

PROGRAMMATIC AGREEMENT

BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION, OKLAHOMA DIVISION
AND
THE OKLAHOMA DEPARTMENT OF TRANSPORTATION
REGARDING PROCESSING OF ACTIONS CLASSIFIED AS
CATEGORICAL EXCLUSIONS FOR FEDERAL-AID HIGHWAY PROJECTS

THIS PROGRAMMATIC AGREEMENT ("Agreement") made and entered into this _____ day of 2019, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION ("FHWA") AND THE STATE OF OKLAHOMA, acting by and through its DEPARTMENT OF TRANSPORTATION ("ODOT") 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 Oklahoma 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 (23 CFR 771.117(g))

Whereas, the FHWA and ODOT 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 ODOT 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 Oklahoma Department of Transportation (hereinafter "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 (listed in Appendix A and B of this Agreement) or CE designated for the State (listed in Appendix C of this Agreement). This Agreement also authorizes ODOT 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).

ODOT and FHWA agree that ODOT and FHWA will process proposed CE action in accordance with the Guidance for Implementing the 2019 Programmatic Agreement for Processing of Categorical Exclusions listed in Appendix D.

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, or for which the use of federal funds is anticipated at the time of the CE determination.

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. ODOT 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 listed in 23

CFR 771.117(c), Appendix B (CEs listed in 23 CFR 771.117(d)) and state designated CE actions in Appendix C, that do not exceed the thresholds in Section IV(A)(1)(b) below, ODOT may make a CE approval on behalf of FHWA. ODOT will identify the applicable listed CE from 771.117 (c) and (d), ensure any conditions or constraints are met, verify that unusual circumstances do not apply(as per 23 CFR 117(b)), 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. ODOT may not approve actions listed in Appendices A, B, and C that exceed the thresholds. ODOT may certify to FHWA that the action qualifies for a CE. An action requires FHWA CE review and approval as an Individual Categorical Exclusion (ICE) based on ODOT certification if the action:
 - i. Involves acquisition of more than minor amounts of right-of-way. A minor amount of right-of-way is defined as acquisitions along an alignment that is not on or immediately adjacent to the existing right-of-way;
 - ii. Involves acquisitions that result in 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 the use of a road detour (other than a shoofly), road, or ramp closure unless the following conditions are satisfied:
 - (a) Provisions are made for access by local traffic and so posted;
 - (b) Through traffic dependent businesses will not be affected adversely;
 - (c) The detour or closure will not substantially alter the environmental consequences of the action;
 - (d) There is no known substantial public controversy associated with the detour or closure.
 - v. Involves the following changes in access control; changes in limits of no access or permanent changes to the operation of an Interstate Highway, associated interchanges, and ramps; or requires an access justification report;
 - 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 US Army Corps of Engineers Permit Section (33 U.S.C. § 1344) other than a Nationwide Permit or General Permit;

- x. Requires a U.S. Coast Guard 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 Interior/U.S. Department of Agriculture or Oklahoma Scenic Rivers Act of 1970;
 - xiii. Is defined as a "Type 1 project" per 23 CFR 772.5 in which impacts to Noise Abatement Criteria (NAC) Category A, B, C, or D receptors are identified;
 - xiv. Results in a "May-Effect, likely to adversely effect" determination under Section 7 of the Endangered Species Act or the Bald and Golden Eagle Protection Act, unless the project can be processed under a Programmatic Biological Opinion with USFWS or processed as an individual formal consultation prior to start of construction;
 - 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;
 - xviii. Involves property in which another Federal Agency or Federally Recognized Tribe has ownership, oversight or other encumbrance;
 - xix. Involves work affecting a known Superfund Site;
 - xx. Results in an adverse effect on prime or unique farmland which Natural Resources Conservation Services (NRCS) has determined requires consideration of alternatives or measures to avoid or offset the loss of farmland;
 - xxi. Results in disproportionately high and adverse effects on any minority or low income in accordance with the provisions of E.O. 12898 and FHWA Order 6640.23.;
 - xxii. Has substantial public or agency controversy on environmental grounds.
- c. ODOT may not approve actions not specifically listed as CEs in Appendices A, B, and C. Instead, if ODOT believes that an action meets the requirements of a CE under 40 CFR 1508.4 and 23 CFR 771.117(a), ODOT may certify that an action will not result in significant environmental impacts if ODOT 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. ODOT 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 FHWA, ODOT shall provide a copy of the CE documentation prepared for the action(s) in accordance with Section V of this Agreement.
 - ii. If any project requires a Section 4(f) *de minimis* determination or programmatic evaluation, ODOT shall submit the 4(f) documentation for

FHWA determination and approval.

- iii. ODOT may request notice to proceed with final design, acquisition of right-of-way, or construction from FHWA once ODOT has completed its certification that a project is a CE.
 - iv. The FHWA's objection to ODOT 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. ODOT 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. Consulting with FHWA regarding any proposed CE determinations for actions that are not specifically listed in 23 CFR part 771.117(c) and (d) and, as determined by FHWA, preparing an appropriate Documented Categorical Exclusion (DCE) report for FHWA concurrence and approval that addresses at minimum the thresholds listed above. Such CEs must be pre-approved by FHWA with a DCE Justification form prior to the time FHWA reviews the DCE report. ODOT shall involve FHWA as early as possible in the project development process when use of the DCE Report is being considered. The eligibility for DCE cannot be made until all studies, agency coordination, and public involvement has been completed and FHWA has concurred with DCE designation by signing the DCE Justification Form.
 4. Meeting applicable documentation requirements in Section V for Automatic Categorical Exclusion (ACE) or Programmatic Categorical Exclusion (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 ODOT to make ACE or PCE approvals. ODOT may not delegate its responsibility for ACE or PCE approvals to third parties (i.e., consultants, local governments, 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:
 - i. Using appropriate technical and managerial expertise to perform the functions set forth under this Agreement.
 - ii. 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. ODOT may procure through consultant services environmental and other technical expertise needed for compliance with this Agreement.
 8. Ensuring that ODOT individuals who prepare and/or approve ACE or PCE documentation will, at a minimum:
 - i. Be knowledgeable with and follow the appropriate subsections 23 CFR 771 through 774, and FHWA and ODOT procedures for environmental analysis and NEPA compliance.
 - ii. Have completed Introduction to NEPA and Transportation Decision-making web-based or instructor lead course offered by National Highway Institute.
 - iii. Have adequate experience addressing NEPA compliance for transportation projects or until such time, have their work reviewed

by staff having the necessary experience.

- B. The FHWA is responsible for:
 - 1. Providing timely advice and technical assistance on CEs to ODOT, 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 ODOT under this Agreement.
 - 3. Overseeing the implementation of this Agreement in accordance with the provisions in Section VII. B including applicable monitoring and performance provisions.

V. DOCUMENTATION OF ODOT CE (ACE AND PCE) APPROVALS AND CERTIFICATIONS

- A. For State CE approvals and State CE certifications to FHWA for approval, ODOT 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, ODOT 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 an ODOT signature evidencing approval.
 - 2. In addition, for actions listed in 23 CFR 711.117(d) and Appendix C, ODOT shall prepare documentation that supports the CE determination and that no unusual circumstances exist that would make the CE approval inappropriate.
- B. ODOT shall maintain a project record for ACE and PCE approvals it makes on FHWA's behalf. This record must include at a minimum ACE and PCE documentation and shall include all the documentation listed below:
 - 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, resource agency and/or public communication, correspondence, consultation, or public meeting documentation;
 - 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 (when required) or a consultation commitment checklist or an email verification of no commitments for the project (when a full re-evaluation is not necessary).
- C. Completed ACE and PCE Approval Documents for each individual action will be accessible via an electronic link in the ODOT Document Vault, with an ODOT signature evidencing approval. Any electronic or paper project records maintained by ODOT shall be provided to FHWA upon request. 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 final acceptance of project construction, final acceptance and closure of construction contract. 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. Only the offices specifically identified below may make ODOT's CE approvals and CE certifications submitted to FHWA for approval:

1. Approval of Appendix A, B and C CEs is delegated to the ODOT Environmental Programs Division.
 2. Certification of CEs is delegated to the ODOT Environmental Programs Division.
- B. These approvals will be indicated in a state-defined field in Financial Management Information System (FMIS). 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, ODOT shall consult with the FHWA prior to requesting any major approvals or grants to establish whether or not the approved CE designation remains valid for the requested FHWA action and as necessary, prepare a consultation commitment checklist to ensure that determinations are still valid.
 - D. For all federal actions, ODOT will provide FHWA with a consultation commitment checklist or an email verification of no commitments for compliance with the original CE prior to the action and if necessary some or all of the studies may be updated. Re-evaluation documentation will be prepared with updated studies to verify the CE status if the project extent or scope changes significantly from the original CE.
 - E. 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

ODOT agrees to develop, carry out, and report on regular quality control and quality assurance activities to ensure that its ACE and PCE approvals are made in accordance with applicable law and this Agreement.
- B. ODOT Performance Monitoring and Reporting
 1. FHWA and ODOT agree to cooperate in monitoring performance under this Agreement and work to assure quality performance.
 2. ODOT agrees to submit annually 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 ODOT is taking to implement those improvements.
- 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 CE processing functions. Performance considerations include, without limitation, the quality and consistency of ODOT's ACE and 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 ACE and PCE approvals.
 2. FHWA and ODOT will conduct at least one joint program review as part of its oversight activities, during the term of this Agreement. ODOT shall prepare and implement a corrective action plan to address any findings or observations identified in the FHWA review. 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 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. 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 Agreement for the Processing of Categorical Exclusion Actions between the Federal Highway Administration and the Oklahoma Department of Transportation", executed on April 12, 2016.
- B. This Agreement shall have a term of five (5) years, effective on the date of the last signature. 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 by giving at least 30 days written notice to the other party.
- F. Expiration or termination of this Agreement shall mean that ODOT is not able to make CE approvals on FHWA's behalf.

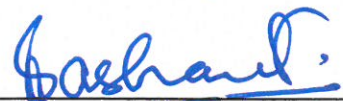
Execution of this Agreement and implementation of its terms by both parties provides evidence that both parties have reviewed this Agreement and agree to the terms and conditions for its implementation. This Agreement is effective upon the date of the last signature below.



 Executive Director
 Oklahoma Department of Transportation

8/01/19

 Date



 Division Administrator
 Federal Highway Administration Oklahoma Division

8/7/19

 Date

Appendix A
CEs listed in 23 CFR 771.117(c)
and Type of CE

23 CFR 771.117(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 \$5,500,515.05 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see www.fhwa.dot.gov or www.fta.dot.gov) of Federal funds; or
- (ii) With a total estimated cost of not more than \$33,003,090.30 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see www.fhwa.dot.gov or www.fta.dot.gov) 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 cultural 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 storm water 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).

(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).

(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).

(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.

The following actions will be processed as **Automatic Categorical Exclusions (ACE)**:

Projects listed in 23 CFR

- 771.117(c) 1 through 21
- 771.117(c) 22 (Restricted to projects which will occur within existing operational right-of-way with no significant alteration to the existing facility)
- 771.117(c) 24
- 771.117(c) 26 (Resurfacing or rehabilitation projects only)
- 771.117(c) 27
- 771.117(c) 28 (Minor rehabilitation projects only within existing right-of-way)
- 771.117(c) 29 and 30

The following actions will be processed as **Programmatic Categorical Exclusions (PCE)**:

Projects listed in

- 23 CFR 771.117(c) 22 (Projects with significant alteration to the existing facility)
- 771.117(c) 23
- 771.117(c) 25
- 771.117(c) 26 (With the exception of resurfacing or rehabilitation)
- 771.117(c) 28 (With the exception of minor rehabilitation within existing right of way)

Appendix B

CEs listed in 23 CFR 771.117(d) and Type of CE

23 CFR 771.117 (d) Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and may be designated as CEs only after FHWA approval unless otherwise authorized under an executed agreement pursuant to 23 CFR 771.117(g). 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) Transportation corridor fringe parking facilities.
- 2) Construction of new truck weigh stations or rest areas.
- 3) 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.
- 4) Approvals for changes in access control.
- 5) 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.
- 6) 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.
- 7) 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.
- 8) 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.
- 9) 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.
- 10) Actions described in 23 CFR 771.117(c)(26), 23 CFR 771.117 (c) (27), and 23 CFR 771.117 (c) (28) that do not meet the constraints in paragraph (e) of this section.

These actions will be processed as **Programmatic Categorical Exclusions (PCE)**.

Appendix C

State Designated CE actions and Type of CE

This Agreement also authorizes ODOT to certify for FHWA approval that an action not specifically listed in 23 CFR 771.117, but meeting CE criteria in 40 CFR 1508.4 and 23 CFR 771.117(a) qualifies as a CE as long as there are no unusual circumstances present that would require the preparation of either an Environmental Assessment (EA) or and Environmental Impact Statement (EIS).

ODOT will consult with FHWA regarding any proposed CE determinations for actions that are not specifically listed in 23 CFR part 771.117(c) and (d) and, as determined by FHWA, preparing an appropriate "Documented CE" (DCE) report for FHWA concurrence and approval that addresses at minimum the thresholds listed above. Such CEs must be pre-approved by FHWA with a DCE Justification form prior to the time FHWA reviews the DCE report. ODOT shall involve FHWA as early as possible in the project development process when use of the DCE Report is being considered. The eligibility for DCE cannot be made until all studies, agency coordination, and public involvement has been completed and FHWA has concurred with DCE designation by signing the DCE Justification Form.

Appendix D

Guidance for Implementing the 2019 Programmatic Agreement for Processing of CEs

DEFINITIONS

The following section contains some definitions for interpretation of key concepts to help ensure a common understanding between FHWA and ODOT in the implementation of the 2019 ODOT/FHWA Programmatic Agreement (PA) for Approval of Categorical Exclusions. Some of these, by their nature, cannot be more than general guidance given that they are dependent on project specific conditions, while others are intended as universal standards. With ODOT and FHWA agreement, this guidance may be updated as needed to reflect changing practice or revised FHWA or Council on Environmental Quality (CEQ) guidance, without requiring renegotiation of the 2019 PA. Definitions are keyed to the Section of the PA in which they first occur or are most relevant.

Regulatory Definition of CEs

Guidance and definitions for interpretation of key concepts in determining if processing a project as a Categorical Exclusion is appropriate per 23 CFR 771.117(a)

- **"Significant impacts to planned growth or land use"** - Generally the following types of actions may induce such changes and are normally ineligible for processing as CEs unless approved as a DCE:
 - o Construction of a highway on new location
 - o Changing the access control of a highway or highway segment
 - o Modification of an existing highway interchange by adding or configuring ramps
 - o Construction of a new interchange on a highway
- **"Relocation of significant numbers of people"** - There is no set threshold in this PA. This determination must be made by considering the context of the project location and the overall intensity of the impact. For example, the relocation of 20 homes in a large urban area with adequate replacement housing stock might not be considered significant, while the same number of relocations in a small rural community lacking adequate replacement housing in the immediate area might be considered significant. Generally, if adequate replacement housing is available in the local community, the relocations do not appear to disproportionately and adversely affect low income or minority populations as determined from available census or other data, and relocations do not result in the elimination of important community resources, businesses or facilities, relocation impacts may be considered "non-significant".
- **"Significant impact on any natural, cultural, recreational, historic, or other resource."** - By definition, any impact considered non-adverse by appropriate regulatory agencies or officials with authority are not significant. In addition, as long as any adverse impacts have been assessed in coordination with appropriate regulatory agencies or officials with authority and such impacts are being avoided, minimized or mitigated to the satisfaction of the appropriate authorities in compliance with federal, state, and local law, they may be considered "non-significant".
- **"Significant air, noise, or water quality impacts."** - **Air Quality** - In general, air quality impacts for any CE action may be presumed to be non-significant for areas which are in conformance with applicable National Ambient Air Quality Standards (NAAQS). Such impacts may also be presumed

to be non-significant in NAAQS non-attainment or maintenance areas if projects are included in a conforming Transportation Improvement Program (TIP). **Noise** - Most CE actions will not have potentially significant noise impacts because they neither add through-traffic lanes nor substantially alter the horizontal or vertical alignment of a facility. Those which do will be evaluated for noise impacts in accordance with FHWA ODOT Noise Policy. Noise impacts which can be mitigated to acceptable levels per FHWA ODOT policy may be considered not significant. Increases in ambient noise levels (mitigated or non-mitigated) less than 15 dBA are not considered significant. **Water Quality** - Projects which are in compliance with Section 401 or 404 of the Clean Water Act (i.e.: will have the appropriate Section 404 permit issued) may be presumed not to have significant water quality impacts

- **"Significant impact to travel patterns"** - These are identical to the types of action listed under "Significant impacts to planned growth or land use" identified above.
- **"Do not otherwise, either individually or cumulatively, have any significant environmental impacts"** - In general if evaluation of a proposed CE action identifies no individually significant impacts, the action may not result in cumulatively significant impacts, however this conclusion must be based on Agency consultation and appropriate environmental analysis. If comment by a regulatory agency or other reviews specifically raises the potential that individual impacts of a CE action could result in, or contribute to, cumulatively significant impacts on important or especially sensitive environmental resource, additional study and public/agency coordination may be necessary before determining if a CE classification is appropriate. Factors to consider are the extent to which such impacts can be adequately mitigated and/or impact a wide variety of different resources.

Guidance and definitions for interpretation of key concepts in determining if processing a project as a Categorical Exclusion is appropriate per 23 CFR 771.117(b) "Unusual Circumstances"

- **"Significant environmental impacts"** - If, following the criteria and guidance identified in the above section, impacts are determined to be non-significant either individually or cumulatively, the CE action has no significant environmental impacts. However, if an unusual circumstance does exist, this may require the preparation of either an EA or EIS.
- **"Substantial controversy on environmental grounds."** - Widespread public, agency, or interest group opposition to a proposed action which focuses on specific and clearly defined social, economic, and environmental impacts. In determining if such controversy rises to the level of an unusual circumstance, consideration must be given to the extent to which such opposition is supported by recognized authorities in the relevant environmental fields or brought forth by recognized environmental advocacy groups. Unresolved disagreements between FHWA/ODOT and federal, state, or tribal resource agencies charged with enforcing federal laws will always be considered substantial controversy on environmental grounds where an EA or EIS should be prepared.
- **"Significant impact on properties protected by Section 4(f) of the DOT Act or Section 106 of the National Historic Preservation Act (NHPA)."** - Adverse impacts and/or Section 4(f) use of protected properties will be considered potentially "significant" only if the adverse effect to historic properties cannot be resolved under Section 106 of NHPA or if appropriate authorities over a public park, wildlife refuge, or recreation area cannot reach agreement with FHWA regarding 4(f) use and measures to minimize harm. In all other instances, such impacts are considered non-significant and an unusual circumstance does not exist that requires the preparation of an EA or EIS.
- **"Inconsistencies with any federal or state law, requirement or administrative determination relating to the environmental aspects of the action."** - Situations in which a proposed project incorporates measures inconsistent with federal, state, or local environmental laws or requirements, as determined by the appropriate federal, state, or local agencies charged with interpreting them, will be considered unusual situations rendering CE processing inapplicable.

Such determinations must be made by the appropriate legal authorities; claims of inconsistency made only by the public or advocacy groups which are not supported by the appropriate agencies do not automatically trigger the need to prepare an EA or EIS.

Processing of Categorical Exclusion

ODOT and FHWA agree that ODOT and FHWA will process proposed CE action in one of the four tiers as defined in this PA.

- Automatic Categorical Exclusion (ACE) which are limited to some of the specific actions identified in 23 CFR771.117(c) as listed in Appendix A.
- Programmatic Categorical Exclusion (PCE) which are limited to some of the specific actions identified in 23 CFR771.117(c), 23 CFR 771.117(d) and designated CE actions as listed in Appendix A, B, and C.
- Individual Categorical Exclusions (ICE) which will be reviewed and approved by FHWA individually before the CE class of action designation is made. ICE includes those actions of a type which may otherwise qualify for processing by ODOT as ACE or PCE but which do not satisfy one or more conditions in Section IV. A.1. (b) of the PA.
- Documented Categorical Exclusion (DCE) include actions which do not readily fall within the definition of ACE, PCE, or ICE but result in no significant impacts to human and natural environment, do not involve public controversy on environmental grounds and are not inconsistent with any federal, state, or local laws, regulations and administrative determinations relating to the environment. Prior planning studies, appropriate agency solicitation, environmental review and public coordination will be required from ODOT to support this decision by FHWA.

Examples where the DCE may be determined appropriate include the following:

- a) Actions which require evaluation of multiple reasonable alignment alternatives as long as the selected alternative follows in general an existing roadway corridor with no significant impacts to the human and natural environment;
- b) Some proposed capacity expansions to the existing corridors on a case by case basis between FHWA and ODOT;
- c) Changing the access control of a highway or highway segment;
- d) Other non-controversial actions no significant impacts to the human and natural environment.