

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

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

Appendix C: State Designated CE actions

Appendix D: Example CE Checklist