

**CATEGORICAL EXCLUSION AGREEMENT**

**BETWEEN**

**THE FEDERAL HIGHWAY ADMINISTRATION**

**AND**

**THE KENTUCKY TRANSPORTATION CABINET**

# CATEGORICAL EXCLUSION AGREEMENT

This Agreement supersedes all previous Categorical Exclusion (CE) processing agreements held between the Federal Highway Administration - Kentucky Division Office (FHWA) and the Kentucky Transportation Cabinet (KYTC).

## INTRODUCTION

In keeping with the FHWA and KYTC Interagency Consensus on Streamlining the NEPA Process for Transportation Projects, approved on March 3, 1998, this Agreement revises procedures for processing projects classified as CE as defined in Title 23 Code of Federal Regulations, Part 771.117 (23 CFR 771.117), and as amended.

This Agreement establishes a procedure that will reduce the paperwork and processing time for certain federal actions that do not have significant impacts on the human and natural environment. In entering into this Agreement, KYTC agrees to act in conjunction with FHWA in assuring compliance with all applicable federal environmental regulations and related requirements. This Agreement has been developed in conformance with the policy and procedures for environmental process of CE actions as defined in Section 23 CFR 771.117 (and as amended).

KYTC and FHWA concur with the classification of certain types of CEs, which normally are found to have no significant social, economic and environmental effect. KYTC agrees that all the conditions stated in this Agreement will be satisfied for all projects processed under the Agreement.

In accordance with FHWA regulations (23 CFR 771, "Environmental Impact and Related Procedures"), CEs are actions which meet the definition contained in the Council on Environmental Quality (CEQ) regulations, 40 CFR 1508.4, and based on past experience with similar actions, do not involve significant environmental impacts. They are actions which:

- Do not induce significant impacts to planned growth or land use for the area,
- Do not require the relocation of significant numbers of people,
- Do not have a significant impact on any natural, cultural, recreational, historic or other resource,
- Do not involve significant air, noise or water quality impacts,
- Do not have significant impacts on travel patterns, or
- Do not otherwise, either individually or cumulatively, have any significant environmental impacts and are, therefore, excluded from the requirement to prepare an EA or EIS.

KYTC and FHWA agree to assess the significance of impacts on a project-by-project basis applying the context and intensity factors listed below to the specifics of the project, rather than establishing program-wide numerical or qualitative thresholds. Significance is defined in the CEQ regulations at 40 CFR 1508.27. Significance varies

with the setting of the proposed action, and short/long-term effects should be considered. Impacts might be considered in the *context* of society as a whole, the affected region or locality. With a site-specific action, significance would usually depend on the effects in the locale, rather than in the world as a whole. The *intensity* of potential impacts will provide a great deal of information about the project.

Whether an impact is a significant impact depends not only on the absolute value of an impact, but also on the circumstances under which the impact is considered.

Factors to consider regarding intensity or severity of impacts include:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Uniqueness characteristics of the geographic area such as proximity to historic or cultural resources, parkland, prime farmland, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects of the quality of human environment are likely to be highly controversial.
- (5) The degree to which the effects on the quality of the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulative significant impact on the environment. Significance cannot be avoided by breaking it down into small component parts.
- (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for the National Register of Historic Places or may cause loss of significant scientific, cultural or historical resources.
- (9) The degree to which the action may adversely affect an endangered or threatened species or its habitats that has been determined to be critical under the Endangered Species Act of 1973.
- (10) Whether the action threatens a violation of federal, state or local laws or requirements imposed for the protection of the environment.

## **PROVISIONS**

This Agreement provides for:

- (1) KYTC Districts and KYTC's Division of Environmental Analysis (DEA) to act cooperatively with and on behalf of FHWA in assuring compliance with all applicable federal environmental regulations and related requirements.
- (2) A process that will be consistent in documenting information that allows for defensible CEs on a statewide basis.
- (3) An efficient process that is concise and easy to follow.
- (4) A process that is easy to follow and would allow the District Environmental Coordinators, Project Managers, DEA and FHWA personnel to make appropriate decisions based on the information provided.
- (5) A process that utilizes technological or innovative advances to reduce the amount of paperwork required for CE processing.

In carrying out this Agreement, KYTC and FHWA agree to a process to use CEs to document decisions for what are defined as "Minor Projects". In addition, it is agreed that additional project types that also satisfy the criteria for assessment as CEs may be documented using one of three additional levels of review and approval for CE projects. The appropriate level of CE shall be determined based on the type of action and the impact of the project. KYTC shall provide FHWA with a copy of documentation prepared for all projects evaluated under this agreement. FHWA approval of project authorization requests shall be considered indicative of its concurrence that the project has been or is intended to be documented with a CE.

## **CATEGORICAL EXCLUSIONS For MINOR PROJECTS (CEMP)**

Based on past experience with similar environmentally insignificant actions, FHWA and KYTC have concluded and are documenting under this Agreement that the project types listed below are considered "Minor Projects", are appropriately assessed as CE actions and will not directly, indirectly or cumulatively cause significant impacts to the human and natural environment. These actions meet the criteria of 23 CFR 771.117(a) and (c), and 40 CFR 1508.4, "and normally do not require any further NEPA reviews by the Administration." The District Environmental Coordinator (DEC) or Environmental Project Manager (EPM) shall confirm that these actions meet the above criteria and document their findings. A CEMP may **NOT** be used to document projects having any of the following characteristics:

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

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(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.

CEMP Actions include the following:

(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.

These projects may also include those defined as follows, provided that all work is conducted within existing right of way:

A. Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes)

B. Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting

C. Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings

D. Bridge scour and debris removal

(23) Federally-funded projects:

A. That receive less than \$5,000,000 of Federal funds; or

B. With a total estimated cost of not more than \$30,000,000 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) 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.

(27) 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.

## **CE PROJECT LEVELS**

If FHWA or KYTC believes that the above CEMP Actions need to be evaluated more closely than the CEMP Project Action procedures entail, these project actions as well as other project actions listed in Table 4 of this Agreement may be processed as one of three levels of CE as detailed below.

## **CE LEVELS 1, 2 AND 3: REVIEW AND PROCEDURE**

Projects listed in Table 4 of this Agreement which have been historically determined to have no significant impacts to the human and natural environment, may be processed as a CE after the appropriate review and procedures are followed as outlined below for the various levels of project actions. CEs have been divided into three levels (1, 2 and 3). The level in which the project is processed and who has signature authority is based on the context and intensity of impacts associated with the project. For example, if the impacts associated with a project fall within the parameters agreed to by FHWA

and KYTC in Table 1, the project may be processed as a CE Level 1 project, and therefore, the KYTC District (District) in which the project is located has review and signature authority. Likewise, if the impacts associated with a project action fall within the agreed parameters listed in Table 2, the project may be processed as a CE Level 2, and the KYTC Division of Environmental Analysis (DEA) has review and signature authority. If the impacts associated with a project exceed the agreed parameters but the project still qualifies as a CE Level project, FHWA has review and signature authority. FHWA shall be provided a copy of all CE documents approved under Levels 1 or 2.

### **CE LEVEL 1 CRITERIA**

CE Level 1 projects are projects that have been determined to have little or no impact to the environment. The DEC shall confirm that these actions meet the criteria for CE Level 1 projects as noted in Table 1 and no significant impacts exist. The DEC and the KYTC District Project Manager (Project Manager) signature is required for CE Level 1 projects. DEA requires that the CE Checklist and necessary supporting documentation be completed and kept on file by the District. Copies of these documents shall be provided to both DEA and FHWA. Projects that do not meet the criteria Level 1 projects may be processed as a CE Level 2 project. Context and intensity of impacts must also be considered when determining whether elevation to a highway level is appropriate, even if the Level 1 criteria are satisfied. Conversely, if Level 1 criteria are not satisfied, but context and intensity analysis determines that the effect of those criteria that is exceeded are minimal and that the criteria listed in Table 2 is not exceeded, then DEA may delegate approval of the document back to the District.

**TABLE 1**

**Projects involving any of the following will not be considered eligible for processing as a Level 1 CE:**

- Any disproportionately high and adverse impacts relative to environmental justice
- Unresolved or substantial public and/or resource agency opposition
- Impacts to areas of cultural or religious significance to Native American tribes
- Projects resulting in nonconformity with air quality standards
- Federal or proposed federal wild and scenic river corridor impacts that result in an Individual 4(f) Impact/Use
- Impacts to federally listed threatened or endangered species not addressed through a programmatic consultation
- Individual Section 4(f) Impacts/Use
- Section 6(f) Impacts

**Projects that involve more than one of the following will not be considered eligible for processing as a CE Level 1 without the written consent of the DEA Director or his designee. (If only one of the impact areas is affected, all necessary coordination and supporting documentation must be attached to the CE Level 1):**

- Programmatic 4(f) impacts (Approved by DEA and FHWA)
- Individual 404
- The reconstruction and/or addition of through travel lanes of an existing facility, which is more than 1 mile in length of new ROW
- Construction of an interchange to replace an existing at grade intersection

**Impacts of CE Level 1 Projects Can Involve:**

1. Minor right-of-way (ROW) acquisition involving a maximum of 10 acres or involving a maximum of 5 relocations.
2. Minor amounts of hazardous materials (involvement limited to petroleum related underground storage tanks and/or releases, asbestos and lead based paint).
3. Wetland impacts that are below the threshold that require a Nationwide Permit.
4. Section 106 impacts provided necessary documentation of consultation is included in the project files as required by 36 CFR Part 800.
5. Section 4(f) impacts/use that fall within the bounds of a Programmatic 4(f) or *de minimis*, provided that the determination has been approved by DEA and FHWA.
6. Minor public or agency controversy on environmental grounds that has been resolved.

## CE LEVEL 2 CRITERIA

The following criteria apply to projects classified as CE Level 2 projects. The determination that these actions meet the criteria of CE Level 2 projects will be made by DEA. The review and signature of the Director of DEA or his designee, the Project Manager, and the DEC are required for CE Level 2 projects. The Director of DEA may, at his discretion and in writing, review and agree to the processing of a Level 2 CE by the DEC and Project Manager if provided sufficient documentation to warrant such action and if the criteria for a CE Level 2 project (Table 2) are not exceeded. Projects that do not meet the following criteria may be processed as CE Level 3 projects. Context and intensity of impacts must also be considered when determining whether elevation to a Level 3 is appropriate, even if the Level 2 criteria are satisfied. Conversely, if Level 2 criteria are not satisfied but context and intensity analysis determines that the effects of those exceeded criteria are minimal, then FHWA may delegate approval of the document back to the KYTC.

**TABLE 2**

Projects that involve any of the following will not be considered eligible for processing as a CE Level 2:

- Any disproportionately high and adverse impacts relative to environmental justice
- Unresolved or substantial public and/or resource agency opposition
- Impacts to areas of cultural or religious significance to Native American tribes
- Projects resulting in nonconformity with air quality standards
- Federal or proposed federal wild and scenic river corridor impacts that result in an Individual 4(f) Impact/Use
- Impacts to federally listed threatened or endangered species not addressed through a programmatic consultation
- Individual Section 4(f) Impacts/Use
- Section 6(f) Impacts

Impacts of CE Level 2 Projects Can Involve:

1. Right-of-way (ROW) acquisition involving a maximum of 10 relocations and/or up to (25 acres) of permanent right-of-way.
2. Section 106 impacts, provided necessary documentation of consultation is included in the project files as required by 36 CFR Part 800.
3. Wetland impacts that arise to a Nationwide or Individual Permit.
4. Section 4(f) impacts/use that fall within the bounds of a Programmatic 4(f) or de minimis, provided that the determination has been approved by FHWA.

### CE LEVEL 3 CRITERIA

Actions with impacts not discussed in this Agreement or with higher impacts than listed in Table 2 require coordination with FHWA. Appropriate environmental documentation must be submitted to FHWA so that a review and determination can be made as to the level of review and documentation needed for the project under NEPA. In some cases, FHWA may decide that the project should be elevated to an Environmental Assessment (EA). An FHWA signature is required for all CE Level 3 projects. Projects in this category must meet the criteria and intent of 23 CFR 771.117. Based on past experience with similar actions, these actions do not involve significant environmental impacts.

**TABLE 3**

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.

- Any disproportionately high and adverse impacts relative to environmental justice
- 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.
- Impacts to areas of cultural or religious significance to Native American tribes
- Projects resulting in nonconformity with air quality standards
- Federal or proposed federal wild and scenic river corridor impacts that result in an Individual 4(f) Impact/Use
- Impacts to federally listed threatened or endangered species
- Individual Section 4(f) Impacts/Use
- Section 6(f) Impacts

### CE PROJECT DESCRIPTIONS

Projects listed below, which have no significant impacts to the human and natural environment, may be processed as a CE Level 1, 2 or 3 document, as appropriate:

- (1) Transportation corridor fringe parking facilities.
- (2) Construction of new truck weigh stations or rest areas.
- (3) 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.
- (4) Approvals for changes in access control.

(5) 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.

(6) 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.

(7) 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.

(8) 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.

(9) 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.

A. 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.

B. 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.

(10) 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.

(11) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes) with impacts beyond the existing operational right of way.

(12) Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting with impacts beyond the existing operational right of way.

(13) Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings with impacts beyond the existing operational right of way.

(14) Modification of an existing interchange or the construction of an interchange or a grade separation to replace an existing at grade intersection (FHWA consultation required when the interstate system is involved).

(15) Construction of realignments on new location, not to exceed two miles in realignment length.

(16) Construction of a minor new highway facility, on new location and less than one mile in length. FHWA consultation required when the interstate system or interstate-like freeways are involved.

## **QUALITY CONTROL AND QUALITY ASSURANCE**

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.

## **PUBLIC AVAILABILITY**

KYTC shall post the revised agreement on its webpage within 30 days of its execution.

## **TERM**

This agreement shall be in effect for a period of five years following its execution. Upon conclusion of the term, and any subsequent terms, the parties may agree, in writing, to the extension of the agreement for an additional term. The term for the extension shall be specified but shall not exceed five years.

**STATEMENT OF ADOPTION**

It is hereby determined that the CE projects that are determined to satisfy the criteria and requirements of this Agreement are actions which meet the definition of a CE in 40 CFR 1508.4, and based upon past experience with similar actions, do not involve significant environmental impacts. They constitute actions which: do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, individually or cumulatively, have any significant environmental impacts and do not require the preparation of an Environmental Assessment or an Environmental Impact Statement under NEPA.

APPROVED:

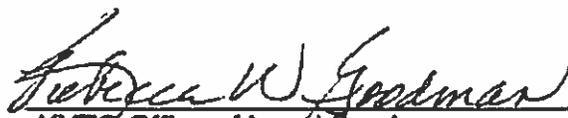
  
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Steve Mills, Acting Division  
Administrator  
Kentucky Division, Federal Highway  
Administration

  
\_\_\_\_\_  
Michael W. Hancock, Secretary  
Kentucky Transportation Cabinet

1/30/15  
Date: \_\_\_\_\_

1/30/15  
Date: \_\_\_\_\_

Approved as to Form and Legality:

  
\_\_\_\_\_  
Rebecca W. Goodman  
KYTC Office of Legal Services

01/30/15  
Date: \_\_\_\_\_