

**PROGRAMMATIC AGREEMENT
BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION WASHINGTON DIVISION
AND
THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
REGARDING THE PROCESSING OF CERTAIN
CATEGORICAL EXCLUSION ACTIONS**

Whereas, the Washington Department of Transportation (WSDOT) proposes highway projects, including local government projects administered through WSDOT Highways and Local Programs, and desires to apply Federal-aid funding for those projects and in doing so, the Federal Highway Administration Washington Division (FHWA) must comply with National Environmental Policy Act (NEPA) and;

Whereas, FHWA is responsible for making all NEPA decisions and WSDOT has considered and decided not to assume responsibilities for Categorical Exclusions (CE) pursuant to 23 U.S.C. § 326 and;

Whereas, FHWA may establish procedures to expeditiously and efficiently process actions that are excluded from the requirements to prepare either an environmental impact statement or an environmental assessment, including the use of programmatic agreements with States and;

Whereas, approximately 95% of the highway projects proposed by WSDOT for Federal-aid funding typically qualify as a CE and WSDOT seeks to assist in reducing the paperwork and processing time for certain Federal actions that do not have significant impacts on the human and natural environment pursuant to 40 CFR 1500.5(k) and;

Whereas, FHWA may delegate the task of analyzing environmental impacts and preparing environmental documentation for NEPA compliance pursuant to 42 U.S.C. 4332(2) (D) and;

Whereas, pursuant to section 1318(d) of the Moving Ahead for Progress in the 21st Century Act (MAP-21) (Public law 112-141, 126 Stat. 405 (July 6, 2012), FHWA may allow a state to determine on FHWA's behalf whether a project is categorically excluded from the preparation of an environmental assessment or environmental impact statement and;

Whereas, the WSDOT wishes to certify that certain projects subject to FHWA approval do not have significant impacts on the human and natural environment and in doing so will reduce the paperwork and processing time for FHWA NEPA approvals in accordance with this Agreement and applicable law. To certify or to provide certification means the WSDOT determined the action meets the CE criteria set forth in this Agreement;

Now, therefore, the FHWA and WSDOT enter into this Programmatic Agreement (Agreement) for the processing of projects under NEPA subject to the following terms and conditions:

SECTION I. DEFINITION OF ACTIONS THAT DO NOT HAVE SIGNIFICANT IMPACTS ON THE HUMAN AND NATURAL ENVIRONMENT

- A. This Agreement allows WSDOT to determine, on behalf of FHWA, whether an action covered by this Agreement is categorically excluded from the preparation of an environmental assessment or environmental impact statement under NEPA. This Agreement does not delegate any other FHWA responsibility under environmental or other Federal laws. This Agreement applies to both WSDOT projects and Local Agency projects using Federal-aid funds. Projects processed under this Agreement must be actions listed in this Section I that meet the definitions in 40 CFR 1508.4 and 23 CFR 771.117 for "categorical exclusions," are not excluded from processing under this Agreement by its terms, and are actions which do not individually or cumulatively have a significant effect on the human environment, and for which neither an environmental assessment nor an environmental impact statement is required.
- B. For a proposed action that WSDOT concludes qualifies for a CE under 23 CFR 771.117, WSDOT shall certify to FHWA that the action meets the requirements of Section I and Section II of this Agreement, including that the criteria listed in 23 CFR 771.117(a) are satisfied and, additionally, the project is one that:
1. Does not induce significant impacts to planned growth or land use for the area.
 2. Does not require the acquisition of more than minor amounts of Right of Way, as defined in Section III (B) (11) of this Agreement.
 3. Is not likely to adversely affect threatened or endangered species or critical habitat.
 4. Does not have a significant impact on any natural, cultural, recreational, historic, or other resource.
 5. Does not involve significant air, noise or water quality impacts.
 6. Does not have significant impacts on travel patterns.
 7. Does not otherwise, either individually or cumulatively, have any significant environmental impacts.
- C. WSDOT shall limit its processing of projects under this Agreement to:
1. Actions listed in 23 CFR 771.117(c).
 2. Actions consistent with the examples found in 23 CFR 771.117(d).
 3. Any activities added through FHWA rulemaking to those listed in 23 CFR 771.117(c) or example activities listed in 23 CFR 771.117(d) after the date of the execution of this Agreement.

SECTION II. CONSIDERATION OF UNUSUAL CIRCUMSTANCES

- A. For each project processed under this Agreement, WSDOT shall consider whether circumstances exist where a normally categorically excluded action may have a

significant environmental effect.

- B. WSDOT shall evaluate as part of its processing of a project whether the action meets 23 CFR 771.117(a) and is one that does not involve unusual circumstances (as described in 23 CFR 771.117(b)) that might require the preparation of an EA or EIS and will certify its findings to FHWA. This consideration of unusual circumstances includes consideration whether the action might result in:
1. Significant environmental impacts.
 2. Substantial controversy on environmental grounds.
 3. Significant impacts on properties protected by section 4(f) of the DOT Act (23 U.S.C. §138, 49 U.S.C § 303) or section 106 of the National Historic Preservation Act.
 4. Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

SECTION III. CONDITIONS OR DETERMINATIONS THAT PRECLUDE PROCESSING ACTIONS UNDER THIS AGREEMENT

- A. Notwithstanding any other provision of this Agreement, any action that does not satisfy the criteria for a CE described in Sections I-II of this Agreement is precluded from being processed by WSDOT as a CE under this Agreement. If at any time during the environmental process WSDOT or FHWA determines that the project fails to meet the criteria listed in Section III B, that project will need to be reviewed and the NEPA approval signed by FHWA.
- B. Other conditions that exclude a project that otherwise may qualify as a CE from being processed under this Agreement are as follows:
1. The action involves unusual circumstances as described in 23 CFR 771.117(b) such that a CE determination is not appropriate.
 2. The action involves use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. 303)
 3. The action requires use or lease of real property owned by a Federal agency.
 4. The action results in a determination of "Adverse Effect" on historic properties protected by Section 106 of the National Historic Preservation Act (NHPA) by FHWA.
 5. The action requires a U.S. Coast Guard bridge construction permit or an Individual permit under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.
 6. The only Clean Water Act Section 404 Nationwide permit (NWP) available for the action is NWP # 23. This exclusion condition will be terminated automatically if the U.S. Army Corps of Engineers (USACE) modifies the regional condition. If this occurs, USACE will provide FHWA and WSDOT with this modified condition and this exclusion condition would no longer be in effect as of the effective date of the modification. This change is not considered to be an amendment per Section VIII of

this Agreement.

7. The action may result in an increase in the designated regulatory floodway, or may result in an increase of more than 1 foot of surface water elevation in the base floodplain when no regulatory floodway is designated, or may increase the risk of damage to property and loss of human life, or may result in modification of a watercourse.
8. The action involves construction in, across, or adjacent to a river designated as a component or proposed for inclusion in the National System of Wild and Scenic Rivers published by the U.S. Department of the Interior or U.S. Department of Agriculture.
9. The action will result in changes in access control that affect traffic patterns.

Examples: Changes that would affect traffic patterns include actions such as the installation of medians or C-curb. Changes that would not affect traffic patterns include actions such as breaks in access control for maintenance or emergency access or minimal alterations or adjustments to driveways.

10. The action will require the acquisition of more than minor amounts of Right-of-Way (ROW).
 - Acquisition includes options to purchase, rights of first refusal, fee title, permanent easements, temporary easements, and/or access rights, including advance/early and post-NEPA acquisitions.
 - Acquisition is considered more than minor if it will require displacement of owners and/or tenants and personal property from residences, commercial or non-profit establishments, or farms..
 - Acquisition is considered more than minor if it will involve more than a quarter of the parcel or substantially affect the functionality of the primary structure on the property.

Typical examples of minor amounts of ROW acquisition include: low cost, strip acquisitions, and corner acquisitions.

11. The action will require the use of a temporary road, detour, or ramp closure. This condition will not apply if the following are true of the project:
 - Provisions are made for access by local traffic and are so posted.
 - Through-traffic dependent business will not be adversely affected
 - The detour or ramp closure, to the extent possible, will not interfere with any local special event or festival.
 - The temporary road, detour or ramp closure does not substantially change the environmental consequences of the action.

- There is no substantial controversy associated with the use of temporary road, detour, or ramp closure.
12. The action will not conform to the Air Quality State Implementation Plan, which is approved or promulgated by the Environmental Protection Agency in air quality non-attainment areas.
 13. The action will require Formal Consultation under Section 7 of the Endangered Species Act.
 14. The action is controversial on environmental grounds. (In cases when controversy is anticipated, WSDOT will discuss the potential for controversy with FHWA to determine if the project can be processed as a PCE or be excluded from this Agreement.)

SECTION IV. NEPA APPROVALS

- A. FHWA will use WSDOT's certification and related project information in determining whether to approve the right of way or construction phase of a project processed as a CE under this Agreement. One of the considerations will be a determination of Fiscal Constraint. WSDOT will review project funding and confirm that the project meets FHWA's fiscal constraint requirements before signing the CE documentation.

WSDOT shall ensure that the certifications and records for each CE project processed under this Agreement are completed prior to or at the time FHWA makes its approval action, including any funding decision, on the underlying action.

- B. In general, the parties contemplate that FHWA shall consider the outcome of the certifications and any records provided by WSDOT prior to the request of any Federal approval.
 1. If FHWA determines the CE applies, approval of the project authorization will also be FHWA's NEPA decision for that project.
 2. If the certification and related project information are inadequate or incomplete, FHWA shall request more detailed information.
 3. If FHWA does not approve the project authorization, FHWA also does not approve the NEPA determination. FHWA shall inform WSDOT of the reasons for its decision not to approve the project.

SECTION V. STATE PERFORMANCE REQUIREMENTS

- A. ***Processing projects under this Agreement: identification, record keeping, and review of effects.*** For projects that WSDOT determines meet the criteria specified in Section I of this Agreement, WSDOT shall:
 1. Document its certification that a project meets the conditions specified in Sections I (B) and II (B), specifying the action from Section I (C) that applies to the project and including, at a minimum, the printed name, title, and date of the State official approving the certification on the appropriate WSDOT form (which can be found

in the WSDOT Environmental Procedures Manual and the Local Agency Guidelines Manual).

2. Include on the Environmental Classification Summary form the following certification when recording the CE findings: "WSDOT has determined that this project does not individually or cumulatively have a significant impact on the environment as defined by NEPA, or involve unusual circumstances as defined in 23 CFR 771.117(b), such that it is excluded from the requirements to prepare an environmental assessment or environmental impact statement."
 3. Record in the project file:
 - a. The regulatory reference for the applicable categorical exclusion.
 - b. The duration (in days) from the date WSDOT initiates its processing of the CE project to the date WSDOT completes its CE certification process.
 - c. The CE findings.
 - d. The outcome of any environmental studies conducted to consider unusual circumstances (23 CFR 771.117(b)) and to determine if the CE classification is proper, as appropriate.
 - e. Any document used in decision making.
 4. Following the CE decision, WSDOT shall re-evaluate its CE certification for the project prior to requesting any major approvals or grants from FHWA, to ensure that the CE designation remains valid. WSDOT shall consult with FHWA and document the re-evaluation (when necessary) pursuant to 23 CFR 771.129. As part of this responsibility
 - a. A re-evaluation must occur when there is a change in the scope or location of the project such that new impacts may occur that were not previously considered.
 - b. A written re-evaluation must occur when at least 3 years have passed since the date the project was certified. These must be included in the project record.
- B. ***Non-transferability.*** WSDOT may not transfer or assign any of the responsibilities administratively delegated to WSDOT under this Agreement. WSDOT may utilize contractors and others to assist WSDOT in carrying out its responsibilities as provided in this Section V.
- C. ***Required resources, qualifications, expertise, standards, and training.***
1. WSDOT must maintain adequate organizational and staff capability and expertise to effectively carry out the provisions of this Agreement. This includes, without limitation:
 - a. Using appropriate technical and managerial expertise to perform the functions set forth under this Agreement.

- b. Devoting adequate financial and staff resources to carry out the certification and processing of projects under this Agreement.
2. The State may procure through consultant services some or all of the environmental and other technical expertise needed to carry out its processing and certifications under this Agreement.
3. At a minimum, all individuals who make CE certifications shall:
 - a. Have completed Introduction to NEPA and Transportation Decision - making web-based course FHWA-NHI-142052.
 - b. Have adequate experience addressing NEPA compliance for transportation projects or until such time, have their work reviewed by staff having the necessary experience.
4. All individuals participating in the processing and certification of projects under this Agreement shall be familiar with and follow the appropriate subsections 23 CFR 771 and WSDOT procedures for environmental analysis and NEPA processing.

D. *State Quality Control*

1. WSDOT agrees to carry out regular quality control activities to ensure that its CE certifications are made in accordance with applicable laws and this Agreement.
2. At a minimum, WSDOT shall monitor its processes relating to project CE certifications, environmental analysis, and project file documentation, and check for errors and omissions. WSDOT shall take corrective actions as needed. WSDOT shall document its quality control activities and any needed corrective actions taken.
3. If WSDOT implements training to meet the capability requirements of this Agreement or as a corrective action, FHWA and WSDOT shall cooperate to bring environmental training courses, from time to time, to the WSDOT Environmental Services Office, the WSDOT Regional, Modal, and Highways & Local Programs Environmental Offices.

E. *Documentation and recordkeeping for CE certifications for individual projects.*

1. WSDOT will create a project record for each action it certifies under the terms of this Agreement. This project record shall be provided to FHWA for projects that require FHWA approval of disposal (surplussing and leasing) of Interstate rights-of-way and any surplus rights-of-way at less than fair market value, and shall be available to FHWA for review upon request for all other projects certified. This record shall include at a minimum:
 - a. A description of the project and which CE WSDOT concluded applies to the project including federal project number.
 - b. The certification and findings to be part of the record listed in Section V (A) (4).

- c. Any checklists, forms, or other documents that summarize the consideration of project effects and unusual circumstances.
 - d. Any stakeholder correspondence, consultation, public meeting or involvement documentation.
2. WSDOT shall notify FHWA of WSDOT's certification that a project has met the conditions set forth in this Agreement as part of WSDOT's request for project right of way or construction authorization. The request for project authorization shall indicate the project has been certified as a project that does not have significant impacts on the human or natural environment and specify the CE for which WSDOT concluded the project qualifies. This notification may occur on the FMIS FHWA-37 Report, item 18. For projects certified in this manner, no further NEPA documentation should be sent to FHWA unless specifically requested by FHWA. Notification to FHWA from WSDOT of the CE certification may occur earlier than the request to proceed.

At the beginning of each Federal fiscal quarter, WSDOT shall provide to FHWA a list of the CE certifications, including the particular CE that applies and include information on the duration as required by FHWA guidance for each certification it has made in the preceding 3 months. The information will be provided within 15 business days after each quarter.

3. WSDOT shall maintain electronic and/or paper project records and records pertaining to WSDOT administration of its certification process for individual projects. WSDOT shall provide FHWA with copies of any project records FHWA may request. WSDOT shall retain those records, including all letters and comments received from governmental agencies, the public, and others for a period of no less than three (3) years after completion of project construction. This 3-year retention provision does not relieve WSDOT of its project or program recordkeeping responsibilities under 49 CFR 18.42 or any other applicable laws, regulations, or policies.
4. WSDOT shall ensure that project records are available to the public consistent with requirements applicable to Federal agencies under 5 U.S.C. § 552 [the Freedom of Information Act (FOIA), as amended in 2002], RCW 42.56, NEPA, and consistent with applicable FHWA regulation, policy, and guidance.

F. *State monitoring and reporting on its performance of the Agreement.* FHWA and WSDOT shall cooperate in monitoring performance under this agreement and each party shall modify its practices as needed to assure quality performance by WSDOT and the FHWA.

- 1. WSDOT shall submit to FHWA (electronically or in hard copy) a report summarizing its performance under this Agreement annually from the effective date of this Agreement. The report will identify any areas where improvement is needed and what measures WSDOT is taking to implement those measures. The report will include actions taken by WSDOT as part of its quality control efforts under Section V(C). A copy of this report will also be available for public review as requested.
- 2. If requested by either party, FHWA and WSDOT shall schedule a follow-up meeting

at which the parties will discuss the report, WSDOT's performance of this Agreement, and the FHWA's monitoring activities.

SECTION VI. FHWA OVERSIGHT ACTIVITIES

Monitoring by FHWA and WSDOT will include consideration of the technical competency and organizational capacity of WSDOT, as well as WSDOT's performance of its CE processing functions. Performance considerations will include, without limitation, the quality and consistency of WSDOT's project certifications, adequacy and capability of the resources applied by WSDOT, and the quality and consistency of WSDOT's administration of its processing of projects under this agreement.

- A. At a minimum, FHWA will review documentation for projects certified under this Agreement as part of its oversight activities, for each 24 month period. The results of that review shall be considered at the time this Agreement is considered for renewal. A copy of this report shall be made available for public review as requested.
- B. Nothing in this Agreement shall prevent FHWA from undertaking other monitoring or oversight actions, including audits, with respect to WSDOT's performance under this Agreement. FHWA, at its sole discretion, may require WSDOT 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.
- C. WSDOT agrees to cooperate with FHWA in all oversight and quality assurance activities.

SECTION VII. TERM, RENEWAL, AND TERMINATION

- A. This Agreement shall have a term of five (5) years, beginning on the date of the last signature. WSDOT shall maintain an executed copy of this Agreement and make it available to the public.
- B. This Agreement is renewable for additional terms of five (5) years each if WSDOT requests renewal and the FHWA determines that WSDOT has satisfactorily carried out the provisions of this Agreement. In considering any renewal of this Agreement, the FHWA will evaluate the effectiveness of the Agreement and its overall impact on the environmental review process.
- C. At least six (6) months prior to the end of each five year term, WSDOT and the FHWA shall 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 in Section VI of this Agreement.
- D. With written concurrence from both parties the terms of this agreement may be continued an additional 6 months until such time as this Agreement is renewed or an amendment or new agreement can be developed.

- E. Either party may terminate this Agreement at any time by giving at least 30 days notice to the other party.

SECTION VIII. AMENDMENTS AND ADMINISTRATIVE MODIFICATIONS

- A. Either party to this Agreement may request that it be amended or administratively modified to reflect non-substantive changes, whereupon the parties shall consult to consider such an amendment.
- B. If the parties agree to amend this Agreement, then the FHWA and the WSDOT 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.

SIGNATURES

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.



Daniel M. Mathis
Division Administrator
Federal Highway Administration

Date: 02/22/2013



Paula Hammond
Secretary of Transportation
Washington State Department of
Transportation

Date: 3/7/13