

PROGRAMMATIC AGREEMENT

BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION, KENTUCKY DIVISION AND THE KENTUCKY TRANSPORTATION CABINET REGARDING THE PROCESSING OF ACTIONS CLASSIFIED AS CATEGORICAL EXCLUSIONS FOR FEDERAL-AID HIGHWAY PROJECTS

THIS PROGRAMMATIC AGREEMENT (“Agreement”), made and entered into this 4/11/2023 day of _____ 2023, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION (“FHWA”) and the STATE of Kentucky, acting by and through its Kentucky Transportation Cabinet (“KYTC”) hereby provides as follows:

WITNESSETH:

Whereas, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, 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 natural and human environment and, therefore, do not require the preparation of an EA or EIS (23 CFR 771.117(c)-(d));

Whereas, the KYTC 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 the KYTC 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 (23 CFR 771.117(g));

Now, therefore, the FHWA and KYTC enter into this Programmatic Agreement (“Agreement”) for the processing of categorical exclusions.

I. PURPOSE

The purpose of this Agreement is to authorize KYTC to determine on behalf of FHWA whether a project qualifies for a CE action specifically listed in 23 CFR 771.117 (listed in Appendix A and B of this

Agreement). This Agreement also authorizes KYTC to provide documentation to FHWA that an action that it cannot approve on behalf of FHWA according to the terms of this Agreement 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).

II. AUTHORITIES

This agreement is entered into pursuant to the following authorities:

- A. National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*
- B. Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141, 126 Stat. 405, Sec. 1318(d) (July 6, 2012)
- C. Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94, 129 Stat. 1312, Sec. 1315 (Dec. 4, 2015)
- D. 40 CFR parts 1500 - 1508
- E. DOT Order 5610.1C
- F. 23 CFR 771.117

III. RESPONSIBILITIES

A. The KYTC is responsible for:

1. Ensuring the following process is completed for each project that qualifies for a CE:

- 1. For actions qualifying for a CEMP, CE Level 1 or CE Level 2 listed in Appendix A (CEs established in 23 CFR 771.117(c)) or Appendix B (CEs established in 23 CFR 771.117(d)), that do not exceed the thresholds outlined below, the KYTC may make a CE approval on behalf of FHWA. The KYTC will identify the applicable CE from Appendix A or B, 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.
- 2. The KYTC may not approve CE Level 3 actions listed in Appendices A or B, that exceed the thresholds for the CEMP, CE Levels 1 or 2. The KYTC shall provide documentation to FHWA that the action qualifies for a CE.
- 3. KYTC may process projects that meet the definition of a CE in one of three (3) ways:
 - 1. CE for Minor Projects (CEMP)
 - A. Actions defined in Appendix A and satisfying the following criteria may be documented with a CEMP:
 - 1) An acquisition of no more than a minor amount of right-of-way;
 - 2) No residential or non-residential displacements;
 - 3) No bridge permit required from the U.S. Coast Guard, under section 9 of the Rivers and Harbors Act of 1899;
 - 4) Wetland and stream impacts that meet the terms and conditions of a U.S. Army Corps of Engineers nationwide or general permit under section 404 of the Clean Water Act;
 - 5) A finding of either “no historic properties affected” or “no adverse effect” to historic properties under the National Historic Preservation Act;

- 6) An impact no greater than a de minimis use of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (Section 4(f));
 - 7) No impacts to federally listed threatened or endangered species determined May Affect, Likely to Adversely Affect unless addressed through the Kentucky Programmatic Conservation Memorandum of Agreement for Forest Dwelling Bats (CMOA).
 - 8) Construction of temporary access, or the closure of existing road, bridge, or ramps, that would result in major traffic disruptions;
 - 9) No change in access control;
 - 10) A floodplain encroachment other than functionally dependent uses (e.g., bridges, wetlands) or actions that facilitate open space use (e.g., recreational trails, bicycle and pedestrian paths);
 - 11) No construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers; and,
 - 12) No impacts to Section 6(f) properties.
- B. If any of the criteria above cannot be met, the action will be processed as a CE Level 1, 2, or 3.

2. CE Level 1

- A. Actions listed in Appendix B, and actions listed in Appendix A that do not satisfy criteria identified in III.A(1)(c)(i), may be documented with a CE Level 1, provided that they satisfy the following criteria:
- 1) A finding under “Section 106” of the National Historic Preservation Act of either:
 - a) “No historic properties affected” or “no adverse effect” to historic properties; or,
 - b) For bridge replacement or rehabilitation projects meeting criterion 2 of this section, a finding of adverse effect to historic properties;
 - 2) No Section 4(f) use, unless such use can be addressed with a de minimis determination or, with FHWA approval, through a programmatic evaluation;
 - 3) No impacts to Section 6(f) properties that require a conversion;
 - 4) No more than 5 relocations;
 - 5) No more than 10 acres of fee simple ROW;
 - 6) No relocation from any identified Environmental Justice population unless approved by FHWA.
 - 7) No disproportionately high and adverse effects to minority or low-income population;

- 8) No more than 0.5 acre of wetland impacts; and,
 - 9) No impacts to federally listed threatened or endangered species determined May Affect, Likely to Adversely Affect unless addressed through the CMOA.
- B. If any of these criteria cannot be met, the action will be processed as a CE Level 2 or 3.

iii. CE Level 2

- A. Actions listed in Appendix or B that do not satisfy criteria identified in III.A(1)(c)(i) or III.A(1)(c)(ii) may be documented with a CE Level 2, provided that they satisfy the following criteria:
- 1) A finding under “Section 106” of the National Historic Preservation Act of either:
 - a) “No historic properties affected” or “no adverse effect” to historic properties; or,
 - b) For bridge replacement or rehabilitation projects meeting criterion 2 of this section, a finding of adverse effect to historic properties;
 - 2) No Section 4(f) use, unless such use can be addressed with a de minimis determination or, with FHWA approval, through a programmatic evaluation;
 - 3) No impacts to Section 6(f) properties that require a conversion;
 - 4) No more than 10 relocations;
 - 5) No relocation from any identified Environmental Justice population unless approved by FHWA.
 - 6) No more than 25 acres fee simple ROW;
 - 7) No disproportionately high and adverse effects to minority or low-income populations.
 - 8) No more than 5 acres of wetland impacts; and,
 - 9) No impacts to federally listed threatened or endangered species determined May Affect, Likely to Adversely Affect unless addressed through the CMOA.
- B. If any of these criteria cannot be met, the action will be processed as a CE Level 3.

iv. CE Level 3

- A. Actions meeting the definition of a CE in 23 CFR 771.117(a) but not satisfying the criteria for CEMP, CE Level 1 or CE Level 2 may be documented with a CE Level 3.
- B. Projects that involve any of the following may only be considered eligible for processing as a CE Level 3 with the written approval of FHWA.

- 1) Any disproportionately high and adverse effects relative to minority or low-income populations.
 - 2) Relocation from any identified Environmental Justice population;
 - 3) Unresolved or substantial public and/or resource agency opposition. CE documentation must demonstrate that the public or agency concerns have been addressed and is attached.
 - 4) Impacts to areas of cultural or religious significance to Native American tribes.
 - 5) Project resulting in nonconformity with air quality standards.
 - 6) Federal or proposed federal wild and scenic river corridor impacts that result in an Individual 4(f) Impact/Use.
 - 7) With the exception of species addressed under the CMOA, impacts that result in a "May Affect, Likely to Adversely Affect" federally listed threatened or endangered species.
 - 8) Individual Section 4(f) Impacts/Use.
 - 9) Section 6(f) Impacts that require a conversion.
- C. Should the Division Office object to a KYTC CE Level 3, this may not constitute a disapproval of the action, but may signify that FHWA will need to engage in project-specific review to verify that the documentation is adequate, which may include consultation with other agencies.
- d. Actions not specifically listed in Appendices A and B may not be documented with a CE without approval of FHWA. If the KYTC believes that an unlisted action meets the requirements of a CE under 40 CFR 1508.4 and 23 CFR 771.117(a), it may prepare a request for consideration by FHWA and determination of the appropriate level of environmental documentation. The environmental document shall be submitted to FHWA for approval prior to the time FHWA contemplates its next approval or grant action for the project.
 - e. KYTC shall provide a copy of the CE documentation prepared for the action(s) in accordance with Section IV of this Agreement.
 - f. The Division of Program Management shall note on the FHWA Programming Document (Form PR-1), that the activity has been documented with a CE.
2. 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. The KYTC may decide to conduct, or FHWA may require, additional studies be completed prior to a CE approval, or the preparation of an EA or EIS.
 3. Meeting applicable documentation requirements in Section IV for State CE approvals on FHWA's behalf and CE Level 3 documentation prepared for FHWA, applicable approval and re-evaluation requirements in Section V, and applicable quality control/quality, monitoring, and performance requirements in Section VI.
 4. The KYTC may not delegate its responsibility for CE approvals to third parties (i.e., consultants, local government staff or other State agency staff).

5. Notifying the FHWA of public controversy, unresolved resource agency concerns or other unusual circumstances that may arise during project development.

B. The FHWA is responsible for:

1. Providing timely advice and technical assistance on CEs to the KYTC, as requested.
2. Providing timely input on and review of CE actions. FHWA will base its approval of CE actions on the project documentation prepared by KYTC under this Agreement.
3. Overseeing the implementation of this Agreement in accordance with the provisions in Section VII, including applicable monitoring and performance provisions.
4. Determining if NEPA documentation should be elevated based on environmental impacts, public or resource agency controversy, or other unusual circumstances. Decisions to elevate NEPA documentation may include change in NEPA class of action or level of CE.

IV. CE DOCUMENTATION APPROVALS

KYTC shall prepare the documentation for projects processed as a CE in one of three ways:

A. For CEs meeting the CEMP criteria:

1. The District Environmental Coordinator (DEC) or Environmental Project Manager (EPM) and the Project Manager (PM) shall confirm that CEMP actions meet the criteria specified in subpart III(A)(1)(c).
2. The DEC or EPM shall prepare a Categorical Exclusion for Minor Projects form documenting that the activity is a CEMP Project Action:
 - a. The documentation will include the photographic record and any supporting data, documenting the findings that the project meets the CEMP project criteria.
 - b. The CEMP determination will be prepared for the signature of both the DEC or EPM and the PM.

B. For CEs meeting the CE Levels 1 and 2 criteria:

1. The DEC or EPM and the PM shall confirm that the CE Level 1 actions meet the criteria specified in subpart III.(A)(1)(c) and document this finding with their signatures.
2. The DEC or EPM, with assistance of subject matter experts (SME), and/or the Project Team (as necessary), shall prepare supporting documentation (exhibits, maps, photos, coordination letters, etc.), including the execution by the DEC or EPM and PM of a Categorical Exclusion Environmental Determination Checklist.
3. CE Level 1 actions are considered to be approved once the CE checklist and supporting documentation has been signed and provided to both the Division of Environmental Analysis (DEA) and the FHWA.
4. The DEA or FHWA shall have thirty days to voice any objections or reservations about the CE Level 1 and 2 designations or the content of the CE Checklist.
5. CE Level 2 actions require the additional signature and approval of the DEA.

C. For CEs meeting the CE Level 3 criteria:

1. The EPM, with SME, DEC, and Project Team assistance as necessary, is responsible for execution of the CE Checklist for CE Level 3 projects.
 2. Documentation for a CE Level 3 includes a CE Checklist and any documentation required to support the CE Level 3 designation.
 3. With recommendation of the DEC or EPM, and the PM, DEA will sign and forward the CE Checklist and supporting materials to the FHWA for approval.
- D. The KYTC should provide any electronic or paper project records maintained by the KYTC to FHWA at its request. The KYTC 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 KYTC of its project or program recordkeeping responsibilities under 2 CFR 200.333 or any other applicable laws, regulations, or policies.
- E. Variations from Standard Practice
1. KYTC may request individual CE review and approval from FHWA even though an action or project falls within the bounds of CE Level 1 or 2, or the list of CEMP projects. The determination for the need for this exception to the standard procedures will be made by the DEA.
 2. Projects may be evaluated against the various CE Level criteria on a case-by case basis and, if found to be consistent with the criteria and intent of 23 CFR 771.117, may be recommended by KYTC for CE designation. The determination for the applicability of CE status for these types of actions or projects will be made with the participation and approval of the FHWA.

V. RE-EVALUATIONS

- A. In accordance with 23 CFR 771.129, the KYTC shall re-evaluate CE determinations and FHWA's approvals for projects, consult with FHWA and, as necessary, prepare additional documentation to ensure that determinations are still valid.
- B. Prior to requesting subsequent major project approvals from the FHWA, all CE projects shall be re-evaluated by KYTC to establish and document whether conditions have changed, rendering the CE classification invalid.
- C. A CE approval is considered to have expired if it is more than two (2) years old. If the CE approval has expired a re-evaluation is required.

VI. QUALITY CONTROL/QUALITY ASSURANCE, MONITORING & PERFORMANCE

- A. **KYTC Quality Control & Quality Assurance**
The KYTC shall 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. The FHWA and KYTC agree to cooperate in monitoring performance under this Agreement and work to assure quality performance.
- B. **FHWA Oversight and Monitoring**
 1. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of KYTC, as well as KYTC's performance of its CE processing

functions. Performance considerations include, without limitation, the quality and consistency of KYTC's CE approvals, CE submissions to FHWA for approval, adequacy and capability of KYTC staff and consultants, and the effectiveness of KYTC's administration of its internal CE approvals.

2. FHWA shall conduct a program audit at least once every three years, to review CE determinations made by KYTC and evaluate adherence to this agreement in its processing of CE documents. FHWA shall notify KYTC, in writing, of any deficiencies identified. KYTC shall provide, in writing, a plan for implementing corrective measures to assure that any deficiencies are corrected, and the root cause addressed.
3. Nothing in this Agreement prevents FHWA from undertaking other monitoring or oversight actions, including audits, with respect to KYTC's performance under this Agreement. The FHWA may require KYTC 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 KYTC agrees to cooperate with FHWA in all oversight and quality assurance activities.

VII. AMENDMENTS


If the parties agree to amend this Agreement, then FHWA and KYTC 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. Changes to Appendices A and B, agreed upon by both parties, shall not require amendment of the Agreement or effect any of its terms.

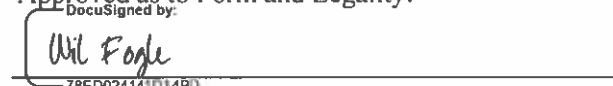
VIII. TERM, RENEWAL, AND TERMINATION

- A. This Agreement shall have a term of five (5) years, effective on the date of the last signature. The KYTC 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 KYTC requests renewal, and FHWA determines that KYTC 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 by giving at least 30 days written notice to the other party.
- D. Expiration or termination of this Agreement shall mean that the KYTC 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.

	4/14/2023
Todd Jeter Division Administrator Kentucky Division, Federal Highway Administration	Date

	4/11/2023
Jim Gray, Secretary Kentucky Transportation Cabinet	Date

<p>Approved as to Form and Legality:</p> 	4/10/2023
KYTC Office of Legal Services	Date

Appendix A: CEs listed in 23 CFR 771.117(c) and 23 CFR 771.117(e)
Appendix B: CEs listed in 23 CFR 771.117(d) and 23 CFR 771.117(e)

Appendix A

23 CFR 771.117 Sections (c) and (e)

23 CFR 771.117 Section (c)

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

(1) Activities that 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 that 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 that 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 means all real property interests acquired for the construction, operation, or mitigation of a project. This area includes the features associated with the physical footprint of the project including but not limited to the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway. This also includes fixed guideways, mitigation areas, areas maintained or used for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transportation power substations, transportation venting structures, and transportation maintenance facilities.
- (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, see www.fhwa.dot.gov or www.fta.dot.gov) 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, see www.fhwa.dot.gov or www.fta.dot.gov) 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 that 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.

23 CFR 771.117 Section (e)

(e) Actions described in (c)(26), (c)(27), and (c)(28) of this section may not be processed as CEs under paragraph (c) if they involve:

(1) An acquisition of more than a minor amount of right-of-way or that would result in any residential or non-residential displacements;

(2) An action that needs a bridge permit from the U.S. Coast Guard, or an action that does not meet the terms and conditions of a U.S. Army Corps of Engineers nationwide or general permit under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899;

(3) A finding of "adverse effect" to historic properties under the National Historic Preservation Act, the use of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (section 4(f)) except for actions resulting in *de minimis* impacts, or a finding of "may affect, likely to adversely affect" threatened or endangered species or critical habitat under the Endangered Species Act;

(4) Construction of temporary access or the closure of existing road, bridge, or ramps that would result in major traffic disruptions;

(5) Changes in access control;

(6) A floodplain encroachment other than functionally dependent uses (e.g., bridges, wetlands) or actions that facilitate open space use (e.g., recreational trails, bicycle and pedestrian paths); or construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.

Appendix B

23 CFR 771.117 Sections (d) and (e)

23 CFR 771.117 Section (d)

(d) Additional actions that 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 must submit documentation that 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 that 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.

23 CFR 771.117 Section (e)

(e) Actions described in (c)(26), (c)(27), and (c)(28) of this section may not be processed as CEs under paragraph (c) if they involve:

- (1) An acquisition of more than a minor amount of right-of-way or that would result in any residential or non-residential displacements;
- (2) An action that needs a bridge permit from the U.S. Coast Guard, or an action that does not meet the terms and conditions of a U.S. Army Corps of Engineers nationwide or general permit under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899;
- (3) A finding of "adverse effect" to historic properties under the National Historic Preservation Act, the use of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (section 4(f)) except for actions resulting in *de minimis* impacts, or a finding of "may affect, likely to adversely affect" threatened or endangered species or critical habitat under the Endangered Species Act;
- (4) Construction of temporary access or the closure of existing road, bridge, or ramps that would result in major traffic disruptions;
- (5) Changes in access control;
- (6) A floodplain encroachment other than functionally dependent uses (e.g., bridges, wetlands) or actions that facilitate open space use (e.g., recreational trails, bicycle and pedestrian paths); or construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.