

**PROGRAMMATIC AGREEMENT
BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION, TENNESSEE DIVISION
AND
THE TENNESSEE 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 17th day of July 2023, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION (“FHWA”) and the STATE of TENNESSEE, acting by and through its DEPARTMENT OF TRANSPORTATION (Tennessee Department of Transportation, or “TDOT”) 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 C.F.R. 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 C.F.R. §1.81(a)(5));

Whereas, the FHWA’s NEPA implementing procedures (23 C.F.R. §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 Tennessee 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 TDOT projects (23 C.F.R. §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 in 23 C.F.R. §771.117(g) implementing the authorities in section 1318(d), effective November 6, 2014;

Whereas, Section 1315(b) of the Fixing America's Surface Transportation Act (FAST Act), Pub. L. 114-94, 129 Stat. 1312 (December 4, 2015) required a revision to 23 C.F.R. §771.117(g);

Whereas, in accordance with Section 1315(b) of the FAST Act, FHWA revised regulations in 23 C.F.R. §771.117(g) effective June 30, 2016;

Now, therefore, the FHWA and the TDOT 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 Tennessee Department of Transportation ("TDOT").

II. PURPOSE

The purpose of this Agreement is to authorize the TDOT to determine on behalf of FHWA whether a project qualifies for a CE specifically listed in 23 C.F.R. §771.117.

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. Fixing America's Surface Transportation Act, P.L. 114-94, 129 Stat. 1312, Sec. 1315(b)
- D. 40 C.F.R. parts 1500 - 1508
- E. DOT Order 5610.1C
- F. 23 C.F.R. §771.117

IV. RESPONSIBILITIES

- A. The TDOT 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 23 C.F.R. §771.117(c) (the “c list”) and in 23 C.F.R. §771.117(d) (the “d list”), that do not exceed the thresholds in Section IV(A)(1)(b) below, the TDOT may make a CE and CE re-evaluation approval on behalf of FHWA. CEs for actions on the “d list” that do not exceed the thresholds are referred to as Programmatic Categorical Exclusions, or PCEs.

In carrying out this responsibility on behalf of FHWA, TDOT shall:

- i. Identify the applicable action as listed in 23 CFR §771.117 within the body of the document;
- ii. Ensure that all relevant conditions or constraints are met;
- iii. Verify that any unusual circumstances do not apply;
- iv. Address all environmental requirements; and
- v. Complete the review with a signature evidencing approval.

Documentation of these decisions shall be maintained by TDOT in the applicable project file.

No Federal review or approval of CEs meeting these circumstances is required.

- b. Actions listed in 23 C.F.R. §771.117(c) and (d) that exceed the thresholds of minor impacts when evaluated in relation to the scope and nature of the proposed project may not be approved by the TDOT.

FHWA review and approval is required if the action:

- i. Involves acquisitions of more than a minor amount of right-of-way (fee simple) or permanent easements, defined as 1.5 acre unless TDOT notifies FHWA, and FHWA agrees that the scope and nature of the project is such that it would allow for more acreage of right-of-way with only the potential for a minor impact, and TDOT documents that agreement in the project file (this threshold does not apply to approvals for disposal of excess right-of-way, stream mitigation projects, permanent air rights, rockfall mitigation, or to the acquisition of temporary easements);
- ii. Involves acquisitions that result in any residential or non-residential relocations (projects requiring residential or non-residential relocations may not be processed as “c list” CEs);
- iii. Involves the construction of temporary access, or the closure of an existing road, bridge, or ramps, that would result in major traffic disruptions. A 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 1 year;

- Designated travel detours would result in an additional travel distance of less than 5 miles in urban areas or 25 miles in rural areas;
 - Provisions are made for access for local traffic and so posted;
 - Through-traffic dependent businesses will not be adversely affected;
 - The temporary road, detour or ramp closure does not substantially change the environmental consequences of the action;
 - Closure of any road, bridge or ramp is temporary, not permanent, and;
 - No substantial controversy is associated with the use of the temporary road, detour, or ramp closure.
- iv. Involves changes in access control, which results in a change to the functional utility of adjacent properties.
- v. Results in a determination of adverse effect on historic properties pursuant to Section 106 of the National Historic Preservation Act;
- vi. Requires the use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. §303), or qualifies as an exception to the requirement for Section 4(f) approval as described in 23 C.F.R. §774.13;
- vii. 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 Sport 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;
- viii. Results in the loss of 0.5 acres or more per permit impact site of waters of the U.S. (including wetlands);
- ix. Requires a U.S. Coast Guard bridge permit;
- x. Requires work encroaching on a regulatory floodway or work adversely affecting the base floodplain (100-year flood) elevations of a water course or lake, pursuant to Executive Order 11988 and 23 C.F.R. §650 subpart A. This includes:
- An action that may result in an increase in the designated regulatory floodway;
 - An action that may result in an increase of more than 1 foot of surface water elevation in the base floodplain when no regulatory floodway is designated, or;
 - An action that may increase the risk of damage to property and loss of human life, or may result in modification of a watercourse.

- xi. 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;
- xii. Is defined as a “Type I project” that in consultation with FHWA has been determined to create a significant noise impact per 23 C.F.R. §772.5 and the TDOT noise manual for purposes of a noise analysis;
- xiii. May affect, is likely to adversely affect federally listed species or designated critical habitat, or results in impacts subject to the conditions of the Bald and Golden Eagle Protection Act;
- xiv. Includes acquisition of land for hardship or protective purposes, or early acquisition pursuant to a Federally funded acquisition project (23 U.S.C. §108(d));
- xv. Involves a known hazardous material site within the proposed right-of-way excluding 1) the relocation or removal of underground storage tanks and 2) remediation of asbestos contained in bridge elements or in other structures; or
- xvi. Is an activity described in 23 CFR §771.117(c)(26) (modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes)), (27) (highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting), and (28) (bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings) if they involve:
 - (1) An acquisition of more than 1.5 acre of right-of-way unless TDOT notifies FHWA, and FHWA agrees that the scope and nature of the project is such that it would allow for more acreage of right-of-way with only the potential for a minor impact, or that would result in any residential or non-residential relocations, and TDOT documents that agreement in the project file (23 CFR §771.117(e)(1));
 - (2) An action that needs a bridge permit from the U.S. Coast Guard, or an action that does not meet the terms and conditions of a U.S. Army Corps of Engineers nationwide or general permit (23 CFR §771.117(e)(2)). ***The FHWA and the TDOT agree that actions listed under 23 CFR §771.117(c)(26), (27) and (28) that require an individual U.S. Army Corps of Engineers permit, or for which the permit status is unknown, may be processed as Programmatic***

Categorical Exclusions as long as all other constraints under 23 CFR §771.117(e) are satisfied.

- (3) A finding of adverse effect to historic properties under the National Historic Preservation Act, the use of a Section 4(f) resource, or a finding of “may affect, likely to adversely affect” threatened or endangered species or critical habitat under the Endangered Species Act (23 CFR §771.117(e)(3));
 - (4) Construction of temporary access, or the closure of existing road, bridge, or ramps, that would result in major traffic disruptions (23 CFR §771.117(e)(4)). Projects that do not involve major traffic and access disruptions are defined in Section IV(A)(b)(iii) above.
 - (5) Changes in access control (23 CFR §771.117(e)(5)), which results in a change to the functional utility of adjacent properties.
 - (6) A floodplain encroachment (23 CFR §771.117(e)(6)), which is defined in Section IV(A)(b)(x) above.
- c. For actions not specifically listed as CEs in 23 C.F.R. §771.117 but meeting the requirements of a CE under 40 C.F.R. §1508.4 and 23 C.F.R. §771.117(a), TDOT agrees to contact FHWA to collaboratively determine the CE classification.
2. Consulting with FHWA for actions that involve unusual circumstances (23 C.F.R. §771.117(b)) to determine the appropriate class of action for environmental analysis and documentation. The TDOT may decide or FHWA may require additional studies to be performed prior to making a CE approval, or during the preparation of an EA or EIS.
 3. Consulting with FHWA for projects that involve any residential and non-residential relocations to determine whether a proposed CE designation is appropriate. Projects meeting the CE criteria should not require a significant number of residential or non-residential relocations, with significance determined by substantial controversy, history of controversial relocations, and relocations involving environmental justice communities, among others.
 4. Meeting applicable documentation requirements in Section V for State CE 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 State (not consultants contracted by the State to act on the State’s behalf) to make CE approvals submitted to FHWA under this agreement. While third parties (i.e., consultants, local government staff, and other State agency staff) may prepare NEPA documents on behalf of the TDOT in accordance with this agreement, the TDOT may not delegate its responsibility for CE approvals to third parties.

B. The FHWA is responsible for:

1. Providing timely advice and technical assistance on CEs to the TDOT, as requested.
2. Providing timely review of and action on CEs. FHWA will base its CE action on the project documentation prepared by the TDOT under this Agreement.
3. Conducting an annual program review as part of its oversight activities, by reviewing a sampling of “c list” CEs and PCEs produced during the previous Federal fiscal year.
4. Overseeing the implementation of this Agreement in accordance with the provisions in Section VII, including applicable monitoring and performance provisions.

V. DOCUMENTATION OF TDOT CE APPROVALS

A. The TDOT shall maintain a project record for CE approvals it makes on FHWA’s behalf and for each CE submitted to FHWA 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 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 TDOT’s approval or FHWA’s final approval; and
5. For cases where projects have been assessed for whether a re-evaluation is necessary, any written re-evaluation or a statement confirming that a written re-evaluation was not necessary.

B. Any electronic or paper project records maintained by the TDOT shall be provided to FHWA at their request. The TDOT 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 the TDOT of its project or program recordkeeping responsibilities under 2 C.F.R. §200.333 or any other applicable laws, regulations, or policies.

VI. NEPA APPROVALS AND RE-EVALUATIONS

- A. The TDOT's CE approvals and CEs submitted to FHWA for approval may only be made by officers or offices specifically identified below:
 - 1. Approval of "c list" CEs and PCEs is delegated to the appropriate TDOT NEPA staff by TDOT management.
 - 2. TDOT approval of "d list" CEs submitted to FHWA is delegated to the appropriate TDOT NEPA staff.
- B. The TDOT shall assess its determinations for projects in accordance with requirements of 23 C.F.R. §771.129 and all applicable Environmental Division guidance to determine whether a written re-evaluation is necessary. The TDOT shall consult with FHWA as necessary when making this determination.

VII. QUALITY CONTROL/QUALITY ASSURANCE, MONITORING & PERFORMANCE

- A. TDOT Quality Control & Quality Assurance
 - 1. The TDOT agrees to 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. TDOT Performance Monitoring and Reporting.
 - 1. The FHWA and the TDOT shall cooperate in monitoring performance under this Agreement and work to assure quality performance.
 - 2. The TDOT shall 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 the TDOT is taking to implement those improvements. The report will include a description of actions taken by the TDOT 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 the TDOT, as well as the TDOT's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of the TDOT's CE approvals, CE submissions to FHWA for approval, adequacy, and capability of the TDOT staff and consultants, and the effectiveness of the TDOT's administration of its internal CE approvals.

FHWA will conduct an annual program review as part of its oversight activities, during the term of this Agreement. Within 30 calendar days of the start of the subsequent Federal Fiscal Year, the TDOT will provide to the Division Office a list of actions (“c list” CEs and PCEs) produced during the previous Federal fiscal year (October 1 through September 30) The list of actions will contain the following information:

- a. the Federal Project Number (FPN)
- b. the TDOT project information number (PIN)
- c. the project route number or facility name, the project termini, county and the TDOT region number
- d. the type of document (“c list” CE or PCE)
- e. the type of work to be performed and the completion date

The Division Office will select a statistically significant number of the documents for review, ensuring that the number of selected projects does not exceed twenty percent of the total number of projects processed during the previous Federal fiscal year. TDOT will provide the selected documents and all backup information in electronic form to the Division Office within 14 calendar days from the receipt of the list of selected documents from the Division Office. The Division Office will complete a review of the selected documents to determine, at a minimum, whether:

- a. The project was correctly processed as a “c list” CE or a PCE.
- b. The documentation includes the correct citation to 23 CFR §771.117 justifying the use of a Categorical Exclusion.
- c. The proposed scope of work correlates to the stated Needs for the project and demonstrably fulfills the Purpose of the project.
- d. The appropriate USFWS letter, stamp, email, or Grouped Programmatic No Effect Activities consultation was attached.
- e. The appropriate State Historic Preservation Office (SHPO) letter, Section 106 PA (with the specific applicable screened undertaking cited in the document), interstate highway exemption, and/or program comment to exempt effects to rail property within railroad ROW was attached.
- f. Documentation of required Native American consultation for projects with potential to affect historic resources is attached.

After the review is completed, the Division Office will prepare a report, which will be forwarded to the TDOT Environmental Division. The report will include program observations, required actions, and findings. The Division Office will transmit its report to the TDOT Environmental Division by the first workday following January 1st of the following calendar year.

2. The TDOT shall implement any identified corrective actions identified in the FHWA review according to direction provided by the FHWA.

3. Nothing in this Agreement prevents FHWA from undertaking other monitoring or oversight actions, including audits, with respect to the TDOT's performance under this Agreement. The FHWA may require the TDOT 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 TDOT 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 the TDOT 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 TDOT shall post and maintain an executed copy of this Agreement on its website, available to the public.
- B. TDOT and FHWA shall review the terms of this agreement annually to evaluate the effectiveness of the Agreement and its overall impact on the environmental review process. This review shall take place through the Division Office's annual review described in Section VII.C.
- C. This Agreement is renewable for additional five (5) year terms if the TDOT requests renewal and FHWA determines that the TDOT has satisfactorily carried out the provisions of this Agreement.
- D. Either party may terminate this Agreement at any time by giving at least 30 days written notice to the other party.
- E. Expiration or termination of this Agreement shall mean that the TDOT 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.

TENNESSEE DEPARTMENT OF TRANSPORTATION

Through signature, the Tennessee Department of Transportation (TDOT) commits to implementation of the provisions of the Programmatic Agreement between the Federal Highway Administration, Tennessee Division and the Tennessee Department of Transportation regarding the Processing of Actions Classified as Categorical Exclusions for Federal-Aid Highway Projects.

7/11/2023

Date

By: 

Howard H. Eley
Commissioner
Tennessee Department of Transportation

FEDERAL HIGHWAY ADMINISTRATION

Through signature, the Federal Highway Administration (FHWA) Tennessee Division commits to implementation of the provisions of the Programmatic Agreement between the Federal Highway Administration, Tennessee Division and the Tennessee Department of Transportation regarding the Processing of Actions Classified as Categorical Exclusions for Federal-Aid Highway Projects.

Signature: *Gilberto DeLeon*
Gilberto DeLeon (Jul 13, 2023 15:37 CDT)

07/13/2023
Date

By: **Email:** gilberto.deleon@dot.gov
Gilberto DeLeon
Acting Division Administrator
FHWA Tennessee Division