Prior to approving any CE determination, FONSI, final EIS, or final EIS/ROD, the State shall ensure and document that for any proposed project the design concept, scope, and funding are consistent with the current Transportation Improvement Plan (TIP), Regional Transportation Plan (RTP), or Metropolitan Transportation Plan (MTP).

A. Projects requiring an EIS, both on the state highway system (SHS) and local government projects off the SHS that are funded by FHWA or require FHWA approvals. This assignment does not include the environmental review associated with the development and approval of the Draft EIS, Final EIS, and ROD for the following projects:

1. Trinity Parkway – This project is in the Dallas District with limits from IH 35E/SH 183 to US 175/SH 310. The project would include new location construction of a four (4) to six (6) lane tollway with a nine-mile encroachment into a USACE-regulated floodway of the Trinity River.
2. Harbor Bridge – This project is in the Corpus Christi District and would construct a new harbor bridge over the Corpus Christi Ship Channel.
3. South Padre Island Causeway 2 – This project is in the Pharr District with limits from SH 100 (mainland) to Park Road (South Padre Island). The project is to construct a new causeway at a new location.

TxDOT will be responsible for any additional environmental review of these projects after the expiration of the statute of limitations for these projects in accordance with 23 U.S.C. 139(f).

B. Projects qualifying for CEs, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals. Upon execution of this MOU, the 23 U.S.C. §326 CE MOU will be terminated, and CE projects included under that MOU will be assumed under the Program. All CE projects formerly excluded from assignment and listed in Appendix B of the Section 326 MOU will be assumed by TxDOT upon the execution of this MOU. These projects were:

1. Frenchtown Road at Horseshoe Lake (BR), Galveston County, CSJ 0912-73-151, bridge replacement with Coast Guard Permit.
2. Isela Rubelcava from SP 276 to El Paso Community College, El Paso County, CSJ 0924-06-269; roadway on new location.
3. CS (Trammel Fresno Road) from Fort Bend Parkway to FM 521, Fort Bend County, CSJ 0912-34- 144; added capacity on existing road.
4. Kuykendahl Road from Alden Bridge to Crownridge Drive, Montgomery County, CSJ 0912-37-140; roadway on new location.
5. East 1st Street at W Fork of Trinity River, Tarrant County, CSJ 0902-48-502, replace bridge plus CSJ 0902-48-622, added capacity from Beach Street to Oakland Blvd.

6. Windhaven Pkwy from 200 feet west of Gentle Way to Spring Creek, Collin County, CSJ 0918-24-143, added capacity on existing road.
7. IH 635 from Beltline Road to 0.55 mile west of Beltline Road, Dallas County, CSJ 2374-07-058, construct frontage road.
8. IH 20 from W of Haymarket to west of US 175, Dallas County, CSJ 2374-03-077, construct frontage roads and ramps to IH 20.
9. FM 2837 from IH 35 to 0.2 mile west of IH 35, McLennan County, CSJ 3521-01-016, intersection operational improvements.
10. FM 2478 (Custer Road) from SH 121 to Stonebridge Dallas County, CSJ 2351-01-020, added capacity on existing road.
11. SH 114 at FM 156, Dallas County, CSJ 0353-02-063, construct interchange.
12. FM 106 (General Brant) from FM 1847 E&S to FM 512, Cameron County, CSJ 2243-01-009, reconstruct roadway with shoulders.
13. FM 3503 (JBS Parkway) from JBS Pkwy/FM 3503 to 0.7 mile south, Ector County, CSJ 0906-06-048, realign existing roadway on new location.
14. Eagleland Hike and Bike Trail, Bexar County, CSJ 1111-13-008, trail mitigation

- C. Projects requiring EAs, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals.
- D. Projects funded by other Federal agencies [or projects without any Federal funding] that also require FHWA approvals. For these projects, TxDOT would not assume the NEPA responsibilities of other Federal agencies. However, TxDOT may use or adopt other Federal agencies' NEPA analyses consistent with 40 CFR parts 1500 – 1508, and USDOT and FHWA regulations, policies, and guidance.

3.3.2 The following are specifically excluded from the list in subpart 3.3.1 of highway projects and classes of highway projects:

- A. Any highway projects authorized under 23 U.S.C. 202, 203, and 204 unless such projects will be designed and constructed by TxDOT.
- B. Any project that crosses State boundaries and any project that crosses or is adjacent to international boundaries. For purposes of this agreement a project is considered "adjacent to international boundaries" if it requires the issuance of a new, or the modification of an existing, Presidential Permit by the U.S. Department of State.

3.4 Limitations

- 3.4.1 As provided at 23 U.S.C. 327(e), TxDOT shall be solely responsible and solely liable for carrying out all of the responsibilities it has assumed under this Part.
- 3.4.2 As provided at 23 U.S.C. 327(a)(2)(D), any highway project or responsibility of the USDOT Secretary that is not explicitly assumed by TxDOT under subpart 3.3.1 in this MOU remains the responsibility of the USDOT Secretary.

PART 4. CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

4.1 Certifications

4.1.1 TxDOT hereby makes the following certifications:

- A. TxDOT has the legal authority to accept all the assumptions of responsibility identified in Part 3 of this MOU;
- B. TxDOT has the legal authority to take all actions necessary to carry out all of the responsibilities it has assumed under this MOU;
- C. TxDOT has the legal authority to execute this MOU;
- D. The State of Texas currently has laws in effect that are comparable to 5 U.S.C. 552, and those laws are located at Texas Government Code § 552.001, et seq. (the Texas Public Information Act); and
- E. The Texas Public Information Act provides that any decision regarding the public availability of a document under that Act is reviewable by a Texas court of competent jurisdiction.

4.2 State Commitment of Resources

4.2.1 As provided at 23 U.S.C. 327(c)(3)(D), TxDOT will maintain the financial resources necessary to carry out the responsibilities it is assuming. TxDOT believes, and FHWA agrees, that the summary of financial resources contained in TxDOT's application, dated May 29, 2014 appears to be adequate for this purpose. Should FHWA determine, after consultation with TxDOT, that TxDOT's financial resources are inadequate to carry out the USDOT Secretary's responsibilities, TxDOT will take appropriate action to obtain the additional financial resources needed to carry out these responsibilities. If TxDOT is unable to obtain the necessary additional financial resources, TxDOT shall inform FHWA, and this MOU will be amended to assign only the responsibilities that are commensurate with TxDOT's financial resources.

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

- A. Using appropriate environmental, technical, legal, and managerial expertise;
- B. Devoting adequate staff resources; and
- C. Demonstrating, in a consistent manner, the capacity to perform TxDOT's assumed responsibilities under this MOU and applicable Federal laws.

Should FHWA determine, after consultation with TxDOT, that TxDOT's organizational and staff capability is inadequate to carry out the USDOT Secretary's responsibilities, TxDOT will take appropriate action to obtain adequate organizational and staff capability to carry out these responsibilities. If TxDOT is unable to obtain adequate organizational and staff capability, TxDOT shall inform FHWA and the MOU will be amended to assign only the responsibilities that are commensurate with TxDOT's available organizational and staff capability. Should TxDOT choose

to meet these requirements, in whole or in part, with consultant services, including outside counsel, TxDOT shall maintain on its staff an adequate number of trained and qualified personnel, including counsel, to oversee the consulting work.

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

4.3 Federal Court Jurisdiction

- 4.3.1 As provided at 23 U.S.C. 327(c)(3)(B), and pursuant to Section 201.6035 of Title 6 of the Texas Transportation Code, TxDOT hereby expressly consents, on behalf of the State of Texas, to accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary assumed by TxDOT under this MOU. This consent to Federal court jurisdiction shall remain valid after termination of this MOU, or FHWA's withdrawal of assignment of the USDOT Secretary's responsibilities for any decision or approval made by TxDOT pursuant to an assumption of responsibility under this MOU. TxDOT understands and agrees that, in accordance with 23 U.S.C. 327, this acceptance constitutes a waiver of the State of Texas's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of carrying out the USDOT Secretary's responsibilities that have been assumed under this MOU.

PART 5. APPLICABILITY OF FEDERAL LAW

5.1 Procedural and Substantive Requirements

- 5.1.1 As provided at 23 U.S.C. 327(a)(2)(C), in assuming the USDOT Secretary's responsibilities under this MOU, TxDOT shall be subject to the same procedural and substantive requirements that apply to the USDOT Secretary in carrying out these responsibilities. Such procedural and substantive requirements include Federal statutes and regulations, Executive Orders issued by the President of the United States, USDOT Orders, Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500 – 1508), FHWA Orders, official guidance and policy issued by the CEQ, USDOT, or the FHWA, and any applicable Federal court decisions, and, subject to subpart 5.1.4 below, interagency agreements such as programmatic agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process [e.g., the MOU between the USDOT and the US Coast Guard and the MOA between FHWA and the US Coast Guard].
- 5.1.2 Official USDOT and FHWA formal guidance and policies relating to environmental review are posted on the FHWA's website, contained in the FHWA Environmental Guidebook, published in the Federal Register, or sent to TxDOT electronically or in hard copy.

5.1.3 After the Effective Date of this MOU, FHWA will use its best efforts to ensure that any new or revised Federal policies and guidance that are final and applicable to FHWA's responsibilities under NEPA and other environmental laws that are assumed by TxDOT under this MOU are communicated to TxDOT within 10 calendar days of issuance. Delivery may be accomplished by e-mail, web posting (with email or mail to TxDOT notifying of web posting), mail, or publication in the Federal Register (with email or mail to TxDOT notifying of publication). If communicated to TxDOT by e-mail or mail, such material will be sent to TxDOT's Director of the Environmental Affairs Division. In the event that a new or revised FHWA policy or guidance is not made available to TxDOT as described in the preceding sentence, and if TxDOT had no actual knowledge of such policy or guidance, then a failure by TxDOT to comply with such Federal policy or guidance will not be a basis for termination under this MOU.

5.1.4 TxDOT will work with all other appropriate Federal agencies concerning the laws, guidance, and policies that such other Federal agencies are responsible for administering. For interagency agreements that involve signatories in addition to FHWA and TxDOT, within six months after the effective date of this MOU, FHWA and TxDOT will contact the relevant third party or parties to determine whether any action should be taken with respect to such agreement. Such actions may include:

- A. Consulting with the third party to obtain written consent to the continuation of the interagency agreement in its existing form, but with the substitution through assignment of TxDOT for FHWA; or
- B. Negotiating with the third party to amend the interagency agreement as needed so that the interagency agreement continues but that TxDOT assumes FHWA's responsibilities.

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, TxDOT will carry out the assumed 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.

5.1.5 Upon termination of this MOU, FHWA and TxDOT shall contact the relevant third party to any interagency agreement and determine whether the interagency agreement should be amended or reinstated as it was on the effective date of this MOU.

5.2 Rulemaking

5.2.1 As provided at 23 U.S.C. 327(f), nothing in this MOU permits TxDOT to assume any rulemaking authority of the USDOT Secretary. Additionally, TxDOT may not establish policy and guidance on behalf of the USDOT Secretary or FHWA for highway projects covered in this MOU. TxDOT's authority to establish State regulations, policy, and guidance concerning the State environmental review of State highway projects shall not supersede applicable Federal environmental review regulations, policy, or guidance established by or applicable to the USDOT Secretary or FHWA.

5.3 Effect of Assumption

5.3.1 For purposes of carrying out the responsibilities assumed under this MOU, and subject to the limitations contained in 23 U.S.C. 327 and this MOU, TxDOT shall be deemed to be acting as FHWA with respect to the environmental review, consultation, and other action required under those responsibilities.

5.4 Other Federal Agencies

- 5.4.1 As provided at 23 U.S.C. 327(a)(2)(E), nothing in this MOU preempts or interferes with any power, jurisdiction, responsibility, or authority of an agency other than the USDOT (including FHWA), under applicable statutes and regulations with respect to a project.

PART 6. LITIGATION

6.1 Responsibility and Liability

- 6.1.1 As provided in 23 U.S.C. 327(e), TxDOT shall be solely liable and solely responsible for carrying out the responsibilities assumed under this MOU. The FHWA and USDOT shall have no responsibility or liability for the performance of the responsibilities assumed by TxDOT, including any decision or approval made by TxDOT in the course of participating in the Program.

6.2 Litigation

- 6.2.1 Nothing in this MOU affects the United States Department of Justice's (hereinafter "DOJ") authority to litigate claims, including the authority to approve a settlement on behalf of the United States if either FHWA or another agency of the United States is named in such litigation or if the United States intervenes pursuant to 23 U.S.C. 327(d)(3). In the event FHWA or any other Federal agency is named in litigation related to matters under this MOU or the United States intervenes in the litigation, TxDOT agrees to coordinate with DOJ in the defense of that action.
- 6.2.2 TxDOT shall defend all claims brought in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, TxDOT shall provide qualified and competent legal counsel, including outside counsel if necessary. TxDOT shall provide the defense at its own expense, subject to 23 U.S.C. 327(a)(2)(G) concerning Federal-aid participation in attorney's fees for TxDOT's counsel. TxDOT shall be responsible for opposing party's attorney's fees and court costs if a court awards those costs to an opposing party, or in the event those costs are part of a settlement agreement.
- 6.2.3 TxDOT will notify the FHWA's Texas Division Office and DOJ's Assistant Attorney General for the Environment and Natural Resources Division of any Notice of Intent to sue (NOI) received pursuant to the citizen suit provisions of an applicable environmental law prior to initiation of litigation in connection with TxDOT's performance or non-performance of any responsibility assumed or discharged under this MOU. TxDOT shall provide to FHWA and DOJ a copy of any such NOI within 7 calendar days after the TxDOT's receipt. The transmission of such copy may be made by electronic or regular mail.
- 6.2.4 TxDOT shall notify the FHWA's Texas Division Office and DOJ of any service of complaint concerning its TxDOT's performance or non-performance of any responsibility assumed or discharged under this MOU within 7 calendar days of the receipt of service of process. TxDOT's notification to FHWA and DOJ shall include a copy of the complaint and be made prior to its response to the complaint. No later than 30 calendar days from the notification and transmission of the complaint (unless otherwise agreed to by the parties), TxDOT, FHWA, and DOJ will hold a conference call to discuss the merits of the complaint, potential strategies to address the matter, and to determine if the case is one of "Federal interest." The final decision that a case is of "Federal interest" will be made by FHWA and DOJ. FHWA and DOJ agree to notify TxDOT as

soon as possible if a case previously determined not to be of "Federal interest" changes to a case of "Federal interest" in the course of the litigation.

- 6.2.5 For all cases, TxDOT agrees to insert the following email addresses for FHWA at FHWA_assignment_lit@dot.gov and for DOJ at efile_nrs.enrd@usdoj.gov to the distribution list in the court's electronic filing system (e.g., PACER) so that FHWA and DOJ may receive electronic copies of any motions, pleadings, briefs, and other such documents filed in any action concerning TxDOT's discharge of any responsibility assumed under this MOU. For "Federal interest" cases, TxDOT agrees to consult with FHWA and DOJ prior to filing or opposing any dispositive motion.
- 6.2.6 TxDOT agrees to notify FHWA's Division Office and DOJ prior to settling any lawsuit, in whole or in part, and shall provide FHWA and DOJ at least 30 calendar days to review and comment on the proposed settlement. TxDOT will not execute any settlement agreement until FHWA and DOJ have provided comments on the proposed settlement, indicated that they will not provide comments on the proposed settlement, or the 30-day review period has expired, whichever occurs first.
- 6.2.7 TxDOT hereby consents to intervention by FHWA in any action or proceeding arising out of, or relating to TxDOT's discharge of any responsibility assigned to the State under this MOU.
- 6.2.8 Within 7 calendar days of receipt by TxDOT, TxDOT will provide notice to FHWA's Division Office and DOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities TxDOT has assumed under this MOU. If TxDOT intends to appeal a court decision, TxDOT shall notify FHWA's Division Office and DOJ and provide FHWA and DOJ 20 calendar days to comment on TxDOT's intention to appeal. If either FHWA or DOJ objects in writing to TxDOT's intention to appeal any aspect of an adverse court decision before the 20-day deadline, then TxDOT will not file an appeal of such aspect. If neither FHWA nor DOJ objects in writing to TxDOT's intention to appeal before the 20-day deadline, then TxDOT may file the notice of appeal. However, TxDOT agrees to withdraw its appeal of any aspect of an adverse court decision if FHWA and DOJ provide a written objection to the appeal of that aspect within 30 days of the filing of the notice of appeal.
- 6.2.9 TxDOT's notification to FHWA and DOJ in subparts 6.2.3, 6.2.4, 6.2.6, and 6.2.8 shall be made by electronic mail to FHWA_assignment_lit@dot.gov and NRSDOT.enrd@usdoj.gov unless otherwise specified by FHWA and DOJ. FHWA and DOJ's comments under subpart 6.2.6 and written objections under subpart 6.2.8 shall be made by electronic mail to rich.oconnell@txdot.gov unless otherwise specified by TxDOT. In the event that regular mail is determined necessary, mail should be sent to:

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

For FHWA: Division Administrator, FHWA Texas Division, 300 East 8th Street, Room 826, Austin, TX 78701.

6.3 Conflict Resolution

- 6.3.1 In discharging any of the USDOT Secretary's responsibilities under this MOU, TxDOT agrees to comply with any applicable requirements of USDOT and FHWA statute, regulation, guidance or

policy regarding conflict resolution. This includes the USDOT Secretary's responsibilities for issue resolution under 23 U.S.C. 139(h), with the exception of the USDOT Secretary's responsibilities under 23 U.S.C. 139(h)(6) regarding financial penalties.

- 6.3.2 TxDOT agrees to follow 40 CFR part 1504 in the event of predecision referrals to CEQ for Federal actions determined to be environmentally unsatisfactory. TxDOT also agrees to coordinate and work with CEQ on matters brought to CEQ with regards the environmental review responsibilities for Federal highway projects TxDOT has assumed.

PART 7. INVOLVEMENT WITH OTHER AGENCIES

7.1 Coordination

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

7.2 Processes and Procedures

- 7.2.1 TxDOT will ensure that it has appropriate processes and procedures in place that provide for proactive and timely consultation, coordination, and communication with all appropriate Federal agencies in order to carry out any of the responsibilities assumed under this MOU, including the submission of all environmental impact statements together with comments and responses to the Environmental Protection Agency as required at 40 CFR 1506.9 and for EPA's review as required by section 309 of the Clean Air Act. These processes and procedures shall be formally documented. Such formal documentation may be in the form of a formal executed interagency agreement or in other such form as appropriate.

PART 8. INVOLVEMENT WITH FHWA

8.1 Generally

- 8.1.2 Except as specifically provided otherwise in this MOU, FHWA will not provide any project-level assistance to TxDOT in carrying out any of the responsibilities it has assumed under this MOU. Project-level assistance shall include any advice, consultation, or document review with respect to the discharge of such responsibility for a particular highway project. However, project-level assistance does not include process or program level assistance as provided in subpart 8.1.5, discussions concerning issues addressed in prior projects, interpretations of any applicable law contained in 23 U.S.C. or 49 U.S.C., interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance.
- 8.1.3 The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving TxDOT's consultation or coordination with another Federal agency with respect to TxDOT's discharge of any of the responsibilities assumed under this MOU for any particular highway project. However, the FHWA may attend meetings between TxDOT and other Federal agencies and submit comments to TxDOT and the other Federal agency in the following extraordinary circumstances:
 - A. FHWA reasonably believes that TxDOT is not in compliance with this MOU;

- B. FHWA determines that an issue between TxDOT and the other Federal agency concerns emerging national policy issues under development by the USDOT; or
- C. Upon request by either TxDOT or the other Federal agency and agreement by FHWA.

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

- 8.1.4 Other Federal agencies may raise concerns regarding the compliance with this MOU by TxDOT and may communicate these concerns to the FHWA. The FHWA will review the concerns and any information provided to FHWA by such other Federal agency. If, after reviewing these concerns, FHWA and such other Federal agency still have concerns regarding TxDOT'S compliance, FHWA will notify TxDOT of the potential compliance issue and will work with both TxDOT and the relevant Federal agency to resolve the issue and, if necessary, take appropriate action to ensure compliance with this MOU.
- 8.1.5 At TxDOT's request, FHWA may assist TxDOT in evaluating its environmental program and developing or modifying any of its processes or procedures to carry out the responsibilities it has assumed under this MOU, including, but not limited to, those processes and procedures concerning TxDOT'S consultation, coordination, and communication with other Federal agencies.
- 8.1.6 TxDOT's obligations and responsibilities under 23 CFR 1.5 are not altered in any way by executing this MOU.

8.2 MOU Monitoring and Oversight

- 8.2.1 The FHWA will provide necessary and appropriate monitoring and oversight of TxDOT's compliance with this MOU. The FHWA's monitoring and oversight activities under this MOU in years 1 through 4 of this MOU's term will primarily consist of auditing as provided at 23 U.S.C. 327(g) and Part 11 of this MOU, and evaluating attainment of the performance measures listed in Part 10 of this MOU. After the fourth year of TxDOT's participation in the Project Delivery Program, the FHWA will monitor TxDOT's compliance with the MOU, including the provision by TxDOT of financial resources to carry out the MOU. The FHWA's monitoring and oversight may also include submitting requests for information to TxDOT and other relevant Federal agencies, verifying TxDOT's financial and personnel resources dedicated to carrying out the responsibilities assumed, and reviewing documents and other information.
- 8.2.2 Pursuant to 23 U.S.C. 327(c)(4), TxDOT is responsible for providing FHWA any information FHWA considers necessary to ensure that TxDOT is adequately carrying out the responsibilities assigned. At the request of FHWA, TxDOT will promptly (within 5 business days) provide FHWA with any information FHWA considers necessary to ensure that TxDOT is adequately carrying out the responsibilities assigned to TxDOT, including making relevant employees and consultants available at their work location (including in-person meeting, teleconference, videoconference or other electronic means as may be available).
- 8.2.3 TxDOT shall make project files and general administrative files pertaining to its discharge of the responsibilities it has assumed under this MOU reasonably available for inspection by FHWA at the files' locations upon reasonable notice, which is not less than 5 business days. These files shall include, but are not limited to, all letters and comments received from governmental agencies, the public, and others with respect to TxDOT's discharge of the responsibilities assumed under this MOU.

- 8.2.4 In carrying out the responsibilities assumed under this MOU, TxDOT agrees to carry-out regular quality control and quality assurance activities to ensure that the assumed responsibilities are being conducted in accordance with applicable law and this MOU. At a minimum, TxDOT's quality control and quality assurance activities will include the review and monitoring of its processes and performance relating to project decisions, environmental analysis, project file documentation, checking for errors and omissions, legal sufficiency reviews, and taking appropriate corrective action as needed. Within 3 months of the effective date of this MOU, TxDOT and FHWA shall finalize a quality control and quality assurance (QA/QC) process that satisfies the requirements of this subpart. In developing and implementing the QA/QC process, TxDOT shall consult with the FHWA Texas Division Office. TxDOT agrees to cooperate with FHWA to incorporate recommendations FHWA may have with respect to its QA/QC process.
- 8.2.5 TxDOT shall perform regular self-assessments of its QA/QC process and performance to determine whether its process is working as intended, to identify any areas needing improvements in the process, and to timely take any corrective actions necessary to address the areas needing improvement. At least 1 month prior to the date of a scheduled FHWA audit, TxDOT shall transmit a summary of its self-assessment(s) to the FHWA Texas Division Office. The summary shall include a description of the scope of the self-assessment(s) conducted and the areas reviewed, a description of the process followed in conducting the self-assessment, a list of the areas identified as needing improvement, any corrective actions that have been or will be implemented, a statement from the Director of TxDOT's Environmental Affairs Division concerning whether the processes are ensuring that the responsibilities TxDOT has assumed under this MOU are being carried-out in accordance with this MOU and all applicable Federal laws and policies, and a summary of TxDOT's progress toward attaining the performance measures listed in Part 10 of this MOU. After a period of 2 years from the Effective Date of this MOU, TxDOT shall conduct its self-assessments no less frequently than annually.
- 8.2.6 Every month after the Effective Date of this MOU for a period of 2 years, TxDOT will provide a report to the FHWA Texas Division Office listing any approvals and decisions TxDOT has made with respect to the responsibilities TxDOT has assumed under this MOU. After a period of two years from Effective Date of this MOU, TxDOT shall submit its approval and decision report to the FHWA no less frequently than every 6 months.

8.3 Record Retention

- 8.3.1 TxDOT will retain project files and general administrative files pertaining to its discharge of the responsibilities it has assumed under this MOU in accordance with the FHWA Records Disposition Manual (Field Offices) Chapter 4, FHWA Order No. 1324.1B, issued July 29, 2013, or in accordance with any subsequent order that supersedes or replaces Order No. 1324.1B.
- 8.3.2 In addition to the period of time specified in subpart 8.3.1, TxDOT will ensure that the following retention periods are maintained for each specified type of record:
- A. **Environment Correspondence Files:** Environment correspondence files include correspondence between FHWA and TxDOT relative to the interpretation, administration, and execution of environmental aspects of the Federal-aid Highway Program. Environmental correspondence files shall be maintained by TxDOT for a period of 3 years after the resolution of the particular issue for which the file is created. After 3 years, TxDOT shall transmit environmental correspondence files to the FHWA to be stored at the Federal Records Center. When environmental correspondence files are 8

years old, the FHWA will transfer the files to the Federal Records Center for permanent storage.

- B. **Environmental Impact Statements and/or Section 4(f) Statements- FHWA:** Files containing reviews and approval of EIS's and Section 4(f) statements for which TxDOT, in assuming the FHWA's responsibilities, is the lead agency shall be maintained by TxDOT for a period of 8 years after approval of the final statement. After 8 years, TxDOT shall transmit its EIS and/or section 4(f) files to FHWA to be stored at the Federal Records Center. After a period of 13 years from the date of approval of the final statement, EIS and/or section 4(f) files will be destroyed.
- C. **Environmental Impact Statements - Other Agencies:** Files containing reviews and comments furnished by TxDOT to other Federal agencies following reviews of an EIS for which another Federal agency is the lead agency shall be maintained by TxDOT for a period of 5 years. After 5 years, TxDOT may destroy these files when no longer needed.
- D. **Fish and Wildlife Coordination:** Files containing correspondence with the fish and wildlife resource agencies early in project development may be destroyed by TxDOT when no longer needed.
- E. **Noise Barriers:** To comply with 23 CFR 772.13(f) regarding noise abatement measures reporting, files containing correspondence, publications, presentations, installation reports for wall barriers, and design of different types of wall barriers by private industry shall be maintained by TxDOT for a period of 4 years after the end of the Federal fiscal year in which the particular file is closed.

8.3.3. The periods of time stated in subpart 8.3.2 are contained in the FHWA Records Disposition Manual, FHWA Order M1324.1B. In case of any conflict in the periods of time in subpart 8.3.2 and the FHWA Records Disposition Manual, subpart 8.3.2 shall control.

8.3.4. Nothing contained in this MOU is intended to relieve TxDOT of its recordkeeping responsibilities under 49 CFR 18.42 or other applicable laws.

8.4 Federal Register

8.4.1 For any documents that are required to be published in the *Federal Register*, such as the Notice of Intent under 23 C.F.R. 771.123(a) and Notice of Final Agency Action under 23 U.S.C. 139(f), TxDOT shall transmit such document to the FHWA's Texas Division Office and the FHWA will cause such document to be published in the *Federal Register* on behalf of TxDOT and will submit such document to the *Federal Register* within 5 calendar days of receipt of such document from TxDOT. TxDOT shall, upon request by FHWA, reimburse FHWA for the expenses associated with publishing such documents in the *Federal Register* (excluding FHWA's overhead). To the extent that the operating procedures of the Government Printing Office and the Federal Register agree, TxDOT will take over the procedures described above from the FHWA Texas Division Office.

8.5 Participation in Resource Agency Reports

8.5.1 TxDOT agrees to provide data and information requested by the FHWA Office of Project Development and Environmental Review and resource agencies for the preparation of national reports to the extent that the information relates to determinations, findings, and proceedings associated with projects processed under this MOU. Such reports include but are not limited to:

- A. Information on the completion of and duration to complete environmental documentation of all NEPA types (EIS, EA, CE);
- B. Archeology Reports requested by the National Park Service;
- C. Endangered Species Act Expenditure Reports requested by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service;
- D. NEPA Litigation Reports requested by CEQ; and
- E. Environmental Conflict Resolution reports requested by the Office of Management and Budget and CEQ.

8.6 Conformity Determinations

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

8.7 Certification of NEPA Compliance

- 8.7.1 For projects funded by FHWA, prior to the execution of any Federal-aid project agreement for a physical construction contract, a design-build contract, or a contract for final design services, the Director of TxDOT's Environmental Affairs Division will submit a certification for each individual project to the FHWA Texas Division Office specifying that TxDOT has fully carried out all responsibilities assumed under this MOU in accordance with this MOU and applicable Federal laws, regulations, and policies. The Director of TxDOT's Environmental Affairs Division may delegate the authority to make the certification required under this subpart to other qualified and duly authorized TxDOT personnel.

8.8 Enforcement

- 8.8.1. Should FHWA determine that TxDOT is not in compliance with this MOU, then FHWA shall take appropriate action to ensure TxDOT's compliance, including appropriate remedies provided at 23 CFR 1.36 for violations of or failure to comply with Federal law or the regulations at 23 CFR with respect to a project, withdrawing assignment of any responsibilities that have been assumed as provided in Part 9 of this MOU, or terminating TxDOT's participation in the Project Delivery Program as provided in Part 13 of this MOU.

PART 9. WITHDRAWAL OF ASSIGNED RESPONSIBILITIES

9.1 FHWA-Initiated Withdrawal of Assigned Projects

- 9.1.1 The FHWA may, at any time, withdraw the assignment of all or part of the USDOT Secretary's responsibilities that have been assumed by TxDOT under this MOU for any highway project or highway projects upon FHWA's determination that:
 - A. With respect to that particular highway project or those particular highway projects, TxDOT is not in compliance with a material term of this MOU or applicable Federal laws or policies, and TxDOT has not taken sufficient corrective action to the satisfaction of FHWA;

- B. The highway project or highway projects involve significant or unique national policy interests for which TxDOT's assumption of the USDOT Secretary's responsibilities would be inappropriate; or
 - C. TxDOT cannot satisfactorily resolve an issue or concern raised in a government-to-government consultation process, as provided in subpart 3.2.3.
- 9.1.2 Upon the FHWA's determination to withdraw assignment of the USDOT Secretary's responsibilities under subpart 9.1.1, FHWA will informally notify TxDOT of FHWA's determination. After informally notifying TxDOT of its determination, FHWA will provide TxDOT written notice of its determination including the reasons for its determination. Upon receipt of this notice, TxDOT may submit any comments or objections to FHWA within 30 calendar days, unless FHWA agrees to an extended period of time. Upon receipt of TxDOT's comments or objections, FHWA will make a final determination within 30 calendar days, unless extended by FHWA for cause, and notify TxDOT of its decision. In making its determination, FHWA will consider TxDOT's comments or objections, the effect the withdrawal of assignment will have on the Program, the amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.
- 9.1.3 The FHWA shall withdraw assignment of the responsibilities TxDOT has assumed for any highway project when the preferred alternative that is identified in the environmental assessment or final environmental impact statement is a highway project that is specifically excluded in subpart 3.3.2. In such case, subpart 9.1.2 shall not apply.

9.2 TxDOT-Initiated Withdrawal of Assignment of Projects

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

PART 10. PERFORMANCE MEASURES

10.1 General

- 10.1.1 Both FHWA and TxDOT have determined that it is desirable to mutually establish a set of performance measures that FHWA can take into account in its evaluation of TxDOT's administration of the responsibilities it has assumed under this MOU.

10.1.2 TxDOT's attainment of the performance measures indicated in this Part 10 will be considered during the FHWA audits, which are required under 23 U.S.C. 327(g).

10.1.3 TxDOT shall collect and maintain all necessary and appropriate data related to the attainment of the performance measures. In collecting this data, TxDOT shall monitor its progress toward meeting the performance measures and include its progress in the self-assessment summary provided under subpart 8.2.5 of this MOU. The summary shall be made available to the FHWA as provided in subpart 8.2.5.

10.2 Performance Measures

10.2.1 The performance measures applicable to TxDOT in carrying-out the responsibilities it has assumed under this MOU are as follows:

A. Compliance with NEPA and other Federal environmental statutes and regulations:

- i. Maintain documented compliance with procedures and processes set forth in this MOU for the environmental responsibilities assumed under the Program.
- ii. Maintain documented compliance with requirements of all applicable Federal statutes and regulations for which responsibility is assumed (Section 106, Section 7, etc).

B. Quality Control and Assurance for NEPA decisions:

- i. Maintain and apply internal quality control and assurance measures and processes, including a record of:
 - a. Legal sufficiency determinations made by counsel; this shall include the legal sufficiency reviews of Notices of Intent and Notices of Final Agency Action as required by law, policy, or guidance; and,
 - b. Compliance with FHWA's and TxDOT's environmental document content standards and procedures, including those related to QA/QC; and,
 - c. Completeness and adequacy of documentation of project records for projects done under the Program.

C. Relationships with agencies and the general public:

- i. Assess change in communication among TxDOT, Federal and State resource agencies and the public resulting from assumption of responsibilities under this MOU.
- ii. Maintain effective responsiveness to substantive comments received from the public, agencies and interest groups on NEPA documents and environmental concerns.
- iii. Maintain effective NEPA conflict resolution processes whenever appropriate.

D. Increased efficiency and timeliness in completion of NEPA process:

- i. Compare time of completion for NEPA approvals before and after assumption of responsibilities under this MOU.
- ii. Compare time to completion for key interagency consultation formerly requiring FHWA participation (e.g., Section 7 biological opinions, Section 106 resolution of adverse effects) before and after assumption of responsibilities under this MOU.

PART 11. AUDITS

11.1 General

- 11.1.1 As required at 23 U.S.C. 327(g), FHWA will conduct a total of 6 audits of TxDOT's discharge of the responsibilities it has assumed under this MOU. Audits will be the primary mechanism used by FHWA to oversee TxDOT's compliance with this MOU ensure compliance with applicable Federal laws and policies, evaluate TxDOT's progress toward achieving the performance measures identified in Part 10, and collect information needed for the USDOT Secretary's annual report to Congress.
- 11.1.2 Pursuant to 23 U.S.C. 327(c)(4), TxDOT is responsible for providing FHWA any information FHWA considers necessary to ensure that TxDOT is adequately carrying out the responsibilities assigned. TxDOT will make documents and records available for review by FHWA in conducting audits and shall provide FHWA with copies of any such documents and records as may be requested by FHWA. In general, all documents and records will be made available to FHWA at their normal place of repository. However, TxDOT will work with FHWA to provide documents through e-mail, CD-ROM, mail, or facsimile to the extent it does not create an undue burden.
- 11.1.3 TxDOT agrees to cooperate with FHWA in conducting audits, including providing access to all necessary information, making all employees available to answer questions (including consultants hired for the purpose of carrying out the USDOT Secretary's responsibilities), and providing all requested information (including making employees available) to FHWA in a timely manner. Employees will be made available either in-person at their normal place of business or by telephone, at the discretion of FHWA.
- 11.1.4 TxDOT and the FHWA Texas Division Office will each designate an audit coordinator who will be responsible for coordinating audit schedules, requests for information, and arranging audit meetings.
- 11.1.5 The FHWA audits will include, but not be limited to, consideration of TxDOT's technical competency and organizational capacity, adequacy of the financial resources committed by TxDOT to administer the responsibilities assumed, quality control and quality assurance process, attainment of performance measures, compliance with this MOU's requirements, and compliance with applicable Federal laws and policies in administering the responsibilities assumed.

11.2 Scheduling

- 11.2.1 As provided at 23 U.S.C. 327(g), FHWA will conduct semiannual audits during each of the first 2 years after the Effective Date of this MOU and an annual audit during the third and fourth years after the Effective Date. After the fourth year of TxDOT's participation in the Program, FHWA will monitor TxDOT's compliance with the MOU, including the provision by TxDOT of financial resources to carry-out the MOU, but will not conduct additional audits under this Part 11.

- 11.2.2 For each semiannual and annual audit, the designated audit coordinators for FHWA and TxDOT will work to establish general audit schedules at least three months prior to the semiannual or annual anniversary dates of the Effective Date of this MOU. The general audit schedules shall include the dates that FHWA will conduct the audit. To the maximum extent practicable, the general audit schedule will identify all employees (including consultants) and documents and other records that TxDOT will make available to FHWA during the audit. TxDOT agrees to work with FHWA to specifically identify each employee. With respect to documents and other records, TxDOT and FHWA agree to try to be as specific as possible, although a general description of the types of documents will be acceptable.
- 11.2.3 TxDOT's audit coordinator shall make all reasonable efforts to ensure all necessary employees (including consultants) are available to FHWA during the specified dates on the general audit schedule. TxDOT will also ensure that all of its documents and records are made reasonably available to FHWA as needed during the general audit schedule.
- 11.2.4 After the general audit schedule is established, the audit coordinators shall work to establish specific audit schedules at least two weeks prior to the scheduled audit. The specific audit schedules shall include the dates, times, and place for which FHWA will talk to TxDOT's employees (including consultants) and review documents and records.
- 11.2.5 To the maximum extent practicable, the specific audit schedule will identify all employees (including consultants) and documents and other records that TxDOT will make available to FHWA during the audit. Should FHWA determine that it needs access to an employee, document or other record that is not identified in the specific audit schedule, TxDOT agrees to make reasonable efforts to produce such employee, document or other record on the specified dates. With respect to employees, TxDOT agrees to work with FHWA to specifically identify each employee. With respect to documents and other records, TxDOT and FHWA agree to try to be as specific as possible, although a general description of the types of documents will be acceptable.

11.3 Other Federal Agency Involvement

- 11.3.1. The FHWA may invite other Federal or State agencies as deemed appropriate, including State Historic Preservation Officers (SHPO), to assist FHWA in conducting an audit under this MOU by sitting in on interviews, reviewing documents obtained by FHWA, and making recommendations to FHWA. In any case, FHWA will ensure TxDOT is aware of the role that any such other Federal agency plays in the audit process.

11.4 Audit Report and Findings

- 11.4.1 Upon completing each audit, FHWA will transmit to TxDOT a draft of the audit report and allow TxDOT a period of 14 calendar days within which to submit written comments to FHWA. The FHWA will grant any reasonable request by TxDOT to extend its deadline to respond in writing to a draft audit report not to exceed a total review period of 30 days. The FHWA will review the comments and revise the draft audit report as may be appropriate. The FHWA will then prepare the draft audit report for public comment.
- 11.4.2 As required at 23 U.S.C. 327(g)(2), FHWA will make the draft audit report available for public comment. In carrying out this requirement, FHWA will, after receipt and incorporation of TxDOT comments as provided in subpart 11.4.1, publish the audit report in the Federal Register and allow a comment period of 30 calendar days. The FHWA will then address and respond to the

public comments by incorporating the comments and response into the final audit report. The final audit report will be published in the Federal Register not later than 60 calendar days after the comment period closes.

PART 12. TRAINING

- 12.1 The FHWA will provide TxDOT available training, to the extent FHWA and TxDOT deems necessary, in all appropriate areas with respect to the environmental responsibilities that TxDOT has assumed. Such training may be provided by either FHWA or another Federal agency or other parties as may be appropriate. TxDOT agrees to have all appropriate employees (including consultants hired for the purpose of carrying out the USDOT Secretary's responsibilities) attend such training.
- 12.2 Within 90 days after the effective date of this MOU, TxDOT and FHWA, in consultation with other Federal agencies as deemed appropriate, will assess TxDOT's need for training and develop a training plan. The training plan will be updated by TxDOT and FHWA, in consultation with other Federal agencies as appropriate, annually during the term of this MOU. While TxDOT and FHWA may take other agencies' recommendations into account in determining training needs, TxDOT and FHWA will jointly determine the training required under this.

PART 13. TERM, TERMINATION AND RENEWAL

13.1 Term

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

13.2 Termination by the FHWA

- 13.2.1 As provided at 23 U.S.C. 327(j)(1), FHWA may terminate TxDOT's participation in the Program, in whole or in part, at any time subject to the procedural requirements in 23 U.S.C. 327 and subpart 13.2.2 below. 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, as well as SHPOs, into account in carrying out the responsibilities assumed.
- 13.2.2 If FHWA determines that TxDOT is not adequately carrying out the responsibilities assigned to TxDOT, then:
 - A. The FHWA shall provide to TxDOT a written notification of its determination;

- B. The FHWA shall provide TxDOT a period of at least 30 calendar days to take such corrective action as the FHWA determines is necessary to comply with this MOU; and
- C. TxDOT, after notification and the period provided under subpart 13.2.2(B), fails to take satisfactory corrective action, FHWA shall provide notice to TxDOT of its determination whether or not to implement the FHWA-initiated termination. Any responsibilities identified to be terminated in the notice that have been assumed by TxDOT of this MOU shall transfer to FHWA.

13.3 Termination by TxDOT

- 13.3.1 TxDOT 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 TxDOT seeks to terminate its participation in this program, and subject to such terms and conditions as FHWA may provide.
- 13.3.2. The Texas Legislature and Governor may, at any time, terminate TxDOT's authority granted to participate in this Program. In that event, FHWA and TxDOT shall develop a plan to transition the responsibilities that TxDOT has assumed back to FHWA so as to minimize disruption to projects, minimize confusion to the public, and minimize burdens to other affected Federal, State, and local agencies. The plan shall be approved by both FHWA and TxDOT.
- 13.3.3. Any such withdrawal of assignment which FHWA and TxDOT have agreed to under a transition plan shall not be subject to the procedures or limitations provided for in Part 9 of this MOU and shall be valid as agreed to in the transition plan.

13.4 Validity of TxDOT Actions

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

13.5 Renewal

This MOU is renewable in accordance with 23 U.S.C. 327 and implementing regulations, as in effect at the time of the renewal.

PART 14. AMENDMENTS

14.1 Generally

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

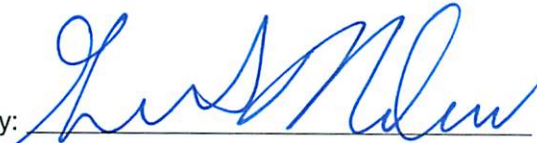
14.2 Additional Projects, Classes of Projects and Environmental Review Responsibilities

- 14.2.1 The FHWA may assign, and TxDOT may assume, responsibility for additional projects , and additional environmental review responsibilities beyond those identified in Part 3 of this MOU by executing an amendment to this MOU.

14.2.2 Should TxDOT decide to request this MOU to be amended to add responsibility for additional projects or classes of projects, or additional environmental review responsibilities beyond those identified in Part 3 of this MOU, such request shall be treated as an amendment to TxDOT's original application that was submitted to FHWA pursuant to 23 U.S.C. 327(b) and 23 C.F.R. part 773. In developing the application supplement, TxDOT shall identify the additional projects, classes of projects, and environmental review responsibilities it wishes to assume and make any appropriate adjustments to the information contained in TxDOT's original application, including the verification of personnel and financial resources.

IN WITNESS THEREOF, the parties hereto have caused this MOU to be duly executed in duplicate as of the date of the last signature written below.

FEDERAL HIGHWAY ADMINISTRATION

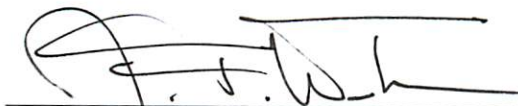
By: 

Gregory G. Nadeau
Acting Administrator
Federal Highway Administration

Dated: 12/16/14

STATE OF TEXAS

Recommended by:



LtGen J.F. Weber, USMC (Ret)
Executive Director
Texas Department of Transportation

Dated: 11/25/2014

Executed for the State of Texas by the State's Chief Executive Officer in accordance with Texas Constitution, Article IV, Section 10:

By: 

Rick Perry
Governor, State of Texas

Dated: December 3, 2014

**PROGRAMMATIC AGREEMENT
BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION,
WASHINGTON DIVISION
AND
THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
REGARDING THE PROCESSING OF ACTIONS CLASSIFIED AS
CATEGORICAL EXCLUSIONS FOR FEDERAL-AID HIGHWAY PROJECTS**

THIS PROGRAMMATIC AGREEMENT (“Agreement”), made and entered into this 15th day of MAY 2015, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION and the STATE of WASHINGTON, acting by and through its DEPARTMENT OF TRANSPORTATION hereby provides as follows:

I. PARTIES

The Parties to this Agreement are the Federal Highway Administration (hereinafter “FHWA”) and the Washington State Department of Transportation (hereinafter “WSDOT”).

II. PURPOSE

The purpose of this Agreement is to authorize the WSDOT to determine on behalf of FHWA whether a project qualifies for a Categorical Exclusion (CE) specifically listed in 23 CFR 771 without further review and approval by FHWA. This agreement allows WSDOT to make NEPA CE approvals on FHWA’s behalf for projects using Federal-aid funds or requiring FHWA approval.

III. AUTHORITIES

This agreement is entered into pursuant to the following authorities:

- A. National Environmental Policy Act, 42 U.S.C. 4321 - 4370
- B. Moving Ahead for Progress in the 21st Century Act, P.L. 112-141, 126 Stat. 405, Sec. 1318(d)
- C. 40 CFR parts 1500 - 1508
- D. DOT Order 5610.1C
- E. 23 CFR 771.109, 771.113 and 771.117

IV. RESPONSIBILITIES

A. WSDOT is responsible for:

1. Approving CEs for actions specifically listed in 23 CFR 771.117(c) and 23 CFR 771.117(d) including c list activities constrained by 23 CFR 771.117(e), on behalf of FHWA. WSDOT will identify the applicable listed CE, ensure any conditions or constraints are met, verify that unusual circumstances do not apply, address any and all other environmental requirements, and complete the review with a signature evidencing approval. No separate review or approval of the CE by FHWA is required.
2. Consulting with FHWA for actions that involve unusual circumstances (23 CFR 771.117(b)) to determine the appropriate class of action for environmental analysis and documentation. WSDOT may decide or FHWA may require additional studies to be performed prior to making a CE approval, or the preparation of an EA or EIS.
3. Meeting applicable documentation requirements, as listed in Section V of this agreement, for State CE approvals on FHWA's behalf, applicable approval and re-evaluation requirements in Section VI, and applicable quality control/quality, monitoring, and performance requirements in Section VII.
4. Relying only upon employees directly employed by the State to make CE approvals under this agreement. WSDOT may not delegate its responsibility for CE approvals to third parties (e.g., local government staff, other State agency staff).

B. FHWA is responsible for:

1. Providing timely review and response to a request from WSDOT for a CE determination for an action not specifically listed in 23 CFR 771.117.
2. Providing timely review and response to any request for coordination, consultation, or compliance with any environmental requirement under law, regulation, or Executive Order related to the State's processing of CE actions under this agreement. This includes all Section 4(f) evaluations and *de minimis* and temporary occupancy determinations, all formal ESA consultations except those included in a programmatic ESA consultation, all responses to Essential Fish Habitat conservation recommendations, all Section 106 Memorandums of Agreement, and government-to-government consultation with Native American Tribes.
3. Providing timely advice and technical assistance on CEs to WSDOT, as requested.
4. Overseeing the implementation of this Agreement in accordance with 23 CFR 771.117(g).

V. DOCUMENTATION OF WSDOT CE APPROVALS

- A. For WSDOT CE approvals, WSDOT shall ensure that it fulfills the following responsibilities for documenting the project specific determinations made:
 - 1. For actions listed in 23 CFR 771.117(c) and 23 CFR 771.117(d), WSDOT will identify the applicable action, ensure any conditions specified in FHWA regulation are met, verify that unusual circumstances do not apply, address all other environmental requirements, and complete WSDOT's NEPA form(s) with a WSDOT signature evidencing approval.
 - 2. In addition, for actions listed in 23 CFR 771.117(d), WSDOT shall prepare documentation that supports the CE determination and that no unusual circumstances exist that would make the CE approval inappropriate.
- B. WSDOT should maintain a project record for CE approvals it makes on FHWA's behalf. This record should include at a minimum:
 - 1. Any checklists, forms, or other documents and exhibits that summarize the consideration of project effects and unusual circumstances;
 - 2. Any stakeholder communication, correspondence, consultation, or public meeting documentation;
 - 3. The name and title of the document approver and the date of WSDOT's approval.
 - 4. For cases involving re-evaluations, any documented re-evaluation (when required) or a statement that a re-evaluation was completed for the project (when documentation is not necessary).
- C. Any electronic or paper project records maintained by WSDOT should be provided to FHWA at its request. WSDOT should retain those records, including all letters and comments received from governmental agencies, the public and others for a period of no less than three (3) years after completion of project construction, according to state records retention schedules. This provision does not displace or relieve WSDOT of its project or program recordkeeping responsibilities under 2 CFR § 200.333 or any other applicable laws, regulations, or policies.

VI. CE APPROVALS AND RE-EVALUATIONS

- A. WSDOT's CE approvals may only be made by the WSDOT Director of Environmental Services, WSDOT Region and Modal Environmental Managers, WSDOT's Local Program Environmental Manager or staff they choose as delegates.

- B. In accordance with 23 CFR 771.129, the WSDOT shall re-evaluate its determinations and approvals for projects, consult with FHWA, and as necessary, prepare additional documentation to ensure that determinations are still valid.

VII. QUALITY CONTROL/QUALITY ASSURANCE, MONITORING AND PERFORMANCE

A. WSDOT Quality Control and Quality Assurance

WSDOT agrees to carry out regular quality control and quality assurance activities, as described in WSDOT procedures, the Environmental Manual and Local Agency Guidelines to ensure WSDOT's CE approvals are made in accordance with applicable law and this Agreement. The signatories of the CEs are responsible for ensuring quality.

B. WSDOT Performance Monitoring and Reporting.

1. FHWA and WSDOT should cooperate in monitoring performance under this Agreement and work to assure quality performance.
2. WSDOT will implement corrective actions to ensure compliance with the terms of this agreement as needed.

C. FHWA Oversight and Monitoring

1. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of WSDOT, as well as WSDOT's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of WSDOT's CE approvals, adequacy and capability of WSDOT staff and consultants, and the effectiveness of WSDOT's administration of its internal CE approvals.
2. FHWA will conduct one or more program reviews as part of its oversight activities. WSDOT shall prepare and implement a corrective action plan as necessary to address any findings or observations identified in the FHWA review. WSDOT should draft the corrective action plan within forty-five (45) days of FHWA finalizing its review. The content of the corrective action plan shall be taken into account at the time this Agreement is considered for renewal.
3. WSDOT and FHWA should cooperate in all oversight and quality assurance activities.


VIII. AMENDMENTS

If the Parties agree to amend this Agreement, then FHWA and WSDOT may execute an amendment with new signatures and dates of the signatures. The term of the Agreement shall remain unchanged unless otherwise expressly stated in the amended Agreement.

IX. TERM, RENEWAL AND TERMINATION

- A. This Agreement shall have a term of five (5) years, effective on the date of the last signature. WSDOT shall post and maintain an executed copy of this Agreement on its website, available to the public.
- B. This Agreement is renewable for additional five (5) year terms if WSDOT requests renewal and FHWA determines WSDOT has satisfactorily carried out the provisions of this Agreement. In considering any renewal of this Agreement, FHWA will evaluate the effectiveness of the Agreement and its overall impact on the environmental review process.
- C. Either party may terminate this Agreement at any time by giving at least thirty (30) days written notice to the other party.

Execution of this Agreement and implementation of its terms by both Parties provides evidence that both Parties have reviewed this Agreement and agree to the terms and conditions for its implementation. This Agreement is effective upon the date of the last signature below.

 04/21/2015
Daniel M. Mathis Date
Division Administrator, Washington Division
Federal Highway Administration

 05/01/15
Lynn Peterson Date
Secretary of Transportation
WSDOT