

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

THIS PROGRAMMATIC AGREEMENT (“Agreement”), made and entered into this ___ day of _____ 2015, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION (“FHWA”) and the STATE of MONTANA, acting by and through its DEPARTMENT OF TRANSPORTATION (“MDT”) hereby provides as follows:

WITNESSETH:

Whereas, the National Environmental Policy Act of 1969 (NEPA), 42 USC 4321-4370h (2014), 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 USC 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 (CEs) for certain actions that FHWA has determined do not normally 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 Montana Department of Transportation (MDT) 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 MDT 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;

Now, therefore, the FHWA and MDT enter into this Programmatic Agreement (“Agreement”) for the processing of CEs.

I. PARTIES

The Parties to this Agreement are the Federal Highway Administration (“FHWA”) and the Montana Department of Transportation (hereinafter “MDT”).

II. PURPOSE

The purpose of this Agreement is to authorize MDT:

- A. To determine on behalf of FHWA whether a project qualifies for a CE specifically listed in 23 CFR 771.117; and
- B. To certify to FHWA that an action not specifically listed in 23 CFR 771.117, but that meets the CE criteria in 40 CFR 1508.4 and 23 CFR 771.117(a) and (b), qualifies for a CE.

III. AUTHORITIES

This agreement is entered into pursuant to the following authorities:

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

IV. RESPONSIBILITIES

- A. MDT 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 established in 23 CFR 771.117(c) and (d), that do not exceed the thresholds in Section IV(A)(1)(b) below, MDT may make a CE approval on behalf of FHWA. MDT 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 CFR 771.117 that exceed the thresholds may not be approved by MDT. MDT may certify to FHWA that the action qualifies for a CE. An action requires FHWA CE review and approval based on MDT certification if the action:
- i. Involves acquisition of more than a minor amount of right-of-way. An 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;
 - ii. Involves acquisition that results in any residential or non-residential displacements;
 - iii. Includes acquisition of land for hardship or protective purposes, or early acquisition pursuant to Federal acquisition project (23 USC 108(d));
 - iv. Results in capacity expansion of a roadway by addition of one or more through lanes;
 - v. Involves the construction of temporary access, or the closure of existing road, bridge, or ramps, that would result in major traffic disruptions, unless the following are true of the project: provisions are made for access by local traffic and are so posted; through-traffic dependent businesses 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 a temporary road, detour or ramp closure;
 - vi. Results in creation of or modification to an access control resolution for a particular roadway;
 - vii. Results in a determination of adverse effect on historic properties pursuant to Section 106 the National Historic Preservation Act;
 - viii. Requires the “use” of properties protected by Section 4(f) of the Department of Transportation Act (49 USC 303);
 - ix. Requires the acquisition of lands under the protection of Section 6(f) of the Land and Water Conservation Act of 1965, the Federal Aid in Fish Restoration Act, the Federal Aid in Wildlife Restoration Act, 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;

- x. Requires a U.S. Army Corps of Engineers Clean Water Act Section 404 permit other than a Nationwide Permit or a General Permit;
 - 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 (EO) 11988 as amended 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 the Interior/U.S. Department of Agriculture;
 - xiii. Is defined as a “Type I project” per 23 CFR 772.5 and MDT’s Noise Policy for purposes of a noise analysis;
 - xiv. May affect federally listed or candidate species, or proposed or designated critical habitat or projects with impacts subject to the conditions of the Bald and Golden Eagle Protection Act; or
 - xv. Does not conform to the State Implementation Plan (SIP) which is approved or promulgated by the U.S. Environmental Protection Agency in air quality non-attainment areas.
- c. MDT is not authorized to approve actions not specifically listed as CEs in 23 CFR 771.117, but meet the requirements of a CE under 40 CFR 1508.4 and 23 CFR 771.117(a). Instead, MDT shall certify that an action will not result in significant environmental impacts if MDT 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. MDT 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 Division Office, MDT shall provide a copy of the CE documentation prepared for the actions(s) in accordance with Section V of this Agreement.
 - ii. If any project requires a Section 4(f) *de minimis* determination or programmatic evaluation, the MDT shall submit the Section 4(f) documentation for FHWA determination and approval.
 - iii. The MDT may request notice to proceed with final design, acquisition of right-of-way, or construction from FHWA once MDT has completed its certification that a project is a CE.
 - iv. The Division Office’s objection to a MDT 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. Providing documentation of certified actions, pursuant to this Agreement, to the FHWA Division Office, as MDT approves the action. Documentation of the certified action will identify the following information:
 - a. MDT project number and a project name; including the route number or facility name where the project will occur
 - b. The applicable CE action listed in the regulation, or if the action is not listed in 23 CFR 771.117, identify the process as “CE not listed.”
 - c. Relevant consultations or technical analyses that are pending (if applicable).
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. MDT 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 for MDT NEPA CE approvals and MDT NEPA CE certifications to FHWA pursuant to Section V of this Agreement; document applicable approval and re-evaluation requirements pursuant to Section VI of this Agreement, and conduct applicable quality control/quality, monitoring, and performance requirements pursuant to Section VII of this Agreement.
5. Assuring that only individuals employed directly by MDT’s Environmental Service Bureau make CE approvals or certifications submitted to FHWA under this agreement. MDT may not delegate its responsibility for CE approvals or certifications to third parties (i.e., consultants, local government staff, and other MDT agency staff).

B. FHWA is responsible for:

1. Providing timely advice and technical assistance on CEs to MDT, 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 MDT under this Agreement;
3. Providing timely input and review of listed actions for which MDT has questions or concerns regarding applicability of CE. FHWA will base its approval of CE actions on the project documentation and certifications prepared by MDT under this Agreement; and

4. Overseeing the implementation of this Agreement in accordance with the provisions in Section VII, including applicable monitoring and performance provisions.

V. DOCUMENTATION OF MDT CE APPROVALS AND CERTIFICATIONS

- A. For MDT NEPA CE approvals and MDT NEPA CE certifications to FHWA for approval, MDT shall ensure that it fulfills the following responsibilities for documenting the project-specific determinations made:
 1. For actions listed in 23 CFR 771.117 (c) and (d), MDT should 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 MDT signature evidencing approval.
 2. In addition, for actions listed in 23 CFR 711.117 (d), MDT shall prepare documentation that supports the CE determination and that no unusual circumstances exist that would make the CE approval inappropriate.
- B. MDT should 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 MDT's approval or FHWA's final approval; and
 5. For cases involving re-evaluations, any documented re-evaluation (when required) or a statement that a re-evaluation was completed for the project (when documentation is not necessary).
- C. MDT will provide FHWA with electronic or paper project records maintained by MDT upon request. MDT 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 (project close-out). This 3-year retention provision does not relieve MDT 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. MDT's CE approvals and CEs submitted to FHWA for approval may only be made by MDT's Environmental Services Bureau (ESB).
- B. In accordance with 23 CFR 771.129, MDT 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. MDT Quality Control/Quality Assurance

MDT 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. MDT Performance Monitoring and Reporting.

1. FHWA and MDT agree to cooperate in monitoring performance under this Agreement and work to assure quality performance.
2. MDT and FHWA will meet annually to discuss MDT's performance under this Agreement. The discussion will identify any areas where improvement is needed and what measures MDT is taking to implement those improvements. The discussion will include a description of actions taken by MDT as part of its quality control efforts under Section VII(A). The results of this annual discussion will be documented as part of FHWA's program reviews, as described in Section VII, Part C(2).

C. FHWA Oversight and Monitoring

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

VIII. AMENDMENTS

This Agreement may be amended by written mutual agreement of the parties. 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. MDT 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 MDT requests renewal and FHWA determines that MDT 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 MDT 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.

Signed by Kevin McLaury

January 6, 2016

Kevin L. McLaury, P.E.
Division Administrator, Montana Division
Federal Highway Administration

Date

Signed by Michael Tooley

December 23, 2015

Michael Tooley
Director
Montana Department of Transportation

Date