

**PROGRAMMATIC AGREEMENT
BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION, TENNESSEE DIVISION
AND
THE TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION
REGARDING THE PROCESSING OF ACTIONS CLASSIFIED AS CATEGORICAL
EXCLUSIONS FOR RECREATIONAL TRAILS PROGRAM PROJECTS**

THIS PROGRAMMATIC AGREEMENT (“Agreement”), made and entered into this 7th day of July 2016, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION (“FHWA”) and the STATE of TENNESSEE, acting by and through its DEPARTMENT OF ENVIRONMENT AND CONSERVATION (Tennessee Department of Environment and Conservation, or “TDEC”) hereby provides as follows:

WITNESSETH:

Whereas, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321-4370h (2014), and the Regulations for Implementing the Procedural Provisions of NEPA (40 C.F.R. 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 C.F.R. §1.81(a)(5));

Whereas, the FHWA’s NEPA implementing procedures (23 C.F.R. §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 Tennessee Department of Environment and Conservation is a State agency that undertakes Recreational Trails Program projects using Federal funding received under the Federal-aid Highway Program and must assist FHWA in fulfilling its obligations under NEPA for TDEC projects (23 C.F.R. §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 in 23 C.F.R. §771.117(g) implementing the authorities in section 1318(d), effective November 6, 2014;

Now, therefore, the FHWA and the TDEC 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 Tennessee Department of Environment and Conservation (“TDEC”).

II. PURPOSE

The purpose of this Agreement is to authorize the TDEC to determine on behalf of FHWA whether a project qualifies for a CE specifically listed in 23 C.F.R. §771.117.

III. AUTHORITIES

This agreement is entered into pursuant to the following authorities:

- A. National Environmental Policy Act, 42 U.S.C. §§4321 - 4370
- B. Moving Ahead for Progress in the 21st Century Act, P.L. 112-141, 126 Stat. 405, Sec. 1318(d)
- C. 40 C.F.R. parts 1500 - 1508
- D. DOT Order 5610.1C
- E. 23 C.F.R. §771.117

IV. RESPONSIBILITIES

A. The TDEC 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 C.F.R. §771.117(c) (the “c list”) that do not exceed the thresholds in Section IV(A)(1)(b) below, the TDEC may make a CE approval on behalf of FHWA. The TDEC will identify the applicable listed 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 23 C.F.R. §771.117(c) that exceed the thresholds may not be approved by the TDEC. FHWA review and approval is required if the action:

- i. Involves acquisitions of more than a minor amount of right-of-way, defined as 1.0 acre;
 - ii. Involves acquisitions that result in any residential or non-residential displacements;
 - iii. Results in a determination of adverse effect on historic properties pursuant to Section 106 of the National Historic Preservation Act;
 - iv. Results in the loss of 0.5 acres or more of waters of the U.S. (including wetlands);
 - v. Requires a U.S. Coast Guard bridge permit;
 - vi. Requires work encroaching on a regulatory floodway or work adversely affecting the base floodplain (100-year flood) elevations of a water course or lake, pursuant to Executive Order 11988 and 23 C.F.R. §650 subpart A. This includes:
 - An action that may result in an increase in the designated regulatory floodway;
 - An action that 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;
 - An action that may increase the risk of damage to property and loss of human life, or may result in modification of a watercourse.
 - vii. 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; or
 - viii. May affect, is likely to adversely affect federally listed species or designated critical habitat, or results in impacts subject to the conditions of the Bald and Golden Eagle Protection Act;
 - c. For actions not specifically listed as CEs in 23 C.F.R. §771.117, but meeting the requirements of a CE under 40 C.F.R. §1508.4 and 23 C.F.R. §771.117(a), TDEC agrees to contact FHWA to collaboratively determine the CE classification.
2. Consulting with FHWA for actions that involve unusual circumstances (23 C.F.R. §771.117(b)), to determine the appropriate class of action for environmental analysis and documentation. The TDEC may decide or FHWA may require additional studies to be performed prior to making a CE approval, or the preparation of an EA or EIS.
 3. Meeting applicable documentation requirements in Section V for State CE approvals on FHWA's behalf, applicable approval and re-evaluation requirements in Section

VI, and applicable quality control/quality assurance, monitoring, and performance requirements in Section VII.

4. Relying only upon employees directly employed by the State (not consultants contracted by the State to act on the State's behalf) to make CE approvals submitted to FHWA under this agreement. While third parties (i.e., consultants, local government staff, and other State agency staff) may prepare NEPA documents on behalf of the TDEC in accordance with this agreement, the TDEC may not delegate its responsibility for CE approvals to third parties.

B. The FHWA is responsible for:

1. Providing timely advice and technical assistance on CEs to the TDEC, as requested.
2. Providing timely input and review of CEs, with reviews completed within 30 days. FHWA will base its approval of CE actions on the project documentation prepared by the TDEC under this Agreement.
3. All correspondence and Native American tribal consultation with the Chickasaw Nation, using project documentation provided by the TDEC.
4. Conducting an annual program review as part of its oversight activities, by reviewing a sampling of "c list" CEs produced and approved during the previous federal fiscal year.
5. Overseeing the implementation of this Agreement in accordance with the provisions in Section VII, including applicable monitoring and performance provisions.

V. DOCUMENTATION OF TDEC CE APPROVALS

A. For State CE approvals, the TDEC shall insure that it fulfills the following responsibilities for documenting the project-specific determinations made:

1. For "c list" CEs (23 C.F.R. §771.117(c), the TDEC should identify the applicable action, 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 TDEC signature evidencing approval. TDEC should use the CE forms that have been approved by FHWA to document NEPA impacts of RTP projects.

B. The TDEC should maintain a project record for CE approvals it makes on FHWA's behalf and for 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 noted in the “Open Project Selection Process Scoring Criteria (OPSP)”, located in the RTP Application Manual;
 3. Any stakeholder communication, correspondence, consultation, or public meeting documentation;
 4. The name and title of the document approver and the date of TDEC’s approval or FHWA’s final approval; and
 5. For cases involving re-evaluations, any written re-evaluation (when required) or a statement that a re-evaluation was completed for a project but that a written re-evaluation was not necessary.
- C. Any electronic or paper project records maintained by the TDEC should be provided to FHWA at their request. The TDEC 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 the TDEC of its project or program recordkeeping responsibilities under 2 C.F.R. §200.333 or any other applicable laws, regulations, or policies.

VI. NEPA APPROVALS AND RE-EVALUATIONS

- A. The TDEC’s CE approvals and CEs submitted to FHWA for approval may only be made by officers or offices specifically identified below:
1. Review of “c list” CEs is delegated to Rachel Jakubovitz, Grants Analyst, TDEC Recreation Educational Services.
 2. Approval of “c list” CEs is delegated to Gerald Parish, Director, TDEC Recreation Educational Services.
- B. In accordance with 23 C.F.R. §771.129, the TDEC shall re-evaluate its determinations 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. TDEC Quality Control & Quality Assurance

The TDEC agrees to carry out regular quality control and quality assurance activities to ensure that its CE approvals and CE submissions to FHWA for approval are made in accordance with applicable law and this Agreement.

B. TDEC Performance Monitoring and Reporting

1. The FHWA and the TDEC should 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 the TDEC, as well as the TDEC's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of the TDEC's CE approvals, CE submissions to FHWA for approval, adequacy and capability of the TDEC staff and consultants, and the effectiveness of the TDEC's administration of its internal CE approvals.

FHWA will conduct an annual program review as part of its oversight activities, during the term of this Agreement. By November 30 of each year, the TDEC will provide to the Division Office a list of actions ("c list" CEs) produced during the previous federal fiscal year (October 1 through September 30). The list of actions will contain the following information:

- a. the Federal project number
- b. the project location (name of community or park) and County in which the project is located
- c. the project name

The Division Office will select approximately 10% of the documents for review (minimum of 2 RTP projects). TDEC will provide the selected documents and all backup information in electronic form to the Division Office by January 15. The Division Office will complete a review of the selected documents to determine, at a minimum, whether:

- a. The project was correctly processed as a "c list" CE.
- b. The project was in the TIP/STIP (with the TIP/STIP sheet included in the electronic file).
- c. The appropriate United States Fish and Wildlife Service (USFWS) letter was attached.
- d. The appropriate State Historic Preservation Office (SHPO) letter was attached.

After the review is completed, the Division Office will prepare a report, which will be forwarded to the TDOT Environmental Division by March 1, with an email to the TDEC if there are any findings, required actions or observations to discuss.

2. The TDEC shall prepare and implement a corrective action plan to address any findings, required actions or observations identified in the FHWA review. Consideration of the results of the review and corrective actions taken by the TDEC shall occur 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 the TDEC's performance under this Agreement. The FHWA may require the TDEC 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 TDEC 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 the TDEC 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.
- B. This Agreement is renewable for additional five (5) year terms if the TDEC requests renewal and FHWA determines that the TDEC 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 by giving at least a 30 days written notice to the other party.
- D. Expiration or termination of this Agreement shall mean that the TDEC 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.

 6-23-16
Robert J. Martineau, Jr. Date
Commissioner
Tennessee Department of Environment and Conservation

 7/7/16
Pamela M. Kordenbrock Date
Division Administrator, Tennessee Division
Federal Highway Administration