

**PROGRAMMATIC AGREEMENT
BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION, ALASKA DIVISION
AND
THE ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES
REGARDING THE PROCESSING OF ACTIONS CLASSIFIED AS CATEGORICAL
EXCLUSIONS FOR FEDERAL-AID HIGHWAY PROJECTS**

THIS PROGRAMMATIC AGREEMENT ("Agreement"), made and entered into this 23rd day of May 2017, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION ("FHWA") and the STATE of ALASKA, acting by and through its DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES ("DOT&PF") hereby provides as follows:

WITNESSETH:

Whereas, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* (2012), 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;

Whereas, the Alaska Department of Transportation and Public Facilities (DOT&PF) 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 DOT&PF 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;

Whereas, the FHWA and the Alaska Department of Transportation and Public Facilities 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. 1313 (Dec. 4, 2015), and 23 CFR 771.117(g);

Now, therefore, the FHWA and the DOT&PF 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 Alaska Department of Transportation and Public Facilities (hereinafter "DOT&PF").

II. PURPOSE

The purpose of this Agreement is to authorize DOT&PF to determine on behalf of FHWA whether a project qualifies for a CE action specifically listed in 23 CFR 771.117 or a CE designated for the State (listed in Appendix A of this Agreement). Any activity added through FHWA rulemaking to those listed in 23 CFR 771.117 or example activities listed in 23 CFR 771.117(d) after the date of the execution of this agreement are also included in this Agreement. This Agreement also authorizes DOT&PF to certify to FHWA that an action that they cannot approve on behalf of FHWA according to the terms of this Agreement, but meeting the CE criteria in 40 CFR 1508.4 and 23 CFR 771.117(a), qualifies for a CE as long as there are no unusual circumstances present that would require the preparation of either an environmental assessment (EA) or an environmental impact statement (EIS).

III. AUTHORITIES

This agreement is entered into pursuant to the following authorities:

- A. National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*
- B. Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141, 126 Stat. 405, Sec. 1318(d) (July 6, 2012)
- C. Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94, 129 Stat. 1313, Sec. 1315 (Dec. 4, 2015)
- D. 40 CFR parts 1500 - 1508
- E. DOT Order 5610.1C
- F. 23 CFR 771.117

IV. RESPONSIBILITIES

A. The DOT&PF 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 CFR 771.117(c) and (d) and designated CE actions in Appendix A, that do not exceed the thresholds in Section IV(A)(1)(b) below, the DOT&PF may make a CE approval on behalf of FHWA. The DOT&PF will identify the applicable CE, ensure any conditions or constraints are met, verify that unusual circumstances do not apply, address any and all other environmental requirements, and complete the review with a signature evidencing approval. No separate review or approval of the CE by FHWA is required.
- b. Actions listed in listed in 23 CFR 771.117(c) and (d) and Appendix A that exceed the thresholds may not be approved by the DOT&PF. The DOT&PF may, however, certify to FHWA that the action qualifies for a CE. An action requires FHWA CE review and approval based on the DOT&PF certification if the action:
 - i. Involves acquisitions of more than a minor amount of right-of-way. A minor amount of right-of-way is defined as no acquisition of an entire parcel or portions of more than 25 parcels;
 - ii. Involves acquisitions that result in any residential or non-residential displacements;
 - iii. Involves the construction of a road on a new location;
 - iv. Results in capacity expansion of a roadway by addition of through lanes;
 - v. Involves a change in access control;
 - vi. Requires the use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. § 303);
 - vii. Requires conversion of lands under the protection of Section 6(f) of the Land and Water Conservation Act of 1965;
 - viii. Requires a U.S. Army Corps of Engineers Section 404 permit involving more than 10 acres of jurisdictional wetlands or Waters of the U.S.;
 - ix. Requires a U.S. Coast Guard bridge permit;
 - x. 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;

- 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" per 23 CFR 772.5 and the DOT&PF Noise Policy for purposes of a noise analysis;
 - xiii. Results in a "may affect, likely to adversely affect" determination for federally listed or candidate species, or proposed or designated critical habitat, or actions that do not conform to the U.S. Fish and Wildlife's National Bald Eagle Management Guidelines;
 - xiv. Includes acquisition of land for hardship or protective purposes, or early acquisition pursuant to 23 U.S.C. § 108(d);
 - xv. 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;
 - xvi. Is not included in or is inconsistent with the statewide transportation improvement program, and in applicable urbanized areas, the transportation improvement program; or
 - xvii. Requires acquisition of property involving a documented hazardous material site
 - xviii. May adversely affect Essential Fish Habitat
 - xix. Requires a marine mammal incidental take authorization.
2. Providing a list of certified actions, pursuant to this Agreement to the Division Office semi-annually. The list of actions certified will contain the following information:
 - a. The DOT&PF project number and a project name; including the route number or facility name where the project will occur
 - b. Identify the CE action as listed in 23 CFR 771.117 or Appendix A, or if the action is not listed in 23 CFR 771.117, identify the process as "CE not categorized."
 - c. Whether the project included a Section 4(f) *de minimis* finding or a Section 4(f) evaluation.
 3. Consulting with FHWA for actions that involve unusual circumstances (23 CFR 771.117(b)), to determine the appropriate class of action for environmental analysis and documentation. The DOT&PF may decide or FHWA may require additional studies to be performed prior to making a CE approval, or the preparation of an EA or EIS.

4. Meeting applicable documentation requirements in Section V for State CE approvals on FHWA's behalf and State CE certifications to FHWA, applicable approval and re-evaluation requirements in Section VI, and applicable quality control/quality, monitoring, and performance requirements in Section VII.
5. Relying only upon employees directly employed by the DOT&PF to make CE approvals or certifications submitted to FHWA under this agreement. The DOT&PF may not delegate its responsibility for CE approvals or certifications to third parties (i.e., consultants, local government staff, and other State agency staff).

B. The FHWA is responsible for:

1. Providing timely advice and technical assistance on CEs to the DOT&PF, 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 DOT&PF 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 DOT&PF CE APPROVALS AND CERTIFICATIONS

A. For State CE approvals and State CE certifications to FHWA for approval, the DOT&PF shall ensure that it fulfills the following responsibilities for documenting the project-specific determinations made:

1. For actions listed in 23 CFR 711.117 and Appendix A, the DOT&PF agrees to identify the applicable action, ensure any conditions specified in FHWA regulation are met, verify that unusual circumstances do not apply, address all other environmental requirements, and complete the review with a DOT&PF signature evidencing approval.
2. In addition, for actions listed in 23 CFR 711.117 and Appendix A, the DOT&PF shall prepare documentation that supports the CE determination and that no unusual circumstances exist that would make the CE approval inappropriate.

B. The DOT&PF agrees to maintain a project record for CE approvals it makes on FHWA's behalf and each CE submitted to FHWA for approval. This record should include at a minimum:

1. Any checklists, 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 DOT&PF's approval or FHWA's final approval; and
 5. For cases involving re-evaluations, documentation of any re-evaluation required.
- C. Any electronic or paper project records maintained by the DOT&PF should be provided to FHWA at their request. The DOT&PF 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 DOT&PF of its project or program recordkeeping responsibilities under 2 CFR 200.333 or any other applicable laws, regulations, or policies.

VI. NEPA APPROVALS AND RE-EVALUATIONS

- A. The DOT&PF's CE approvals and CEs submitted to FHWA for approval may only be made by officers or offices specifically identified below:
1. Approval of listed in 23 CFR 771.117(c) and (d) and designated CE actions in Appendix A CEs are delegated to the DOT&PF Regional Environmental Managers and the DOT&PF Statewide Environmental Program Manager.
 2. Certification of CEs is delegated to the DOT&PF Regional Environmental Managers and the DOT&PF Statewide Environmental Program Manager.
- B. In accordance with 23 CFR 771.129, the DOT&PF 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. DOT&PF Quality Control & Quality Assurance

The DOT&PF 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 laws and this Agreement.

B. DOT&PF Performance Monitoring and Reporting

1. The FHWA and DOT&PF agree to cooperate in monitoring performance under this Agreement and work to assure quality performance.

C. FHWA Oversight and Monitoring

1. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of DOT&PF, as well as DOT&PF's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of DOT&PF's CE approvals, CE submissions to FHWA for approval, adequacy and capability of DOT&PF staff and consultants, and the effectiveness of DOT&PF's administration of its internal CE approvals.
2. FHWA will conduct one or more program reviews as part of its oversight activities, during the term of this Agreement. The DOT&PF shall prepare and implement a corrective action plan to address any noncompliance findings or observations identified in the FHWA review. The DOT&PF should draft the corrective action plan within 45 days of FHWA finalizing its review. The results of that review and corrective actions taken by the DOT&PF 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 DOT&PF's performance under this Agreement. The FHWA may require DOT&PF 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 DOT&PF 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 DOT&PF 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.

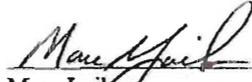
IX. TERM, RENEWAL, AND TERMINATION

- A. This Agreement shall have a term of five (5) years, effective on the date of the last signature. The DOT&PF 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 DOT&PF requests renewal and FHWA determines that DOT&PF has satisfactorily carried out the provisions of this Agreement. In considering any renewal of this Agreement, FHWA will evaluate the effectiveness of the Agreement and its overall impact on the environmental review process.
- C. Either party may terminate this Agreement at any time only by giving at least 30 days written notice to the other party.

D. Expiration or termination of this Agreement shall mean that the DOT&PF 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.

 5/10/17
Date
Sandra A. Garcia-Aline
Division Administrator
Alaska Division
Federal Highway Administration

 5/23/17
Date
Marc Luiken
Commissioner
Alaska Department of Transportation and Public Facilities

Appendix A: State Designated CE actions

1. Boardwalks
2. Wildlife crossing construction
3. Electrical plug-ins for vehicles

