

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

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**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 from those requirements;

**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 Oregon Department of Transportation (ODOT) 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 ODOT projects (23 CFR 771.109);

**Whereas**, Section 1318(d) of the Moving Ahead for Progress in the 21st Century Act (MAP21), 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, allowing States to determine and approve whether an action qualifies for a listed CE on behalf of FHWA without further FHWA review and approval;

**Now, therefore**, the FHWA and the Oregon Department of Transportation enter into this Programmatic Categorical Exclusion Agreement ("Agreement") for the processing of categorical exclusions.

## **I. PARTIES**

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

## **II. PURPOSE**

The purpose of this Agreement is to authorize ODOT to determine and approve on behalf of FHWA whether a project qualifies for a CE listed in 23 CFR 771.117 provided it does not exceed the thresholds described in Section IV.A.1.b [hereinafter “programmatic categorical exclusion” (PCE) approvals].

This Agreement does not delegate any other FHWA responsibility under environmental or other Federal laws. This Agreement applies to all ODOT projects using Federal-aid funds.

## **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, PL. 112-141, 126 Stat, 405, Sec.1318(d)
- C. 40 CFR 1500 – 1508
- D. DOT Order 5610.1C
- E. 23 CFR 771.117
- F. ORS 190.010
- G. ORS 366.558

## **IV. RESPONSIBILITIES**

### **A. The ODOT is responsible for:**

1. Ensuring the following process is completed for each project that qualifies for a PCE:
  - a. The ODOT may approve on behalf of FHWA those PCEs specifically listed in 23 CFR 771.117 (c) and (d) that do not exceed the thresholds in Section IV.A. 1 .b. of this Agreement. The ODOT will identify the applicable listed CE from 771.117 (c) and/or (d), 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 PCE by FHWA is required.
  - b. If the following thresholds are met or exceeded, notwithstanding the listing of the action in 23 CFR 771.117 (c) or (d), ODOT may not approve the PCE and must instead defer to FHWA to review and approve the action.

- i. Involves unusual circumstances as described in 23 CFR 771.117(b);
  - ii. Involves use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. 303) that require preparation of an Individual Section 4(f) Evaluation;
  - iii. Results in a determination of “Adverse Effect” on historic properties protected by Section 106 of the National Historic Preservation Act (NHPA) by FHWA;
  - iv. Requires a U.S. Coast Guard permit;
  - v. Requires an Individual Permit under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act;
  - vi. Results in an increase in the designated regulatory floodway elevation, or an increase of more than 1 foot of surface water elevation in the 100-year floodplain when no regulatory floodway is designated;
  - vii. Requires a Wild and Scenic River Section 7 determination from the river administering agency;
  - viii. Results in changes that substantially affect traffic patterns temporarily or permanently;
  - ix. Requires the acquisition of more than minor amounts of right-of-way or displacement of owners and/or tenants;
  - x. Does not conform to the Air Quality State Implementation Plan;
  - xi. Requires an individual project-level formal consultation under Section 7 of the Endangered Species Act because the project cannot be processed with the Federal-Aid Highway Programmatic Biological Opinion with USF&WS and NMFS;
  - xii. Requires an exception to Oregon Statewide Planning Goals; or
  - xiii. Is controversial. In cases when controversy is anticipated, ODOT will discuss the potential for controversy with FHWA to determine if the project can be processed under this Agreement.
  - xiv. Is identified subsequent to the execution of this agreement by FHWA via written notification to ODOT.
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 ODOT may decide, or FHWA may require, additional studies to be performed prior to making a PCE approval, CE approval, or preparation of an EA or EIS

3. Ensuring that the PCE Determination Form is completed prior to the ODOT request for FHWA right-of-way authorization and that the PCE Approval Document is completed prior to the ODOT request for FHWA construction authorization.
4. Meeting applicable documentation requirements in Section V for PCE approvals on FHWA's behalf, 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 the ODOT to make PCE approvals. The ODOT may not delegate its responsibility for PCE approvals to third parties (i.e., consultants, local government staff, and other State agency staff).
6. Maintaining adequate organizational and staff capability and expertise to effectively carry out the provisions of this Agreement. This includes, without limitation:
  - a. Using appropriate technical and managerial expertise to perform the functions set forth under this Agreement.
  - b. Devoting adequate financial and staff resources for processing and approving of projects under this Agreement.
7. Providing for quality assurance and quality control of consultant-produced documents. The ODOT may procure through consultant services environmental and other technical expertise needed for compliance with this Agreement.
8. Ensuring that the ODOT individuals who prepare and/or approve PCE documentation will, at a minimum:
  - a. Be knowledgeable with and follow the appropriate subsections 23 CFR 771 through 774, and FHWA and ODOT procedures for environmental analysis and NEPA compliance.
  - b. Have completed Introduction to NEPA and Transportation Decision-making web-based course FHWA-NHI-142052.
  - c. Have adequate experience addressing NEPA compliance for transportation projects or until such time, have their work reviewed by staff having the necessary experience.
9. Providing credentials of individuals responsible for the documentation to FHWA every year, as part of the annual report. Information to be supplied includes: (1) Date individual completed course FHWA-NHI-142052; (2) Brief statement of the individual's experience.

B. The FHWA is responsible for:

1. Providing timely advice and technical assistance on PCEs to the ODOT, as requested.

2. Overseeing the implementation of this Agreement in accordance with the provisions in Section VII. C.

## **V. DOCUMENTATION OF ODOT PCE APPROVALS**

- A. For PCE approvals, The ODOT shall identify in its Quarterly Programmatic Categorical Exclusion (PCE) Report (Appendix A) provided to FHWA the applicable actions from 23 CFR 771.117 (c) and/or (d), ensure any conditions specified in FHWA regulation are met, verify that unusual circumstances do not apply, and address all other environmental requirements. Completed PCE Determination Forms and PCE Approval Documents will be accessible via an electronic link in the quarterly report, each with an ODOT signature evidencing approval. Electronic links associated with each project will include all underlying NEPA support documentation.
- B. The ODOT shall maintain a project record for PCE approvals it makes on FHWA's behalf. This record should include at a minimum:
  1. Any checklists, forms, or other documents and exhibits that summarize the consideration of project effects and unusual circumstances;
  2. A summary of public involvement complying with the requirements of FHWA-approved public involvement policy;
  3. Stakeholder communication, correspondence, consultation, or public meeting documentation that supports project and environmental decisions;
  4. The name and title of the document approver and the date of ODOT's approval; and
  5. For cases involving re-evaluations, any documented re-evaluation.
- B. Any electronic or paper project records maintained by the ODOT shall be provided to FHWA upon request. The ODOT 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 three-year retention provision does not relieve ODOT of its project or program recordkeeping responsibilities under 2 CFR § 200.333 or any other applicable laws, regulations, or policies, including ORS 192.420—192.505.

## **VI. NEPA APPROVAL AUTHORITY AND RE-EVALUATIONS**

- A. The ODOT's PCE approvals may only be made by qualified ODOT Geo-Environmental Managers, ODOT Region Environmental Managers or their qualified designees.
- B. These approvals will be indicated in a state-defined field in FMIS, and will also be reported in the ODOT Quarterly PCE Report to FHWA. FHWA will use ODOT's reporting in FMIS, to determine whether to approve right-of-way or construction phases for projects that meet the conditions of this Agreement.

- C. In accordance with 23 CFR 771.129, the ODOT shall re-evaluate its determinations and approvals for projects, consult with FHWA, and as necessary, prepare additional documentation to ensure that determinations are still valid.
- D. If FHWA does not approve the project authorization for right-of-way or construction due to concerns with NEPA compliance, then FHWA will immediately inform ODOT of the reasons for its decision not to approve these phases.

## **VII. QUALITY CONTROL/QUALITY ASSURANCE, MONITORING & PERFORMANCE**

### **A. ODOT Quality Control and Quality Assurance**

- 1. The ODOT agrees to develop, carry out and report on regular quality control and quality assurance activities to ensure that its PCE approvals are made in accordance with applicable law and this Agreement. Within six months of the execution date of this agreement, ODOT, in coordination with FHWA, will develop QA/QC procedures that ensure ODOT PCE documentation meets all legal requirements, and that ODOT provides appropriate QA/QC oversight of PCEs. The QA/QC procedures will be described in a document that will be submitted to FHWA by October 1, 2015. FHWA will provide a written response within thirty (30) calendars of the submission, regarding the acceptability of the procedures.

### **B. ODOT Performance Monitoring and Reporting**

- 1. The FHWA and ODOT will cooperate in monitoring performance under this Agreement and work to assure quality performance.
- 2. The ODOT will submit to FHWA, ODOT Quarterly Programmatic Categorical Exclusion (PCE) Report (Appendix A) summarizing approvals made under this Agreement. The report will also identify any areas where improvement is needed and what measures ODOT is taking to implement those improvements. The report will include a description of actions taken by ODOT as part of its quality control and quality assurance efforts under Section VII.A.
- 3. The ODOT PCE Quarterly Report (Appendix A) will be provided to FHWA no later than 15 calendar days following the end of each Federal Fiscal Year quarter. Performance gaps that have been noted by the ODOT or the FHWA in the performance quarter will be captured in the Quarterly Report.
- 4. The ODOT will provide to the FHWA an Annual Report that summarizes ODOT's performance under this Agreement no later than 45 calendar days following the end of each Federal Fiscal Year. The annual report will include:
  - i. follow-up from prior years' reports recommendations;
  - ii. state-wide quality control and assurance activities that were undertaken in the past year;

- iii. the results from implementing quality control and assurance activities;
- iv. corrective actions taken and results of those actions;
- v. identification of training needs and training provided;
- vi. program changes that have occurred due to the review(s); and
- vii. program changes that should be considered.

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

1. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of ODOT, as well as ODOT's performance of its PCE processing functions. Performance considerations include, without limitation, the quality and consistency of ODOT's PCE approvals, project environmental documentation, CE submissions to FHWA for approval, adequacy and capability of ODOT staff and consultants, and the effectiveness, quality and consistency of ODOT's administration of its internal PCE approvals.
2. FHWA will conduct one or more program reviews as part of its oversight activities, during the term of this Agreement. The ODOT shall prepare and implement a corrective action plan to address any findings or observations identified in the FHWA review. The ODOT shall draft the corrective action plan within 45 calendar days of FHWA finalizing its review. The results of that review and corrective actions taken by the ODOT 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 ODOT's performance under this Agreement. The FHWA may require ODOT to perform other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with applicable Federal laws and regulations.
4. The ODOT agrees to cooperate with FHWA in all oversight and quality assurance activities.

### **VIII. AMENDMENTS**

If the parties agree to amend this Agreement, then FHWA and ODOT 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, upon signature by all parties, terminates and replaces the existing Programmatic Categorical Exclusion Agreement between the Federal Highway Administration (FHWA) and the Oregon Department of Transportation (ODOT) For Federal Actions with Minor Impacts in Compliance with the National Environmental Policy Act, the Council on Environmental Quality Regulations and FHWA Regulations (23 CFR 771), executed on June 28, 1999.

- B. This Agreement shall have a term of five (5) years, effective on the date of the last signature. The ODOT shall post and maintain an executed copy of this Agreement on its website, available to the public.
- C. This Agreement is renewable for additional five (5) year terms if ODOT requests renewal and FHWA determines that ODOT 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.
- D. At least six (6) months prior to the end of each five year term, ODOT and the FHWA will meet to discuss the results under the Agreement and consider amendments to this Agreement. This meeting may be combined with a meeting to discuss performance under the monitoring provisions of this Agreement.
- E. Either party may terminate this Agreement at any time only by giving at least 30 days written notice to the other party.
- F. Expiration or termination of this Agreement shall mean that the ODOT 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.

 _____ Phillip A. Ditzler Oregon Division Administrator Federal Highway Administration	<u>3/10/2020</u> Date
 _____ Kris Strickler Director Oregon Department of Transportation	<u>03-10-2020</u> Date



**APPENDIX A**

ODOT Programmatic Categorical Exclusion (PCE) Report										
ODOT Key #	Federal Aid #	Project Name	PCE Type (s)	PCE Start Date	PCE Determination Date	PCE Approval Date	PCE Completion Time (in days)	Cost to Complete PCE	Link to Environmental File	Comments (as necessary)
Project Information Organized by Region										
PCE Start Date – Project Kick-off Date										
PCE Determination Date – Date at which Region finalizes and signs PCE Determination Form										
PCE Approval Date – Date ODOT finalizes and signs the PCE Approval Document										
PCE Completion Time – Time from Project Kick-off to PCE Approval Date (in calendar days)										
Cost to Complete PCE – Cost from Project Scoping to PCE Approval Date										
Comments – Include information related to why a PCE has transitioned to a FHWA-approved CE (i.e., scope change; Section 106 effect is now “adverse, etc.) or other information as needed										

**CERTIFICATION:**

The projects included in this quarterly report have been reviewed under the provisions of the FHWA and ODOT Programmatic Categorical Exclusion Agreement and ODOT has determined that these projects meet the requirements of that Agreement; and that projects submitted in this report are consistent with 23 CFR 771.117 (a) and (b). If circumstances change and a project will no longer meet the conditions of the PCE, ODOT will provide that updated information to FHWA in a subsequent quarterly report.

\_\_\_\_\_  
 ODOT Geo-Environmental Official

\_\_\_\_\_  
 ODOT Region 1 Environmental Manager

\_\_\_\_\_  
 ODOT Region 2 Environmental Manager

\_\_\_\_\_  
 ODOT Region 3 Environmental Manager

\_\_\_\_\_  
 ODOT Region 4 Environmental Manager

\_\_\_\_\_  
 ODOT Region 5 Environmental Manager

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 Date

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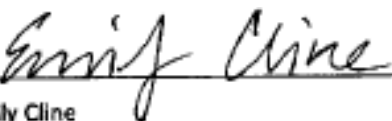
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 Date

## Amendment to the FHWA–ODOT Programmatic Categorical Exclusion Agreement

Amendments to the PCE Agreement executed on March 10, 2020 are described below with reference to the relevant sections of the agreement:

Section	Amendment or Clarification
IV. A. 1. b.	ODOT NEPA Manual subsection 423 provides guidance for determining whether project impacts meet or exceed the PCE Agreement impact thresholds.
V. A.	FHWA Oregon Division and ODOT have agreed to biannual PCE reporting. ODOT will prepare one Mid-year Report and an Annual Report.
VI. A.	“Geo-Environmental” is now “Environmental and Hydraulic Engineering.”
VI. B.	FHWA Oregon Division and ODOT have agreed to biannual PCE reporting. ODOT will prepare one Mid-year Report and an Annual Report.
VII. A. 1.	QA/QC procedures for the PCE program have been developed and are located in subsection 453 of the ODOT NEPA Manual.  ODOT conducts two quality assurance reviews per year and documents the results in the “PCE Quality Assurance Review: Summary of Findings and Recommendations” report.
VII. B. 2.	FHWA Oregon Division and ODOT have agreed to biannual PCE reporting. ODOT will prepare one Mid-year Report and an Annual Report.  ODOT conducts two quality assurance reviews per year and documents the results in the “PCE Quality Assurance Review: Summary of Findings and Recommendations” report.
VII. B. 3.	FHWA Oregon Division and ODOT have agreed to biannual PCE reporting. ODOT will prepare one Mid-year Report and an Annual Report.
VII. B. 4.	FHWA and ODOT have agreed that the content of the Annual Report will conform to the Annual Report template which is maintained by ODOT.
IX. A.	The current PCE Agreement replaces the previous agreement that was executed on March 11, 2015.
Appendix A	FHWA Oregon Division and ODOT have agreed to biannual PCE reporting. ODOT will prepare one Mid-year Report and an Annual Report.  Certification is with respect to the provisions of the PCE Agreement executed on March 10, 2020.  “Geo-Environmental” is now “Environmental and Hydraulic Engineering.”

These amendments are hereby adopted per section VIII. of the PCE Agreement executed on March 10, 2020.



Emily Cline  
Environmental Program Manager  
FHWA Oregon Division



Susan Haupt  
Environmental & Hydraulic Engineering Section Manager  
ODOT Engineering & Technical Services Branch