

**PROGRAMMATIC AGREEMENT
BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION,
PENNSYLVANIA DIVISION AND
THE PENNSYLVANIA 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 22nd July day of 2019, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION (“FHWA”) and the Commonwealth of PENNSYLVANIA, acting by and through its DEPARTMENT OF TRANSPORTATION (“PennDOT”) 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 the functions of the Secretary under NEPA as they relate to matters within FHWA’s primary responsibilities (49 CFR §1.81(a)(5));

WHEREAS, The Federal Aid Highway Act, 23 USC §326, allows for state assumption of responsibility for categorical exclusions for types of activities specifically designated by FHWA;

WHEREAS, FHWA’s regulations, 23 CFR §106(c), allows for PennDOT to assume the responsibilities for design, plans, specifications, estimates, contract awards and inspection with respect to projects unless FHWA determines that the assumption is not appropriate;

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 Pennsylvania Department of Transportation (PennDOT) 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 PennDOT projects (23 CFR 771.109);

WHEREAS, Section 1315(b) of the Fixing America's Surface Transportation Act (FAST Act), Pub. L. 114-94 (Dec. 4, 2015) 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; and

WHEREAS, the FHWA developed regulations, 23 CFR 771.117(g), , effective November 6, 2014 governing programmatic agreements allowing a State DOT to make a NEPA CE determination and approval on FHWA's behalf.

NOW, THEREFORE, the FHWA and PennDOT enter into this programmatic agreement ("Agreement") for the processing of categorical exclusions.

Titles Not Controlling: Titles of paragraphs are for reference only, and shall not be used to construe the language of this agreement.

Severability: The provisions of this Agreement shall be severable. If any phrase, clause, sentence or provision of this Agreement is declared to be contrary to the Constitution of Pennsylvania or of the United States or of the laws of the Commonwealth the applicability thereof to any government agency, person or circumstance is held invalid, the validity of the remainder of this Agreement and the applicability thereof to any government agency, person or circumstance shall not be affected thereby.

No Waiver: Any party may elect not to enforce its rights and remedies under this Agreement in the event of a breach by the other party or parties of any term or condition of this Agreement. In any event, the failure by any party to enforce its rights and remedies under this Agreement shall not be construed as a waiver of any subsequent breach of the same or any other term or condition of this Agreement.

Integration and Merger: This Agreement, when executed, approved and delivered, shall constitute the final, complete and exclusive Agreement between the parties containing all the terms and conditions agreed on by the parties. All representations, understandings, promises and agreements pertaining to the subject matter of this Agreement made prior to or at the time this Agreement is executed are superseded by this Agreement unless specifically accepted by any other term or provision of this Agreement. There are no conditions precedent to the performance of this Agreement except as expressly set forth herein.

I. PARTIES

The parties to this Agreement are the Federal Highway Administration ("FHWA") and the Pennsylvania Department of Transportation ("PennDOT").

II. PURPOSE

The purpose of this Agreement is to authorize PennDOT to determine on behalf of FHWA whether a project qualifies for a CE specifically listed in 23 CFR 771.117 and approve said CE except when the project qualifies as a Level 2 CE. This Agreement also authorizes PennDOT to certify to FHWA 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 the project would not qualify as a Level 2 CE or 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 USC §§4321 - 4370
- B. Moving Ahead for Progress in the 21st Century Act, P.L. 112-141, 126 Stat. 405, Sec. 1318(d)
- C. 23 USC §326
- D. 40 CFR parts 1500 - 1508
- E. DOT Order 5610.1C
- F. 23 CFR §771.117
- G. 23 CFR §106 (c)

IV. RESPONSIBILITIES

A. PennDOT is responsible for:

1. Ensuring the following process is completed for each project that qualifies for a CE:
 - i. For actions qualifying for a CE listed in 23 CFR 771.117(c) and 23 CFR 771.117(d), that do not exceed the thresholds below, PennDOT may make a CE approval on behalf of FHWA. PennDOT will identify the applicable listed CE, ensure relevant conditions or constraints are met, verify that unusual circumstances do not apply, address other environmental requirements, and complete the review with a signature evidencing approval. No separate review or approval of the CE and documentation by FHWA is required.
 - ii. Actions that exceed the thresholds below are considered Level 2 CEs and may not be approved by PennDOT. PennDOT may certify to FHWA that the action qualifies for a CE. An action requires FHWA CE review and approval based on PennDOT certification if the action:

- Involves public controversy on environmental grounds or the potential for controversial displacements of residences or businesses.¹
- Involves an Adverse Effect on historic resources that cannot be resolved with a letter of agreement or standard treatment, or that triggers a Section 4(f) use (other than a *de minimis* or net benefit use).
- Involves a Coast Guard Permit.
- Involves EPA or PA HSCA Superfund Sites.
- Involves either an Individual or Programmatic Section 4(f) Evaluation (other than *de minimis* or net benefit use).
- Involves federally listed Wild and Scenic Rivers or Section 6(f) property.
- Involves an “is likely to adversely affect” finding for federally listed or candidate endangered or threatened species or Designated Critical Habitat.²
- Involves an action that does not conform to the PA Air Quality Implementation Plan that is approved or promulgated by the EPA in air quality nonattainment areas.
- Requires right-of-way acquisition from properties acquired by municipalities with hazard mitigation grants under the provisions of the Stafford Act [42 U.S.C. 5170c].

iii. If a project requires a Section 4(f) *de minimis* determination or programmatic evaluation, PennDOT shall submit the 4(f) documentation for FHWA determination and approval.

iv. FHWA may object to a PennDOT certification of CE. FHWA’s objection to a PennDOT 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. 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. PennDOT 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 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 assurance, monitoring, and performance requirements in Section VII.

¹ The threshold of public controversy and degree of adverse effect that would mandate classification of a Level 2 CE, EA or EIS will be at the discretion of FHWA.

² Designated Critical Habitats are described in 50 CFR §§ 17 and 226.

4. Relying only upon employees directly employed by the Commonwealth to make CE approvals or certifications submitted to FHWA under this Agreement. PennDOT 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 PennDOT, as requested.
2. Providing timely input and review of certified actions. FHWA will base its approval of CE actions on the project documentation and certifications prepared by PennDOT 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 PENNDOT CE APPROVALS AND CERTIFICATIONS

A. For state CE approvals and state CE certifications to FHWA for approval, PennDOT shall insure that it fulfills the following responsibilities for documenting the project-specific determinations:

1. PennDOT shall certify that an action will not result in significant environmental impacts, that the action qualifies for a CE, and the action does not involve unusual circumstances that warrant the preparation of an EA or EIS.
2. The CE documentation, which includes project scoping documentation, CE evaluations, and reevaluations, will be completed according to the policy and procedures in PennDOT *Publication 10B (Design Manual 1B), Chapter 3*.
3. CE documentation will be completed and approved using the CE Expert System electronic documentation tool, which operates through PennDOT's Engineering and Construction Management System (ECMS).
4. In circumstances where an electronic CE document cannot be produced, PennDOT may use a hard copy version of CE documentation forms.
5. PennDOT should identify the applicable action, ensure that conditions specified in FHWA regulations are met, verify that unusual circumstances do not apply, address other environmental requirements, and complete the review with a PennDOT electronic signature evidencing approval.
6. For actions listed in 23 CFR 711.117 (d), PennDOT shall prepare documentation that supports the CE determination and that no unusual circumstances exist that would make the CE approval inappropriate.
7. CE documentation will include as appropriate the level of documentation required for each CE action: forms and exhibits that summarize the consideration of

project effects and unusual circumstances; a summary of public involvement complying with the requirements of FHWA-approved public involvement policy.

8. CE documentation will include the name and title of the person approving the document and the date of PennDOT's approval or FHWA's final approval;
 9. NEPA Reevaluations for CE evaluations will be completed according to the policy and procedures in PennDOT *Publication 10B (Design Manual 1B)*, Chapter 3.
- B. PennDOT will maintain a project file for CE approvals it makes on FHWA's behalf and each CE submitted to FHWA for approval. The project file will include as appropriate, supporting documentation, reports, findings, correspondence, and other project information as appropriate.
- C. PennDOT will retain these electronic records, including all letters and comments received from governmental agencies, the public, and others for a period of no less than seven (7) years after completion of project construction. This 7-year retention provision does not relieve PennDOT of its project or program recordkeeping responsibilities under 2 CFR § 200.333 or other applicable laws, regulations, or policies.
- D. Approved CE documentation will be publicly available through the CE Expert System for a period of no less than seven (7) years after completion of project construction.
- E. For those CE approvals delegated to PennDOT, PennDOT and FHWA may develop, by agreement, streamlined procedures and documentation to address non-complex projects. Existing agreements are included in *Publication 10X (Design Manual 1X)*.

VI. NEPA APPROVALS AND RE-EVALUATIONS

- A. PennDOT's CE approvals and CEs submitted to FHWA for approval will follow the procedures described in PennDOT *Publication 10B (Design Manual 1B)*, Chapter 3 and the Stewardship and Oversight Agreement along with the *Procedures for Projects of Division Interest (PoDI)* and *PennDOT Project Oversight (PO) Identification* document.
- B. In accordance with 23 CFR 771.129, PennDOT 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. PennDOT Quality Control & Quality Assurance
1. PennDOT 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.

2. The FHWA and PENNDOT agree to cooperate in monitoring performance under this Agreement and work to assure quality performance.

B. FHWA Oversight and Monitoring

1. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of PennDOT, as well as PennDOT's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of PennDOT's CE approvals, CE submissions to FHWA for approval, adequacy and capability of PennDOT staff and consultants, and the effectiveness of PennDOT's administration of its internal CE approvals.
2. FHWA will conduct three or more program reviews as part of its oversight activities, during the term of this Agreement. The reviews will be conducted in accordance with the Program Review and Oversight (PRO) as outlined in the Stewardship and Oversight Agreement between PennDOT and FHWA. PennDOT shall prepare and implement a corrective action plan to address findings or observations identified in the FHWA review. PennDOT should draft the corrective action plan within 45 days of FHWA finalizing its review. The results of that review and corrective actions taken by PennDOT 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 PennDOT's performance under this Agreement. The FHWA may require PennDOT 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. PennDOT 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 PennDOT may execute an amendment with new signatures and dates of the signatures. The term of this 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. PennDOT 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 PennDOT requests renewal and FHWA determines that PennDOT has satisfactorily carried out the provisions of this Agreement. In considering the renewal of this Agreement, FHWA will

evaluate the effectiveness of this 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 PennDOT 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.

Alii Keli 7/22/19

Name:
Division Administrator
Federal Highway Administration

Date
Pennsylvania Division

Melissa J. Butke
Name: Melissa J. Butke
Title: Director of Project Delivery

7/3/19
Date
PennDOT