

Programmatic Agreement
for the
Review and Approval of
NEPA Categorically Excluded Transportation Projects
between the
Federal Highway Administration Nebraska Division
and the
Nebraska Department of Roads

There are three classes of action that prescribe the level of documentation required in the National Environmental Policy Act (NEPA) process: Environmental Impact Statements (Class I), Categorical Exclusions (Class II), and Environmental Assessments (Class III). This agreement applies to Categorical Exclusions (CE) - any linear transportation project or associated facility that does not individually or cumulatively have a significant environmental impact. This agreement provides for the expeditious processing of CE level actions by the Nebraska Department of Roads (NDOR), under the guidance and with the approval of, the Federal Highway Administration, Nebraska Division (FHWA). Programmatic Categorical Exclusion actions meeting the criteria established under this agreement are deemed approved by FHWA.

FHWA retains full federal authority and responsibility on all federal aid projects; reserves the right to modify document classification on a case-by-case basis; and to evaluate the implementation of this agreement. In entering into this agreement, NDOR agrees to act on behalf of FHWA in assuring compliance with all applicable Federal environmental and related requirements. FHWA will provide guidance, oversight, technical assistance, and approval as appropriate.

REGULATORY BASIS:

All CE actions processed under this agreement shall be in accordance with the requirements of 23 Code of Federal Regulations (CFR) 771.117, Categorical Exclusions (23 CFR 771.117) or succeeding regulations. These actions must also be consistent with, and ensure compliance with, other applicable federal, state and local law.

The CE action directly, indirectly, or cumulatively, shall not cause any significant environmental impacts, as described in 23 CFR 771.117(a) or succeeding regulations, to:

- planned growth or land use for the area;
- relocate significant numbers of people
- any natural, cultural, recreational, historic or other resource;
- air, noise, or water quality;
- travel patterns

The CE action shall not involve unusual circumstances, as described in 23 CFR 771.117(b) or succeeding regulations, leading to:

- significant environmental impacts;
- substantial controversy on environmental grounds;
- significant impact on properties protected under section 4(f) or section 106;
- inconsistencies with any federal, state or local law, requirement or administrative determination relating to the environmental aspects of the action.

A. DEFINITIONS:

For the purposes of this agreement, the following classifications of NEPA decision documents are defined:

- Programmatic Categorical Exclusion (PCE): An action that, based on past experience has shown to never or almost never cause significant environmental impacts and can "programmatically" be classified as a CE as confirmed by the NEPA Determination Form and may be processed by NDOR under this agreement.
- Categorical Exclusion (CE): An action that does not individually or cumulatively have significant environmental impacts determined through undertaking environmental studies and documented in the Categorical Exclusion Documentation Form. Categorical Exclusions are reviewed by NDOR and approved by FHWA.

B: EXCEPTIONS:

Exceptions may be considered to the conditions of this agreement. These exceptions will be on a case-by-case basis requiring a meeting for approval by FHWA. If one or more conditions are not met, and an exception is not approved, then the project must be classified at a higher NEPA level as determined by FHWA.

C. CONDITIONS for PCEs:

Individual actions to be classified as programmatic categorical exclusions under this agreement must meet all the requirements of the Regulatory Basis as well as all of the following conditions. Exceptions may be considered.

1. New right of way (ROW), other land acquisition, or displacements:
 - The action shall not involve acquisition of more than minor amounts of ROW acquisition or permanent easement for construction of such items as clear vision corners and grading. This requirement shall be construed to mean an amount no more than 1.5 acres per linear mile of ROW within the project's limits.

- No improvements other than minor relocations such as fences, signage, etc...
 - No commercial or residential displacements shall result from these ROW acquisitions.
2. The action shall not involve a use of properties protected by Section 4(f) of the Department of Transportation Act (as defined in 49 U.S.C. 303) or Section 6(f) of the Land and Water Conservation Act.
 3. The action shall not have been determined by the State Historical Preservation Officer to have an adverse effect on any property determined eligible for the National Register of Historical Places.
 4. The action shall not include any work greater than a 0.1 acre in wetlands or any channel changes. The action shall not be subject to an individual Section 404 and/or Section 10 permit issued by the United States Army Corps of Engineers (USACE).
 5. The action shall not be subject to a Section 9 permit issued by the United States Coast Guard (USCG).
 6. The analysis required by Section 7 of the Endangered Species Act shall not lead to a determination of other than “no effect” or “may affect – not likely to adversely affect by implementing existing agency approved protocols for state and federally listed resources under regulations implementing the Endangered Species Act. This call must be supported by a letter from USFWS and/or NGPC as appropriate. Federally listed resources are defined as federally listed threatened or endangered species, proposed threatened or endangered species, designated critical habitat, and proposed designated critical habitat.
 7. The action will not include work modifying the topography as a result of either placement or removal of materials which results in more than a one foot rise or the locally regulated maximum in the 100 year water surface elevation.
 8. The action shall not cause construction in, across, or adjacent (within 0.5 miles or along the first 1.25 miles of a stream tributary to the designated river) to a river designated as a component or proposed for inclusion in the National System of Wild and Scenic Rivers published by U.S. Department of the Interior /U.S. Department of Agriculture.
 10. The action shall not involve known hazardous materials impacts anticipated to adversely affect construction activities, and shall not involve the acquisition of known unresolved contaminated sites where the project sponsor could reasonably expect to assume liability for corrective action upon acquisition.
 11. The action will not involve any changes in access control rights.
 12. The action shall conform to all applicable laws, regulations, implementation plans, or other applicable federal and state air quality requirements pursuant to the Federal Clean Air Act.
 13. The use of temporary road, detour, or ramp closure unless the use of such facilities occupies the location less than 3 days and satisfies the following:
 - Provisions are made for access by local traffic and so posted;
 - Through traffic dependent business will not be adversely affected;
 - The temporary road, detour or ramp closure does not substantially change the environment consequences of the action; and

- There is no substantial controversy associated with the use of temporary road, detour, or ramp closure.
14. No significant public opposition to the project.

D. CLASSIFICATION CRITERIA:

Programmatic Categorical Exclusions (PCE)

All conditions specified in Section C must be met for classification as a Programmatic Categorical Exclusion (PCE). If one or more conditions are not met, and an exception is not approved by FHWA, the action must be classified at a higher NEPA level as determined in consultation with FHWA. Project qualifying as a PCE will have the NEPA Determination Form completed. If all of the conditions of the form are met, then NDOR can ultimately approve the PCE and proceed into final design. If there are any concerns or questions about whether or not any of the conditions are met for a given project, then consult FHWA. The NEPA Determination Form will document for each project that no significant impacts are expected and is appropriately classified as a PCE. This form will become a permanent part of the project file, along with the supporting documentation.

Categorical Exclusions (CE):

FHWA has determined that the actions listed below must be classified at a NEPA level of categorical exclusion or higher.

- (1) Action covering any added capacity on an existing highway may be processed and approved as a categorical exclusion following appropriate public involvement.
- (2) Additional actions that meet the criteria for a CE established in the CEQ regulations (40 CFR 1508.4) and 23 CFR 771.117 (a), or succeeding regulations, may be processed as CEs only after FHWA approval.
- (3) Section 771.117 (d) (12): Acquisition of land for hardship or protective purposes; advance land acquisition loans under the Urban Mass Transit Act (UMTA).¹ 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

¹ 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. Protective acquisition is done to prevent imminent development of a parcel which is needed for a 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.

required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

(4) Use of USACE Nationwide Permit 23 for impacts greater than 0.1 acres will require processing the action as an FHWA approved CE.

E. IMPLEMENTATION:

FHWA and NDOR agree to the following:

(1) Per 771.111(h)(2)(i) and (ii), every Federal action requires some level of public involvement, including providing for early and continuous opportunities throughout the project development process. The level of public involvement should commensurate with the proposed action.

For all actions under this agreement, all project impacts, regardless of CE level, must be assessed for context and intensity 40 CFR 1508.27). As such, the application of 23 CFR 771.111 (h) (2) (iii) must be evaluated to determine if a public information meeting or the opportunity for a hearing is in the public's interest.

(2) NDOR will pursue early coordination as required with regulatory and resource agencies, and ensure compliance with all appropriate federal and state laws and regulations. Where right of entry for environmental studies has been denied, NDOR will need to update the NEPA document and/or administrative record based on findings made after access becomes possible. When required, the NEPA document classification will be changed to reflect all issues.

(3) FHWA shall be consulted on any project where the criteria in any section of this agreement are exceeded, so that the processing of the federally funded undertakings is acceptable to FHWA. NDOR shall contact FHWA upon identifying an issue for which an exception under Section B above may be appropriate. NDOR and FHWA commit to resolving the issue within ten (10) working days. A record of consultation must be maintained in the appropriate project file.

(4) FHWA and NDOR agree that NEPA Determination Form dated November 2008 will be used to determine the environmental classification of each action. Information gathered during the planning process of a project is used to answer key questions which enable NDOR to determine if the improvements associated with the project will have an effect, either individually or cumulatively, on the human or natural environment. If positive or unknown responses are given on the form, the action will be classified as CE or higher documentation unless an exception is authorized. The completed form, with pertinent "back-up" project data attached, will document the PCE decision.

(5) FHWA and NDOR agree that the Categorical Exclusion Documentation Form dated November 2008 will be used for processing CEs. This form was developed to provide a consistent process resulting in a more thorough and efficient advancement of projects. The level of information to be provided should be commensurate with the proposed project's potential for adverse environmental impacts. Supplemental guidance is provided with the form to address documentation needs.

(6) For projects involving coordination with Resource or Regulatory Agencies, confirmation of the project as a PCE will not be made until coordination is satisfactorily completed.

(7) Programmatic Categorical Exclusion actions meeting the criteria established under this agreement is deemed approved by FHWA. NDOR will produce a monthly report (first week of the month, for the preceding month's projects) listing all projects processed as PCEs for FHWA files.

(8) NDOR agrees to reevaluate the PCE classification on all proposed actions prior to requesting subsequent project approvals to establish whether or not conditions of the project have changed and to determine if the NEPA determination remains valid for the action. Projects which upon reevaluation remain within the limits of this agreement need no further NEPA coordination with FHWA. Documented reevaluation is required to be completed by NDOR for projects as impacts occur and/or more than three years have elapsed between any two of the following events: approval of NEPA document, right of way authorization, construction authorization, permit request or renewal.

(9) Regardless of the NEPA document, NDOR is responsible for 1) updating the project's involvement with Threatened and Endangered species, as Section 7 requirements must be fulfilled, per the current species list prior to right of way and construction authorization by FHWA; and 2) reviewing the list of environmental commitments contained in the NEPA document and coordinating with the appropriate design staff to insure that these environmental commitments have been incorporated into the project.

(10) NDOR shall develop manual(s) to ensure that the process and protocols reflected in this agreement are implemented to their full extent.

(11) NDOR and FHWA agree that training project sponsors, consultants and NDOR staff in areas related to this agreement and the Project Classification Guide (Attachment A) is an integral part of the successful execution of transportation projects. Training, both formal and informal, shall be offered to ensure the effective implementation of the agreement and guidance.

(12) Minimum requirements are established by NDOR for those preparing environmental documentation. Qualifying experience will include a training component.

(13) This agreement shall not preclude NDOR from requesting individual CE review and approval from FHWA when deemed necessary even though the action falls within the bounds of this agreement. This agreement shall not preclude processing projects outside the bounds of this agreement with FHWA's participation and approval. This agreement shall also not preclude the FHWA the right to request, for individual review, CE actions that fall within the bounds of a PCE.

(14) Full compliance with this agreement will be determined through FHWA random sampling of the quarterly reports. FHWA will create a database and perform 100% sampling for the first 3 months to determine if any modifications need to be made to either the forms identified in item (3) and (4) or the agreement. If there are deficiencies in the PCE documentation and/or supporting documentation, then the FHWA will annotate these deficiencies in the database. A report will be generated and sent to NDOR for action/resubmission. If the process appears to be functioning adequately, FHWA will reduce the sampling frequency to 25% for the remainder of the first year. A process review will be conducted at a minimum of every two years thereafter.

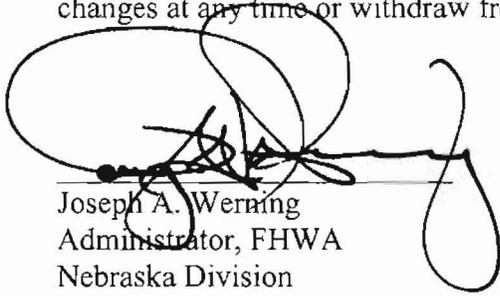
At any time should the FHWA determine that NDOR has substantial deficiencies or has not taken sufficient corrective action to ensure compliance to this agreement, then the FHWA shall take appropriate action including reassuming any responsibilities that have been assigned in this programmatic agreement or remedies provided for in 23 CFR 1.36.

F. RELATED AGREEMENTS AND GUIDANCE:

Related agreements and guidance between FHWA and/or NDOR and the resource / regulatory agencies remain in full force and effect. Attachment B is a list of Federal laws, regulations, guidance and related agreements that may impact the processing envisioned by this agreement.

H. EFFECTIVE DATE, TERM AND MODIFICATION:

This agreement is effective upon the date of the last signature. Either party may request changes at any time or withdraw from these procedures after providing written notice.



Joseph A. Werning
Administrator, FHWA
Nebraska Division



John L. Craig
Executive Director, NDOR

12-17-2008
Date

Dec 17, 2008
Date

Attachment A:

FEDERAL LAWS, REGULATIONS, GUIDANCE AND RELATED AGREEMENTS

Nebraska Agreements

- FHWA Nebraska Division: Non-Federal Designated Representative Letter
- Programmatic Agreement under Section 106, National Historical Preservation Act, as amended, among FHWA, Nebraska Historical Commission, Advisory Council on Historical Preservation and NDOR (Dated December 1995)
- Nebraska Historic Bridge Programmatic Agreement – Between the NDOR and the Advisory Council on Historic Preservation, the Nebraska State Historical Society (NESHPO) and the FHWA.
- Nebraska NEPA / 404 Merger Process – Between the USACE, FHWA, EPA, FWS, NGPC, NDEQ, and NDOR
- Memorandum of Understanding, Air Quality Analysis for Environmental Documents – Between NDOR, FHWA, and NDEQ
- Memorandum of Understanding on Section 106 Compliance – Between NDOR, FHWA, and NESHPO
- Agreement for Threatened and Endangered Species Pre-Reviews and Concurrence Process – NDOR and NGPC
- Formal Designation of Authorized Representative for Federal-Aid Transportation Projects – NDOR and FHWA
- NDOR Wetland Mitigation Bank Instruments – Between NDOR, USACE, EPA, NDEQ, FWS, NGPC, and FHWA

General

- Council on Environmental Quality Regulations
- National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 et seq.
- Department of Transportation Act of 1966, Section 4(f)
- Federal-Aid Highway Act of 1970, 23 U.S.C 109 , particularly section (h) - Economic, Social and Environmental Effects
- Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991
- Transportation Efficiency Act for the 21ST Century (TEA-21), P.L. 105-178
- Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), P.L. 109-59
- Freedom of Information Act

Physical Environment

- Clean Air Act Amendments of 1990 (CAAA)
- Clean Water Act of 1977 and 1987
- Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA)
- Federal Water Pollution Control Act of 1972 (see Clean Water Act of 1977 & 1987)
- Federal Insecticide, Fungicide, and Rodenticide Act
- Federal Land Policy and Management Act of 1976 (Paleontological Resources)
- Hazardous and Solid Waste Amendments (HSWA) of 1984 (see Resource Conservation and Recovery Act of 1976)
- Noise Control Act of 1972
- Pollution Prevention Act of 1990
- Resource Conservation and Recovery Act of 1976 (RCRA)
- Safe Drinking Water Act of 1944, as amended
- Solid Waste Disposal Act (see Resource Conservation and Recovery Act of 1976)
- Superfund Amendments and Reauthorization Act (SARA) of 1986 (see Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA))

Natural Environment

- Emergency Wetlands Resources Act of 1986
- Endangered Species Act of 1973
- Executive Order 11990, Protection of Wetlands
- Executive Order 12962, Recreational Fisheries
- Executive Order 13112, Invasive Species
- Executive Order 13186, Migratory Birds
- Fish and Wildlife Coordination Act of 1934, as amended
- Marine Mammal Protection Act of 1972, As Amended
- Marine Protection Research and Sanctuaries Act of 1972, as amended
- Migratory Bird Treaty Act
- Water Bank Act Wetlands Mitigation Banks, ISTEA 1991, Sections 1006-1007
- Wildflowers, Surface Transportation and Uniform Relocation Act of 1987 Section 130

Special Status Land Use

- Coastal Zone Management Act of 1972
- Coastal Zone Management Act Reauthorization Amendments Of 1990
- Executive Order 11988, Floodplain Management
- Flood Disaster Protection Act
- Land and Water Conservation Fund Act of 1964, as amended Section 6(f)
- National Trails System Act
- Rivers and Harbors Appropriation Act of 1899, Sections 9 and 10
- Wild and Scenic Rivers Act of 1968, as amended
- Wilderness Act of 1964

Community

- American Indian Religious Freedom Act of 1978
- Executive Order 12898 - Environmental Justice
- CEQ Guidance - Environmental Justice (1997b)
- Executive Order 13166 - Improving Access to Services for Persons with Limited English Proficiency
- Farmland Protection Policy Act of 1981
- Public Hearings, 23 U.S.C. 128
- Title VI of the Civil Rights Act of 1964, as amended
- Uniform Relocation Assistance and Real Property Acquisition Act of 1970, as amended

Cultural Resources

- Act for the Preservation of American Antiquities (1906)
- Archaeological and Historical Preservation Act of 1974
- Archeological Resources Protection Act Of 1979
- Executive Order 11593 - Protection and Enhancement of Cultural Environment (1971)
- Executive Order 13007 - Indian Sacred Sites (1996)
- Executive Order 13287 - Preserve America (2003)
- Historic Bridges, Surface Transportation and Uniform Relocation Act of 1987 Section 123(f)
- Historic Sites and Buildings Act of 1935

- National Historic Preservation Act of 1966, as amended (Section 106)
- Native American Graves Protection and Repatriation Act of 1990
- Reservoir Salvage Act of 1960

Other requirements in addition to those listed may apply to some projects.