



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Highways

1900 Kanawha Boulevard East • Building Five • Room 110
Charleston, West Virginia 25305-0430 • (304) 558-3505

Gregory L. Bailey, P.E.
Interim
State Highway Engineer

Jimmy Wriston, P. E.
Secretary of Transportation
Commissioner of Highways

February 27, 2023

Mr. Jeffrey Blanton, P.E.
Division Administrator
Federal Highway Administration
154 Court Street
Charleston, West Virginia 25301

Dear Mr. Blanton:

Please find attached the signed Programmatic Agreement for approval of actions classified as Categorical Exclusions (C.E.) for federal-aid highway projects for your approval.

Please address your response letter to Mr. Travis Long, Director of the Technical Support Division, at 1334 Smith Street, Charleston, West Virginia 25301, and e-mail at Travis.E.Long@wv.gov. If you should have any questions or require additional information, you may contact Mr. Long at (304) 414-6457 or via the e-mail address above.

Sincerely,

A handwritten signature in blue ink that reads "Jimmy Wriston, P.E.".

Jimmy Wriston, P. E.
Secretary of Transportation
Commissioner of Highways

JW:Bl

Attachment

**PROGRAMMATIC AGREEMENT
BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION, WEST VIRGINIA DIVISION
AND
THE WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
REGARDING APPROVAL OF ACTIONS CLASSIFIED AS CATEGORICAL EXCLUSIONS
FOR FEDERAL-AID HIGHWAY PROJECTS**

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) and as said regulations may be amended, 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 the U.S. Department of Transportation (Secretary) 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, 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 West Virginia Department of Transportation ("WVDOT") 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 WVDOT 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, FHWA developed regulations implementing the authorities in section 1318(d), effective November 6, 2014 (23 CFR § 771.117(g));

Whereas, this Programmatic Agreement ("Agreement") replaces the FHWA's Programmatic Categorical Exclusions approval letter of July 11, 1988 and modification letters dated October 7, 1991 and January 28, 2002;

Now, therefore, FHWA and WVDOT enter into this Agreement for the processing of categorical exclusions.

I. PARTIES

The Parties to this Agreement are the FHWA and the WVDOT.

II. PURPOSE

The purpose of this Agreement is to authorize WVDOT to determine on behalf of FHWA whether a project qualifies for a CE specifically listed in 23 CFR § 771.117 (*See Appendix A*). This Agreement also authorizes WVDOT 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 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, P.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. WVDOT is responsible for:

1. Ensuring the following process is completed for each project that qualifies for a CE:
 - a. WVDOT may approve on behalf of FHWA CE actions listed in in 23 CFR § 771.117(c) and 23 CFR § 771.117(d), that do not meet any of the thresholds in Section IV(A)(1)(b) of this Agreement. A CE approved by WVDOT is a Programmatic CE (PCE). Prior to PCE approval, WVDOT will identify the applicable listed CE (*See Appendix A*), 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.

- i. FHWA and WVDOT concur that activities that conform to 23 CFR § 771.117(c)(1), (2) and (11) do not directly lead to construction; therefore, no individual documentation is required. These types of activities are limited to:
- Planning and research activities;
 - Grants for training;
 - Funds for agency liaison positions established under 23 U.S.C. § 139(j);
 - Preliminary engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed;
 - Federal-aid system revisions which establish classes of highways on the Federal-aid highway system;
 - Approval of utility installations along or across a transportation facility, for NEPA review for new buried utility installations on/along an existing WVDOT controlled access (C/A) right of way (ROW). , except for those on the Interstate highway system and/or those that require changes to the controlled access right-of-way; and
 - Determination of payback under 23 U.S.C. § 156 for property previously acquired with Federal-aid participation.
- ii. For the remaining actions listed in 23 CFR §771.117(c) that qualify for a PCE, WVDOT shall maintain a project file for PCE approvals it makes on FHWA's behalf. The PCE project file shall include the following:
- Any checklists, forms or other documents and/or exhibits that summarize the consideration of project effects and/or unusual circumstances;
 - WVDOT project number, project name, and route number or facility name, if a route number is not available;
 - Project description, including any alternatives considered;
 - Identification of the specific CE action from the list in Appendix A;
 - A summary of public involvement, if applicable to the action, to comply with the requirements of WVDOT's approved public involvement policy;
 - Agency and/or stakeholder communication, correspondence, consultation, technical reports and/or public meeting documentation that supports project decisions and environmental review conclusions;
 - A list of outstanding mitigation commitments; and
 - Name and title of the document reviewer and approver and the date of WVDOT's approval.

- iii. WVDOT shall make all PCE project files, including all documentation described above, available to FHWA for inspection at any time. If requested, WVDOT shall provide copies of all PCE documentation to FHWA.
- b. WVDOT will prepare a CE certification package for FHWA review and approval if the action meets any of the following thresholds:
- i. Involves unusual circumstances 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);
 - iii. Results in a determination of “adverse effect” on historic properties pursuant to Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 306108);
 - iv. May affect, likely to adversely affect federally listed species, or its designated critical habitat or a jeopardy decision of a candidate species or its proposed critical habitat or projects that result in a take of a Bald or Golden Eagle;
 - v. Requires a U.S. Coast Guard bridge permit (33 U.S.C. § 401);
 - vi. Requires an Individual Permit under Section 404 of the Clean Water Act;
 - vii. Requires a land transfer from a Federal agency;
 - viii. Requires acquisition of lands protected under Section 6(f) of the Land and Water Conservation Act of 1965 (54 U.S.C. § 200305);
 - ix. Involves acquisitions of more than a minor amount of right-of-way and shall be assessed within the context and intensity of the project setting to determine if the amount of acquisition would cause substantial controversy in comparison to the project scope;
 - x. Involves acquisitions that result in residential or non-residential displacements;
 - xi. Includes acquisition of land for hardship or protective purposes, or early acquisition pursuant to Federal acquisition project (23 U.S.C. § 108(d));
 - xii. Results in changes that substantially affect traffic patterns temporarily or permanently, including those associated with a permanent change in access control, and shall be assessed within the context and intensity of the project setting, to determine if the change would produce substantial controversy in comparison to the project scope;

- xiii. Requires work encroaching on a regulatory floodway that results in an increase to the regulated surface water elevation (100-year floodplain) of a stream, river or lake, pursuant to Executive Order 11988 and 23 CFR § 650 subpart A;
 - xiv. Impacts a river designated as a component of, or proposed for inclusion in the National System of Wild and Scenic Rivers (16 U.S.C. 1271 et seq.) and requires a Wild and Scenic River Section 7 determination from the river administering agency;
 - xv. Is a "Type I project" in 23 CFR § 772.5 and has a noise impact where noise abatement is found to be feasible and reasonable by the WVDOT noise policy;
 - xvi. Is not included in or is inconsistent with the Statewide Transportation Improvement Program (STIP), and in applicable urbanized areas, the Transportation Improvement Program (TIP);
 - xvii. Does not conform to the State Implementation Plan which is approved or promulgated by the U.S. Environmental Protection Agency (EPA) in air quality non-attainment areas.
 - xviii. Project crosses state lines.
- c. If WVDOT believes that an action meets the requirements of a CE under 40 CFR § 1508.4 and 23 CFR § 771.117(a), WVDOT may certify that an action qualifies for a CE, will not result in significant environmental impacts, and does not involve unusual circumstances that warrant the preparation of an EA or EIS. WVDOT shall submit the CE certification package to FHWA for review and approval prior to the time FHWA contemplates its next approval or grant action for the project.
- i. The FHWA Division Office's objection to a WVDOT CE certification may not constitute a disapproval of the action, but signifies that FHWA will need to engage in project-specific review to verify that such 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. WVDOT may decide, or FHWA may require, additional studies to be performed prior to making a PCE approval, submitting a CE certification to FHWA, or deciding to prepare an EA or EIS.
 3. Ensuring that the PCE documentation is completed prior to any WVDOT request for FHWA right-of-way authorization and/or construction authorization.
 4. Meeting applicable documentation requirements in Section A.1.a. ii. and 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 WVDOT to make PCE approvals and/or CE certifications to FHWA under this Agreement. WVDOT may use qualified consultants to assist with additional studies and/or necessary documentation, but WVDOT may not delegate its responsibility for CE approvals or CE certifications to consultants, local government staff, and other State agency staff. WVDOT shall provide quality assurance and quality control of consultant-produced documents.
6. Maintaining adequate organizational and staff capability and expertise to effectively carry out the provisions of this Agreement. This includes, without limitation:
 - a. Use appropriate technical and managerial expertise to perform the functions set forth in this Agreement; and
 - b. Devote adequate financial and staff resources for processing and approving projects under this Agreement.

B. The FHWA is responsible for:

1. Providing timely advice on and technical assistance with CEs to WVDOT, as requested.
2. Providing timely input on and review of WVDOT CE certifications. FHWA will base its approval of CE actions on the project documentation and CE certifications prepared by WVDOT 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 WVDOT CE APPROVALS AND CERTIFICATIONS

- A. For PCE approvals, WVDOT shall identify in its Annual Programmatic Categorical Exclusion (PCE) Report to FHWA the applicable actions included in Appendix A, ensure any conditions specified in FHWA regulations are met, verify that unusual circumstances do not apply, address all other environmental requirements, and complete the review with a WVDOT signature evidencing approval. PCE documentation will include the information outlined in Section A.1.a. ii.
- B. WVDOT should maintain a project record for PCE approvals it makes on FHWA's behalf and shall include the information listed in Section A.1.a. ii.
- C. Any non-privileged electronic or paper project records maintained by WVDOT should be provided to FHWA at their request. WVDOT 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 WVDOT 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-REVALUATIONS

- A. The WVDOT's PCE approval authority lies with the Technical Support Division NEPA Compliance and Permitting Assistant Director Technical Support Division NEPA Compliance and Permitting Section Unit Leaders, Planning Division Project Development Unit Leader or District Environmental Coordinator, as applicable. CEs that require FHWA approval will be submitted by the Technical Support Division Assistant Director, Technical Support Division NEPA Compliance and Permitting Section Unit Leaders or Planning Division Project Development Unit Leader.
 - 1. District Environmental Coordinator approval authority is limited to projects that do not require additional interagency coordination.
- B. PCE approvals shall be indicated in the state-defined field in FMIS and shall also be reported in WVDOT's Annual PCE Report to FHWA. FHWA will use WVDOT's reporting in FMIS to determine whether to approve right-of-way or construction phases for projects that meet the conditions of this Agreement. If FHWA does not approve the project authorization, then FHWA will promptly notify WVDOT of the reasons for its decision.
- C. In accordance with 23 CFR § 771.129, WVDOT shall re-evaluate its determinations and CE 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. WVDOT Quality Control and Quality Assurance
 - 1. WVDOT agrees to carry out regular quality control and quality assurance activities to ensure that its PCE approvals and CE certification packages for FHWA review and approval, are made in accordance with applicable law and this Agreement.
- B. WVDOT Performance Monitoring and Reporting.
 - 1. FHWA and WVDOT agree to cooperate in monitoring performance under this Agreement and work to assure quality performance.
 - 2. WVDOT shall submit to FHWA their Annual PCE Report summarizing the approvals made under this Agreement. The suggested format of WVDOT's Annual PCE Report is provided in Appendix B. The report shall include a description of any actions taken by WVDOT, as part of its quality control and quality assurance efforts under Section VII.A.
 - 3. WVDOT shall provide FHWA with their Annual PCE Report no later than 30 days following the end of the calendar year.

4. WVDOT Technical Support Division NEPA Compliance and Permitting Section will provide oversight and periodic review of PCE approvals completed by District Environmental Coordinators.

C. FHWA Oversight and Monitoring

1. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of WVDOT, as well as WVDOT's performance of its PCE processing functions. Performance considerations include, without limitation, the quality and consistency of WVDOT's PCE documentation and approvals, CE certification submissions for FHWA for approval, adequacy and capability of WVDOT staff and consultants, and the effectiveness of WVDOT's administration of its internal PCE approvals.
2. FHWA will conduct one or more program reviews as part of its oversight activities, during the initial five (5) year term of this Agreement. WVDOT shall prepare and implement a corrective action plan to address any findings or observations identified in the FHWA review. WVDOT should draft the corrective action plan within 45 days of FHWA communicating any recommendations. The results of that review and corrective actions taken by WVDOT 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 WVDOT's performance under this Agreement. FHWA may require WVDOT 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. WVDOT 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 WVDOT 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. WVDOT 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 term if WVDOT requests renewal and FHWA determines that WVDOT 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. At least 6 months prior to the end of each five (5) year term, WVDOT and FHWA will meet to discuss the results under the Agreement and consider whether amendments are necessary.
- D. Either party may terminate this Agreement at any time only by giving at least 30 days written notice to the other party.
- E. Expiration or termination of this Agreement shall mean that the WVDOT 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.

Jeffrey Blanton
 Jeffrey Blanton, P.E.
 Division Administrator
 West Virginia Division
 Federal Highway Administration

3/1/2023
 Date

Jimmy Wriston, P.E.
 Jimmy Wriston, P.E.
 Secretary, West Virginia Department of Transportation

2/27/23
 Date

APPROVED AS TO FORM THIS
27 DAY Feb 2023
 ATTORNEY LEGAL DIVISION
 WEST VIRGINIA DEPARTMENT
 OF TRANSPORTATION
 DIVISION OF HIGHWAYS

Q & ~

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