

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

THIS PROGRAMMATIC AGREEMENT ("Agreement"), made and entered into this ____ day of _____, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION ("FHWA") and the STATE of MASSACHUSETTS, acting by and through its DEPARTMENT OF TRANSPORTATION ("MassDOT") 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 normally do not have a significant effect on the human environment and therefore do not require the preparation of an EA or EIS (23 CFR 771.117 (c)-(d));

Whereas, the Massachusetts Department of Transportation (MassDOT) 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 MassDOT 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 regulations are codified in 23 CFR §771.117(g); and

Whereas, this Agreement supersedes the previous programmatic agreement among FHWA and MassDOT regarding Processing of Certain Categorical Exclusions dated May 5, 2016;

Now, therefore, the FHWA and MassDOT 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 Massachusetts Department of Transportation ("MassDOT").

II. PURPOSE

The purpose of this Agreement is to authorize MassDOT 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 MassDOT to certify to FHWA that an action not specifically listed in 23 CFR 771.117, but meeting the CE criteria in 40 CFR 1508.1 and 23 CFR 771.117(a), qualifies for a CE if 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 *et seq.*
- B. Moving Ahead for Progress in the 21st Century Act, P.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, The Council on Environmental Quality Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (CEQ Regulations);
- E. Procedures for Considering Environmental Impacts, USDOT Order 5610.1C (and any successor order or regulations); and

F. 23 CFR 771.117 (and any successor order or regulations).

IV. RESPONSIBILITIES

A. MassDOT 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, MassDOT may make a CE approval on behalf of FHWA (also known as a Programmatic CE). Prior to the CE approval, MassDOT 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) include a statement in their Project Info system, and complete the review with a signature evidencing approval. No separate review or approval of the CE by FHWA is required; however, any and all 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 MassDOT. MassDOT may certify to FHWA that the action qualifies for a CE and may request Individual CE approval. If MassDOT is unsure whether a threshold is exceeded, MassDOT will consult with FHWA. An action requires FHWA CE review and approval based on the MassDOT certification if the action:

- i. Includes residential or commercial displacement, or acquisition of property rights that results in substantial abutter impacts;
- ii. Requires submittal of an Interchange Modification Report in accordance with 23 USC 111;
- iii. Is reviewed by the U.S. Fish and Wildlife Service or the National Marine Fisheries Service and they have indicated the action “may affect, is likely to adversely affect” any listed or candidate species or critical habitat that has been designated or proposed under the Endangered Species Act;

- iv. Involves opposition or unresolved objections resulting from consultation or correspondence with Federally Recognized Tribes;
- v. Results in a determination of adverse effect on historic properties pursuant to Section 106 the National Historic Preservation Act (54 U.S.C. § 306108);
- vi. Has an adverse effect on a National Historic Landmark;
- vii. Requires the use of properties protected by Section 4(f) (49 U.S.C. § 303/23 U.S.C. § 138) that cannot be documented with an FHWA *de minimis* determination;
- viii. Requires the acquisition of lands under the protection of Section 6(f) of the Land and Water Conservation Act of 1965 (54 U.S.C. § 200305), the Federal Aid in Sport Fish Restoration Act (16 U.S.C. 777-777k, 64 Stat. 430), the Federal Aid in Wildlife Restoration Act (16 U.S.C. 669-669i; 50 Stat. 917), or other unique areas or special lands that were acquired in fee or easement with public-use money and have deed restrictions or covenants on the property;
- ix. Requires a U.S. Army Corps of Engineers Section 404 (33 U.S.C. § 1344) permit other than a General Permit;
- x. Requires a U.S. Coast Guard bridge permit (33 U.S.C. § 401);
- xi. Requires work encroaching on a regulatory floodway or work affecting the base floodplain (100-year flood) elevations of a water course or lake, pursuant to Executive Order 11988 and 23 CFR 650 subpart A;
- xii. Includes impacts subject to the conditions of the Bald and Golden Eagle Protection Act;
- xiii. Is defined as a "Type I project" per 23 CFR 772.5 and any MassDOT noise manual for purposes of a noise analysis;
- xiv. Includes acquisition of land for hardship or protective purposes, or early acquisition pursuant to Federal acquisition project (23 U.S.C. § 108(d)); or
- xv. Generates substantial public controversy or opposition, for any reason.

c. MassDOT may not approve actions not specifically listed as CEs in 23 CFR 771.117, but meet the requirements of a CE under 40 CFR 1508.1 and 23 CFR 771.117(a). Instead, MassDOT shall certify that an action will not result in significant environmental impacts if MassDOT 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. MassDOT shall submit this certification to FHWA for review and subsequent approval or objection.

- i. MassDOT 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 MassDOT 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 quarterly, with submittals on May 1, August 1, and November 1 of each year based on an annual report submittal on February 1 of each year. The list of actions certified will contain the following information:

- a. The date of determination, name of the CE approver, MassDOT project number, Federal project number, project name, project location and project description (including the route number or facility name where the project will occur);
- b. Identification of the CE action listed in regulation; and
- c. A list of projects where consultations were required to meet other Federal environmental laws, if applicable (e.g., Formal Section 7 consultations, Use of a Section 4(f) property, Projects with an adverse effect under Section 106, etc.). Copies of consultation documentation or technical analyses shall be provided to FHWA upon request.

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. MassDOT 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 MassDOT CE approvals on FHWA's behalf and MassDOT 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 MassDOT to make CE approvals or certifications submitted to FHWA under this agreement. MassDOT shall 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 MassDOT, 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 MassDOT under this Agreement.
3. Overseeing the implementation of this Agreement in accordance with the provisions in Section VII, including applicable monitoring and performance provisions.

V. DOCUMENTATION OF MASSDOT CE APPROVALS AND CERTIFICATIONS

A. For MassDOT CE approvals (Programmatic CEs) and MassDOT CE certifications to FHWA for approval, MassDOT shall ensure that it fulfills the following responsibilities for documenting the project-specific determinations made:

1. For actions listed in Appendix A and B, MassDOT shall identify the applicable action, ensure any and all 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 Project Info, including name of the approver with a signature and date of approval

2. In addition, for actions listed in 23 CFR 771.117(d) and Appendix B, MassDOT shall prepare documentation that supports the CE determination and that no unusual circumstances exist that would make the CE approval inappropriate.
3. Within one year of the date of execution of this Agreement, MassDOT shall work with FHWA to update and document the CE review process and procedures for documenting compliance with all appropriate environmental laws and regulations for projects that are funded or approved by FHWA. Procedures will include:
 - a. MassDOT Guide for processing Categorical Exclusions (CE Guide), including but not limited to, processes for conducting Section 106 reviews, Section 4(f) reviews, and NEPA reevaluations
 - b. CE project documentation template (CE checklist)
 - c. CE Re-evaluation template (Re-evaluation checklist)

B. MassDOT 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 Design Public Hearing (DPH) and other public meeting documentation, complying with the requirements of the FHWA-approved public involvement plan. If a public hearing was held in accordance with 23 CFR §771.111(h), MassDOT will send a copy of the hearing transcript to FHWA prior to or concurrent with completion of NEPA;
3. Confirmation that the next phase (e.g., Right-of-Way, Construction) 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 MassDOT'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 MassDOT shall be provided to the FHWA Division Office at their request. MassDOT 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 MassDOT of its project or program recordkeeping responsibilities under 2 CFR 200.333 or any other applicable laws, regulations, or policies.

VI. NEPA APPROVALS AND REEVALUATIONS

- A. MassDOT's CE approvals and CE certifications submitted to FHWA for approval may only be made by the Director of Environmental Services or their Designee, provided the Designee is a MassDOT Environmental Services section employee. Any employee making CE approvals or certifications must be part of MassDOT Environmental Services and have sufficient training and experience to complete such reviews and certifications. Training and experience requirements will be included in the CE Guide.
- B. In accordance with 23 CFR 771.129, MassDOT 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. The following provisions shall apply to NEPA Re-evaluations:
 - 1. Approval of NEPA Re-evaluations is delegated to persons listed above in Section VI.A.
 - 2. A written re-evaluation will be prepared when there is a change in the Project limits, a change in the Project's scope, or unforeseen conditions, resulting in the potential to induce impacts that were not previously considered in the CE.
 - 3. A written re-evaluation will be prepared if three (3) years pass between any major steps to advance the action (e.g. authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) after the approval of a CE or a prior re-evaluation by FHWA or by MassDOT. Typically, the scope of this type of reevaluation will address any developments in legislative or regulatory authorities.

VII. QUALITY CONTROL/QUALITY ASSURANCE, MONITORING & PERFORMANCE

A. MassDOT Quality Control & Quality Assurance

1. MassDOT 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. MassDOT Performance Monitoring and Reporting

1. FHWA and MassDOT shall cooperate in monitoring performance under this Agreement and work to assure quality performance.
2. MassDOT 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 1st of every year. The report will identify any areas where improvement is needed and what measures MassDOT is taking to implement those improvements. The report will include a description of actions taken by MassDOT as part of its quality control efforts under Section VII(A).

C. FHWA Oversight and Monitoring

1. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of MassDOT, as well as MassDOT's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of MassDOT's CE approvals, CE submissions to FHWA for approval, adequacy and capability of MassDOT staff and consultants, and the effectiveness of MassDOT'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. The first program review shall be completed within two years of Agreement start date. MassDOT and FHWA shall jointly prepare a corrective action plan that will be implemented by MassDOT to address any findings or observations identified in the FHWA review. MassDOT should draft the corrective action plan within 45 days of FHWA finalizing its review. The results of that review and corrective actions taken by MassDOT 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 MassDOT's performance under this Agreement. FHWA may require MassDOT 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. MassDOT 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 MassDOT may execute an amendment with new signatures and dates of the signatures. The term of the Agreement shall remain unchanged unless expressly stated otherwise 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. MassDOT 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 MassDOT requests renewal and FHWA determines that MassDOT 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. The terms of this Agreement will expire five years after the date of the last signature to this Agreement.
- E. **Expiration or termination of this Agreement shall mean that MassDOT 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.

Signature on original

5/4/2021

Date

Jeffrey McEwen
Division Administrator
Federal Highway Administration
Massachusetts Division

Signature on original

5/3/2021

Date

Jonathan Gulliver
Highway Administrator
Massachusetts Department of
Transportation

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 paragraph (a) of Section 771.117 as of the date of this Agreement, and normally do not require any further NEPA approvals by the FHWA for the purposes of this Agreement. Subsequent changes to CEQ and/or FHWA regulations may require reevaluation of the list below:

- (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 which establish classes of highways on the Federal-aid highways 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) [Not Applicable]
- (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 locators, 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 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:
- a. 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
 - b. 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 1508.1) and paragraph (d) of Section 771.117 may be designated as CEs only after Administration approval unless otherwise authorized under an executed agreement pursuant to paragraph (g) of Section 771.117. Subsequent changes to CEQ and/or FHWA regulations may require reevaluation of the list below. 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:

(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.

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 their 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 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 Appendix A that do not meet the constraints in paragraph (e) of this section.

(e) Actions described in (c)(26), (c)(27), and (c)(28) of Appendix A may not be processed as CEs under Appendix A 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.