

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

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**THIS PROGRAMMATIC AGREEMENT (“Agreement”), made and entered into this 17<sup>th</sup> day of February 2016, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION (“FHWA”) and the STATE of MAINE, acting by and through its DEPARTMENT OF TRANSPORTATION (“MaineDOT”) 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 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 MaineDOT 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 MaineDOT 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 MaineDOT 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 Maine Department of Transportation (“MaineDOT”).

## **II. PURPOSE**

The purpose of this Agreement is to authorize MaineDOT to determine on behalf of FHWA whether a project qualifies for a CE specifically listed in 23 CFR 771.117 (listed in Appendix A and B of this Agreement). This Agreement also authorizes MaineDOT to certify to FHWA that an action not specifically listed in 23 CFR 771.117, 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 - 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
- E. 23 CFR 771.117
- F. Fixing America’s Surface Transportation (FAST) Act

## **IV. RESPONSIBILITIES**

A. MaineDOT 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 Appendix A (CEs established in 23 CFR 771.117(c) and Appendix B (CEs established in 23 CFR 771.117(d)), that do not exceed the thresholds in Section IV(A)(1)(b) below, MaineDOT may make a CE approval on behalf of FHWA (also known as a Programmatic CE). Prior to the CE approval, MaineDOT will identify the applicable listed CE, ensure any conditions or constraints are met, verify that unusual circumstances pursuant to 23 CFR 771.117(b) do not apply, address any and all other environmental



requirements as stated per 23 CFR 771.105(a) and complete the review by including a statement in their ProjEx database as further described in Section V(C). No separate review or approval of the CE by FHWA is required; however, any project documentation will be made available to FHWA, in accordance with Section V of this Agreement, upon request.

- b. Actions listed in Appendices A and B that exceed the below thresholds may not be approved by MaineDOT. MaineDOT may certify to FHWA that the action qualifies for a CE and may request Individual CE approval. An action requires FHWA CE review and approval based on the MaineDOT certification if the action:
  - i. Includes a residential or commercial displacement, or acquisition of property rights that results in substantial abutter impacts;
  - ii. Is reviewed by the U.S. Fish and Wildlife Service or the National Marine Fisheries Service and they have indicated the action has the potential to jeopardize the continued existence of any listed species or has the potential to result in the destruction or adverse modification of critical habitat that has been designated under the Endangered Species Act;
  - iii. Includes adverse effects that cannot be resolved via an agreeable Memorandum of Agreement under Section 106 of the National Historic Preservation Act;
  - iv. Has an adverse effect on a National Historic Landmark;
  - v. Requires an Individual Section 4(f) approval; or
  - vi. Generates substantial public controversy or opposition, for any reason.
- c. MaineDOT may not 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, MaineDOT shall certify that an action will not result in significant environmental impacts if MaineDOT 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. MaineDOT shall submit this certification to FHWA for review and subsequent approval or objection.
  - i. If requested by the FHWA Division Office, MaineDOT shall provide a copy of the CE documentation prepared for the action(s) in accordance with Section V of this Agreement.
  - ii. The FHWA Division Office's objection to a MaineDOT 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 a list of actions approved on FHWA's behalf (Programmatic CE approvals), pursuant to this Agreement to the FHWA Division Office annually. The list of actions certified will contain the following information:
  - a. The MaineDOT project number, project name, project location and project description; including the route number or facility name where the project will occur;
  - b. Identify the CE action listed in the regulation; and
  - c. List any consultations or technical analyses required to meet other federal environmental laws, if applicable (e.g., Section 7, Section 4(f), Section 106, etc.).
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. MaineDOT 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 MaineDOT CE approvals on FHWA's behalf and MaineDOT CE certifications to FHWA, applicable approval and re-evaluation requirements in Section VI, and applicable quality control/quality assurance, monitoring, and performance requirements in Section VII.
5. Relying only upon employees directly employed by MaineDOT to make CE approvals or certifications submitted to FHWA under this agreement. MaineDOT 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. FHWA is responsible for:

1. Providing timely advice and technical assistance on CEs to MaineDOT, 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 MaineDOT under this Agreement. The FHWA Division Office shall make every effort to review and approve (or object to) certifications prepared by MaineDOT within 7 business days.
3. Overseeing the implementation of this Agreement in accordance with the provisions in Section VII, including applicable monitoring and performance provisions.



## **V. DOCUMENTATION OF MAINEDOT CE APPROVALS AND CERTIFICATIONS**

- A. For MaineDOT CE approvals (Programmatic CEs) and MaineDOT CE certifications to FHWA for approval, the MaineDOT shall ensure that it fulfills the following responsibilities for documenting the project-specific determinations made:
1. For actions listed in Appendix A and B, MaineDOT shall 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 document the approval of the CE in MaineDOT's ProjEx database and MaineDOT's environmental electronic project file (CPD e-file).
  2. Within one year of the date of implementation of this Agreement, MaineDOT shall work with FHWA to establish a process for documenting compliance with all appropriate environmental laws and regulations for projects that are funded or approved by FHWA.
- B. MaineDOT shall maintain a project record for CE approvals it makes on FHWA's behalf and each CE submitted to FHWA for individual approval. This record should include at a minimum:
1. Any checklists, forms, permits, approvals, or other documents and exhibits that summarize the consideration of project effects and unusual circumstances;
  2. A summary of public involvement, including public meeting documentation, complying with the requirements of the FHWA-approved public involvement plan;
  3. Documentation that the next phase (i.e., Right-of-Way, Construction, etc.) of the project is identified in the most recent Statewide Transportation Improvement Program (STIP);
  4. Any stakeholder and resource and regulatory agency communication, correspondence, or consultation;
  5. The name and title of the document approver and the date of MaineDOT's approval or FHWA's final approval; and
  6. 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. Any electronic or paper project records maintained by MaineDOT shall be provided to the FHWA Division Office at their request. MaineDOT 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 MaineDOT 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. MaineDOT's approval of CEs listed in Appendix A and B and certification of CEs submitted to the FHWA Division Office for individual approval has only been delegated to and may only be made by MaineDOT Environmental Office staff.
- B. In accordance with 23 CFR 771.129, MaineDOT 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. MaineDOT Quality Control & Quality Assurance**

MaineDOT 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. MaineDOT Performance Monitoring and Reporting.**

- 1. FHWA and MaineDOT shall cooperate in monitoring performance under this Agreement and work to assure quality performance.
- 2. MaineDOT shall annually submit to FHWA (electronically or hard copy) a report summarizing its performance under this Agreement. The report will be based on a calendar year and be submitted to FHWA by February 1<sup>st</sup> of every year. The report will identify any areas where improvement is needed and what measures MaineDOT is taking to implement those improvements. The report will include a description of actions taken by MaineDOT as part of its quality control efforts under Section VII(A).

### **C. FHWA Oversight and Monitoring**

- 1. Monitoring by FHWA will include consideration of MaineDOT's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of MaineDOT's CE approvals, CE submissions to FHWA for approval, and the effectiveness of MaineDOT'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. MaineDOT and FHWA shall jointly prepare a corrective action plan that will be implemented by MaineDOT to address any findings or observations identified in the FHWA review. MaineDOT should draft the corrective action plan within 45 days of



FHWA finalizing its review. The results of that review and corrective actions taken by MaineDOT 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 MaineDOT's performance under this Agreement. FHWA may require MaineDOT 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. MaineDOT agrees to cooperate with FHWA in all oversight and quality assurance activities.

## VIII. AMENDMENTS

- A. If the parties agree to amend this Agreement, then FHWA and MaineDOT 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. MaineDOT 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 MaineDOT requests renewal and FHWA determines that MaineDOT 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 30 days written notice to the other party.
- D. This Agreement shall be terminated if the process in Section V(A)(2) has not been implemented within one year of the date of the last signature to this Agreement.
- E. **Expiration or termination of this Agreement shall mean that MaineDOT 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.



David Bernhardt  
Commissioner  
Maine Department of Transportation

2/9/16

Date



Todd D. Jorgensen  
Division Administrator  
Federal Highway Administration

2/17/16

Date



## APPENDIX A - CEs established in 23 CFR 771.117(c)

The following actions meet the criteria for CEs in the CEQ regulations (40 CFR 1508.4) and §771.117(a) and normally do not require any further NEPA approvals by the FHWA:

(1) Activities which do not involve or lead directly to construction, such as planning and research activities; grants for training; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system.

(2) Approval of utility installations along or across a transportation facility.

(3) Construction of bicycle and pedestrian lanes, paths, and facilities.

(4) Activities included in the State's *highway safety plan* under 23 U.S.C. 402.

(5) Transfer of Federal lands pursuant to 23 U.S.C. 107(d) and/or 23 U.S.C. 317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA.

(6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.

(7) Landscaping.

(8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.

(9) The following actions for transportation facilities damaged by an incident resulting in an emergency declared by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121):

(i) Emergency repairs under 23 U.S.C. 125; and

(ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:

(A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and

(B) Is commenced within a 2-year period beginning on the date of the declaration.

- (10) Acquisition of scenic easements.
- (11) Determination of payback under 23 U.S.C. 156 for property previously acquired with Federal-aid participation.
- (12) Improvements to existing rest areas and truck weigh stations.
- (13) Ridesharing activities.
- (14) Bus and rail car rehabilitation.
- (15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.
- (16) Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.
- (17) The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a CE.
- (18) Track and railbed maintenance and improvements when carried out within the existing right-of-way.
- (19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.
- (20) Promulgation of rules, regulations, and directives.
- (21) Deployment of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience. Examples include, but are not limited to, traffic control and detector devices, lane management systems, electronic payment equipment, automatic vehicle locaters, automated passenger counters, computer-aided dispatching systems, radio communications systems, dynamic message signs, and security equipment including surveillance and detection cameras on roadways and in transit facilities and on buses.
- (22) Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. Existing operational right-of-way refers to right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose. This area includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, etc.) and other areas maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities. Portions of the right-of-way that have not been disturbed or



that are not maintained for transportation purposes are not in the existing operational right-of-way.

(23) Federally-funded projects:

(i) That receive less than \$5,000,000 (*as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor*) of Federal funds; or

(ii) With a total estimated cost of not more than \$30,000,000 (*as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor*) and Federal funds comprising less than 15 percent of the total estimated project cost.

(24) Localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.

(25) Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. 1341; 1342)) carried out to address water pollution or environmental degradation.

(26) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes), if the action meets the constraints in paragraph (e) of this section.

(27) Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints in paragraph (e) of this section.

(28) Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings, if the actions meet the constraints in paragraph (e) of this section.

(29) Purchase, construction, replacement, or rehabilitation of ferry vessels (including improvements to ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities which themselves are within a CE.

(30) Rehabilitation or reconstruction of existing ferry facilities that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in the existing facility's capacity. Example actions include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.

## APPENDIX B - CEs established in 23 CFR 771.117(d)

Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after Administration approval unless otherwise authorized under an executed agreement pursuant to paragraph (g) of this section. The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to:

(1)-(3) [Reserved]

(4) Transportation corridor fringe parking facilities.

(5) Construction of new truck weigh stations or rest areas.

(6) Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.

(7) Approvals for changes in access control.

(8) Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

(9) Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.

(10) Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.

(11) Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.

(12) Acquisition of land for hardship or protective purposes. 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 required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

(i) 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.

(ii) Protective acquisition is done to prevent imminent development of a parcel which may be needed for a proposed 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.

(13) Actions described in paragraphs (c)(26), (c)(27), and (c)(28) of this section that do not meet the constraints in paragraph (e) of this section.