

**FIRST AMENDED  
PROGRAMMATIC AGREEMENT AMONG THE FEDERAL HIGHWAY  
ADMINISTRATION, THE MASSACHUSETTS HIGHWAY  
DEPARTMENT, THE MASSACHUSETTS STATE HISTORIC  
PRESERVATION OFFICER, AND THE ADVISORY COUNCIL ON  
HISTORIC PRESERVATION REGARDING IMPLEMENTATION OF  
MINOR HIGHWAY PROJECTS**

**WHEREAS**, the Federal Highway Administration (FHWA) proposes to administer its Transportation Program in Massachusetts, authorized by 23 U.S.C. 101 et seq., through the Massachusetts Highway Department (MassHighway) (23 U.S.C. 315); and,

**WHEREAS**, the FHWA has determined that certain types of minor transportation projects may have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places; and has consulted with the Advisory Council on Historic Preservation (Council) and the Massachusetts State Historic Preservation Officer (Massachusetts SHPO) pursuant to Section 800.14(b) of the regulations (36 CFR 800) implementing Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470f); and,

**WHEREAS**, MassHighway participated in consultation and has been invited to be a signatory party to this Agreement; and,

**WHEREAS**, historic properties are defined as prehistoric and historic archaeological sites, buildings, structures, districts, and objects, included in or eligible for listing in the National Register of Historic Places (National Register); and,

**WHEREAS**, any project involving tribal lands (as defined in 36 CFR 800.16(x)), or any project that may affect a property identified by a federally recognized Indian tribe with ancestral homelands in Massachusetts as possessing traditional religious and cultural significance, shall not be governed by this Agreement, but shall be reviewed by FHWA in consultation with appropriate Federally recognized Indian Tribes, in accordance with 36 CFR 800; and,

**WHEREAS**, 36 CFR 800 encourages Federal Agencies to efficiently fulfill their obligations under Section 106 of the National Historic Preservation Act through the development and implementation of cooperative programmatic agreements; and,

**WHEREAS**, the U.S. Department of Transportation and the Council have agreed to streamline environmental review processes in accordance with Section 1309 of the Transportation Equity Act for the 21st Century (TEA-21; Public Law 105-178) through execution of the *Environmental Streamlining National Memorandum of Understanding* (1999); and,

**WHEREAS**, MassHighway employs a staff of cultural resources specialists and consultants who meet the Secretary of Interior's Professional Qualification Standards in 36 CFR Part 61

Appendix A in the fields of archaeology, architectural history, and history, to carry out its cultural resource programs and responsibilities; and,

**WHEREAS**, the *Programmatic Agreement Among the Federal Highway Administration, the Massachusetts Department of Public Works, the Advisory Council on Historic Preservation and the Massachusetts State Historic Preservation Officer Regarding Implementation of the Federal Aid Highway Program in Massachusetts* (Programmatic Agreement) was fully executed in January 1992 and the parties to the original agreement have consulted and agreed to amend the Programmatic Agreement, pursuant to Stipulation 8(A) of the original agreement, and thus this amended agreement supersedes the earlier Programmatic Agreement executed in January 1992;

**NOW THEREFORE**, the FHWA, the Council, the Massachusetts SHPO, and MassHighway agree that the review of minor highway projects shall be administered according to the following stipulations to satisfy FHWA's Section 106 responsibilities.

## **STIPULATIONS**

FHWA will ensure that the following measures are carried out:

### **I. Purpose and Applicability**

This Programmatic Agreement sets forth the process by which the FHWA will meet its responsibilities under Sections 106, 110(d), and 110(f) of the National Historic Preservation Act, with the assistance of MassHighway, for minor highway projects in the Federal Aid Highway Program. This Programmatic Agreement establishes the basis for MassHighway's internal review of individual minor projects and how MassHighway will notify and coordinate with the Massachusetts SHPO and the FHWA.

This Programmatic Agreement only applies to minor highway projects, that is, highway projects classified as categorical exclusions under 23 CFR 771.115 and 23 CFR 771.117. Projects that require an Environmental Assessment or Environmental Impact Statement for compliance with the National Environmental Policy Act will follow the procedures in 36 CFR 800.

At any time, MassHighway can choose to process a minor project by following the procedures in 36 CFR 800 rather than by following the procedures in this Programmatic Agreement. For reasons such as known controversy, the Massachusetts SHPO, the Council, or FHWA may also request that MassHighway process a minor project by following the procedures in 36 CFR 800.

### **II. Responsibilities of FHWA and MassHighway**

MassHighway shall continue to employ, at a minimum, an archaeologist and a structural historian to direct consultants who conduct Section 106 work and to provide review and quality control on all Section 106 work.

For minor projects, FHWA authorizes MassHighway to conduct all consultation with the Massachusetts SHPO and other consulting parties on its behalf, including determining Areas of

Potential Effects, National Register eligibility determinations, determinations of effect, and project applicability to this Programmatic Agreement. FHWA will remain ultimately responsible for all findings and determinations and will take the lead in any consultation with the Council for projects with active Council participation (36 CFR Part 800.6(b)(2)), and those involving the Secretary of the Interior.

MassHighway will solicit comments from the appropriate federally recognized Indian tribes, either through MassHighway's Engineering Directive titled *Early Environmental Coordination for Design Projects* (included as Appendix 2) or through an archaeological survey. FHWA shall retain ultimate responsibility for complying with all federal requirements pertaining to direct government-to-government consultation with Indian tribes. Notwithstanding any other provision of this agreement, FHWA shall honor the request of any federally recognized Indian tribe for direct government-to-government consultation regarding an undertaking covered by this agreement.

### **III. Professional Qualifications**

MassHighway staff and consultants who conduct Section 106 work must meet the *Secretary of the Interior's Professional Qualifications Standards* in 36 CFR 61-Appendix A.

### **IV. Projects Requiring No Massachusetts SHPO Review**

**A. Project Types:** The signatories to this Programmatic Agreement agree that the minor project types listed in Appendix 1, by their nature and definition, are categorically exempt from review by the Massachusetts SHPO. MassHighway shall determine whether a particular project meets the exemption categories in Appendix 1. MassHighway can add minor projects to the list in Appendix 1 upon written authorization by all parties to this agreement

If a minor project is not in the list in Appendix 1, MassHighway's review will be conducted in accordance with Stipulation V.

**B. Notification and Coordination:** For actions that meet the categories listed in Stipulation IV.A, MassHighway shall document its finding that the action is exempt from review and maintain that documentation in its files. MassHighway shall notify the Massachusetts SHPO of its use of the documentation on specific projects in an annual report to the Massachusetts SHPO, the Council and FHWA, as specified in Stipulation IX. Following review of the annual report, the Massachusetts SHPO, the Council, and FHWA may request copies of documentation pertaining to specific projects.

## V. Review of Minor Highway Projects

A. **MassHighway Internal Review:** For minor projects that are not listed in Stipulation IV.A, MassHighway will employ a multi-disciplinary approach to implement the following internal review process, as appropriate to the project:

- Initiate the Section 106 process in accordance with the procedures in 36 CFR 800.3, including establishing whether there is an undertaking, coordinating with other reviews, planning to involve the public, and identifying other consulting parties, as appropriate;
- Determine the project's Area of Potential Effects, as defined in 36 CFR 800.16(d);
- Review existing information on file at the Massachusetts Historical Commission (including the *Inventory of Historic and Archaeological Assets of the Commonwealth* and State and National Registers of Historic Places) in the Area of Potential Effects;
- Assess the likelihood that unidentified historic properties exist in the Area of Potential Effects;
- Determine the degree of existing disturbance within the Area of Potential Effects and determine whether an archaeological or historic architectural survey is needed.
- Perform archaeological or historic architectural field reconnaissance and/or intensive surveys, as warranted, in conformance with the Secretary of the Interior's *Standards and Guidelines for Archeology and Historic Preservation: Identification* (1983) and the Massachusetts State Archaeologist's permit regulations (950 CMR 70).
- If an historic architectural survey is performed, MHC inventory forms will be prepared for any property more than 40 years old that is scheduled to be removed or denatured by a project; and any property that will be affected by a project and that is found eligible for listing in the National Register of Historic Places by MassHighway. The inventory forms will be prepared in accordance with the guidelines outlined in MHC's most recent Historic Properties Survey Manual to the extent necessary to identify the property and to allow its eligibility for listing in the National Register to be evaluated. An MHC National Register Criteria Statement form will be prepared for each affected property that is found eligible.

MassHighway may address multiple steps simultaneously. MassHighway will solicit and consider the views of the local historical commissions, other government entities, or other interested parties in the Section 106 process through the procedures described in MassHighway's Engineering Directive titled *Early Environmental Coordination for Design Projects* and through its existing public participation program.

B. **Eligibility Evaluations and Assessments of Effect:** MassHighway will apply the National Register criteria in 36 CFR Part 63 to properties identified within the Area of Potential Effects that have not been previously evaluated to determine if such properties are eligible in accordance with 36 CFR 800.4(c)(1); and will make determinations of eligibility of properties for the National Register. If MassHighway's internal review finds that there are no National Register listed or eligible properties in the Area of Potential Effects or that a project does not affect any historic properties, and there is no known public controversy on historic preservation issues, MassHighway will follow the process outlined in Stipulation IV.B for these No Historic Properties Affected Projects. If

MassHighway's internal review suggests that a project may affect National Register listed or eligible properties, MassHighway will apply the criteria of adverse effect in 36 CFR 800.5(a), make a Finding of No Adverse Effect or a Finding of Adverse Effect, and notify and coordinate with FHWA and Massachusetts SHPO on the project in accordance with Stipulation V.C.

**C. Notification and Coordination with the FHWA and with the Massachusetts SHPO:**

**1. Findings of No Adverse Effect**

For any project that includes, within the Area of Potential Effects, National Register listed or eligible properties that will not be adversely affected by the project, as defined by the Criteria of Adverse Effect set forth in 36 CFR 800.5(a), MassHighway shall make a formal Finding of No Adverse Effect. MassHighway shall forward copies of adequate documentation to support a No Adverse Effect finding to the Massachusetts SHPO, FHWA, and other consulting parties, as appropriate.

- a. For projects where there are no consulting parties other than the SHPO, the SHPO will have 21 days to review a Finding of No Adverse Effect. Unless the Massachusetts SHPO objects to MassHighway and/or FHWA within 21 days of receiving the notification, no further review of the project is warranted and the project may proceed. Failure of the Massachusetts SHPO to respond within 21 days from the receipt of the finding may be considered agreement with the finding.
- b. For projects where there are consulting parties in addition to the SHPO, all parties will have 30 days from receipt, to review a Finding of No Adverse Effect. Unless the Massachusetts SHPO or a consulting party objects to MassHighway and/or FHWA within 30 days of receiving the notification, no further review of the project is warranted and the project may proceed. Failure of the Massachusetts SHPO or any other consulting party, as appropriate, to respond within 30 days from the receipt of the finding may be considered agreement with the finding.
- c. MassHighway will submit any disputes concerning the No Adverse Effect finding to FHWA for resolution in accordance with Stipulation XII.

## **2. Findings of Adverse Effect**

For any project that includes, within the Area of Potential Effects, National Register listed or eligible properties that will or may be adversely affected by the project, as defined by the Criteria of Adverse Effect set forth in 36 CFR 800.5(a), MassHighway shall make a formal Finding of Adverse Effect. MassHighway shall forward copies of its documentation to support an Adverse Effect finding to the FHWA. The FHWA, in turn, shall make its determination and forward the appropriate project documentation to the Massachusetts SHPO for comment. Review of the project shall proceed in accordance with 36 CFR 800.6 to include notification to the Council and other consulting parties, as appropriate.

## **VI. Review of MassHighway Projects under Massachusetts State Law**

MassHighway and the MHC shall consult to develop a Programmatic Memorandum of Agreement for review of minor state-funded projects (except those requiring a Section 404 Permit from the U.S. Army Corps of Engineers). Minor state-funded projects that do not involve Federal funding or permits are not subject to the requirements of this Agreement.

## **VII. Emergency Situations and Post-Review Discoveries**

MassHighway, acting on behalf of FHWA, may determine and implement appropriate measures for the identification and treatment of historic properties during emergencies declared by the President or the Governor of the Commonwealth of Massachusetts or for post-review discoveries of historic properties. MassHighway will notify FHWA and the Massachusetts SHPO of these situations and afford them an opportunity to comment, as provided in 36 CFR 800.12(b)(2) or 36 CFR 800.13(b), as appropriate.

## **VIII. Treatment of Human Remains**

If previously unidentified human remains are discovered during construction, that portion of the project will stop immediately. The area will be protected and the MassHighway Resident Engineer will immediately consult with FHWA, MassHighway's archaeologist, the Massachusetts SHPO, the State Archaeologist, the Director of the Commission on Indian Affairs, and the State Medical Examiner. Native American human remains discovered on Federal or tribal lands will be treated in accordance with the Native American Graves Protection and Repatriation Act (P.L. 101-601). Any human remains discovered on non-federal lands will be treated in accordance with the Massachusetts Unmarked Burial Law (M.G.L. Chapter 38: Section 6, M.G.L. Chapter 9: Sections 26A and 27C, and M.G.L. Chapter 7: Section 38A).

## **IX. Annual Review and Monitoring**

MassHighway, FHWA, and Massachusetts SHPO will regularly consult to review implementation of the terms of this Programmatic Agreement. MassHighway will prepare an annual report for submittal to the Massachusetts SHPO, the Council, and FHWA that covers the

calendar year. This report will include information on Projects Requiring No Massachusetts SHPO Review and on No Historic Properties Affected Projects processed under this Programmatic Agreement. The Annual Report should also include an assessment of the effectiveness of the Programmatic Agreement, discuss concerns with the Programmatic Agreement, and include recommendations for changes to it. MassHighway shall provide the Massachusetts SHPO, the Council, and FHWA with a copy of this Annual Report by March 1 of the following year. The FHWA, the Council, and the Massachusetts SHPO will review the Annual Report and, if deemed appropriate, all parties shall meet to discuss and resolve any issues raised as a result of the review.

The FHWA, Council, and Massachusetts SHPO may monitor activities carried out pursuant to this Programmatic Agreement. MassHighway will cooperate with these parties in carrying out their monitoring efforts.

## **X. Amendment**

Any party to this Programmatic Agreement may request that it be amended, whereupon the parties will consult to consider such an amendment.

## **XI. Termination**

Any party to this Programmatic Agreement may terminate it by providing 30 calendar days notice in writing to the other parties explaining the reason for termination, provided that the parties will consult during the period prior to termination to seek agreement on amendments and other actions that would avoid termination. In the event of termination, the FHWA will comply with 36 CFR 800.3 through 36 CFR 800.7 with regard to individual projects covered by this Programmatic Agreement.

## **XII. Dispute Resolution**

FHWA will become actively involved in the resolution of any disagreements or objections. Initially, FHWA will consult with the objecting party and MassHighway to resolve the disagreement or objection.

If no resolution is reached on questions of National Register eligibility, MassHighway will prepare documentation in accordance with the provisions of 36 CFR Part 63 for transmittal by FHWA to the Keeper of the National Register.

If no resolution is reached on other findings or determinations, or regarding implementation of this Agreement, MassHighway will prepare documentation in accordance with 36 CFR 800.11(e) for transmittal by FHWA to the Council for comment, including the FHWA's proposed response. Within 30 days after receipt of all pertinent documentation, the Council shall exercise one of the following options:

- a. Advise the FHWA that the Council concurs in the FHWA's proposed final decision, whereupon the FHWA will respond to the objection accordingly;

- b. Provide the FHWA with recommendations, which the FHWA shall take into account in reaching a final decision regarding its response to the objection; or
- c. Notify the FHWA that the Council will comment pursuant to 36 CFR 800.7(c), and proceed to comment. The resulting comment shall be taken into account by the FHWA in accordance with 36 CFR 800.7(c)(4) and Section 110(1) of the NHPA.

Should the Council not exercise one of the above options within 30 days after receipt of all pertinent documentation, the FHWA may assume the Council's concurrence in its proposed response to the objection.

FHWA's responsibility to comply with the stipulations of this Programmatic Agreement for all other projects that are not the subject of the dispute will remain unchanged.



Execution and implementation of this Programmatic Agreement evidences that the FHWA has satisfied its Section 106 responsibilities for all individual undertakings of minor highway projects covered under this agreement.

FEDERAL HIGHWAY ADMINISTRATION

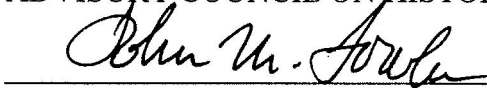


Stanley Gee, Division Administrator

9/14/04

Date

ADVISORY COUNCIL ON HISTORIC PRESERVATION

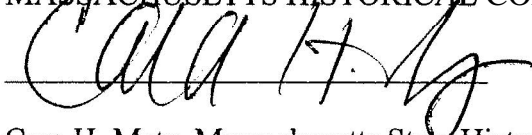


John M. Fowler, Executive Director

10/15/04

Date

MASSACHUSETTS HISTORICAL COMMISSION

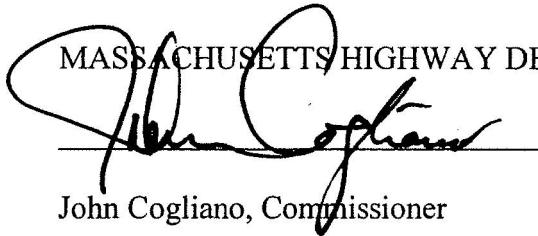


Cara H. Metz, Massachusetts State Historic Preservation Officer,

9/23/04

Date

MASSACHUSETTS HIGHWAY DEPARTMENT



John Cogliano, Commissioner

9/10/04

Date

## **APPENDIX 1**

### **PROJECTS REQUIRING NO MASSACHUSETTS SHPO REVIEW**

#### **Interstate Related Projects**

1. Interstate bridge or roadway projects (excluding air rights development) where all work occurs within the previously disturbed areas<sup>1</sup> of the roadway right-of-way.

#### **Roadway Related Projects**

2. Pothole filling, crack sealing, joint repair, pavement milling or grooving, surface treatments, and resurfacing or repair of existing ramps or roadways within the previously disturbed right-of-way.
3. Reconstruction activities on the existing roadway within the previously disturbed areas of the roadway right-of-way except in National Register eligible or listed Historic Parkways or Park Roads. Reconstruction activities may include roadway restoration; roadway rehabilitation; repair, replacement or resetting of existing guardrail (wood or weathering steel guardrail to be consistent with that existing); widening less than one full travel lane; addition of shoulders; construction of cross-overs on median strips; and addition or extension of emergency turnouts.

Note: This would allow expansion of the roadway pavement as long as it occurs within the previously disturbed areas of the roadway right-of-way.

4. Correcting substandard roadway geometrics and intersections, provided that such improvements do not extend beyond the limits of previously disturbed areas of the roadway right-of-way and that such improvements are not in National Register eligible or listed Historic Parkways or Park Roads. These improvements would include, but are not limited to, turn lanes; improved turning radii; channelization, divisional, and refuge islands; acceleration/deceleration lanes; and installation of curbs and gutters.
5. Repair, in-kind replacement (essentially the same size, material, color, and texture) or extension of curbs, curbing, and sidewalks, including street furniture. For projects not located on National Register eligible or listed bridges, districts or properties; minor modifications in size, locations, content, and material composition of these features are permitted as well as installation of new curbs, gutters, sidewalks, and street furniture.
6. New or renewal of pavement markings (normal and raised), rumble strips, traffic sensors, snow and ice detectors, or other similar features on existing ramps and roadways.

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<sup>1</sup> "Previously Disturbed Area" refers to an area previously modified by construction activities and includes filled slopes (roadway embankments) and roadway cuts.

7. Modifications to sidewalks and curbs to satisfy the requirements of the Massachusetts Architectural Access Board and the Americans with Disabilities Act. Alterations to facilities less than 50 years old to make them accessible for elderly and handicapped persons.
8. Removal of trees, as part of a roadway project, except in or adjacent to National Register eligible or listed bridges, districts, or properties.
9. Landscaping, including weeding; thinning; in-kind replacement of existing specimens; and shallow bed preparation in areas previously landscaped within the existing right-of-way.
10. Installation of utilities (including fiber optic cables) along or across a transportation facility; replacing/repairing existing underground utilities within the existing roadway footprint; and replacement and relocation of existing utility poles between edge of sidewalk and roadway.
11. Rehabilitation, reconstruction or refurbishing of existing active at-grade railroad crossings including installation of railroad warning signs and devices, such as flashing lights and gates.
12. Stream stabilization and restoration activities, (including removal of debris or sediment obstructing the natural waterway).
13. Construction of wetland mitigation areas in previously disturbed areas of the roadway right-of-way.

#### **Bridge/Culvert Related Projects**

14. All work, up to and including replacement of bridges with a National Register eligibility determination of either "Not Eligible" or "Conditionally Not Eligible" on file; provided that:
  - MassHighway's Historic Bridge Specialist reviews each bridge and finding, and finds the determination appropriate;
  - No work is proposed outside previously disturbed areas of the roadway right-of-way; and,
  - No National Register-listed or -eligible properties, districts, or sites are identified within or adjacent to the proposed project area.

15. All work, up to and including replacement of steel stringer bridges (except those with documented pre-1900 construction dates) and concrete slab bridges provided that:
  - MassHighway's Historic Bridge Specialist reviews each bridge and finds that it does not possess unusual engineering or architectural characteristics that might make it National Register-eligible,
  - No work is proposed outside previously disturbed areas of the roadway right-of-way; and,
  - No National Register-listed or -eligible properties, districts, or sites are identified within or adjacent to the proposed project area.
16. All work, up to and including replacement of bridge structures with less than a 20-foot span length, excluding stone slab culverts and stone arch and brick arch structures.

### **Roadside Safety Related Projects**

17. Highway safety improvement projects including installation, replacement, modification, or removal of safety appurtenances, such as impact attenuators, median glare screens, roadway delineators, guardrails, and safety barriers (except on National Register eligible or listed bridges, districts, or properties). These improvements also include pole countermeasures (reflectors, breakaway devices, and shielding systems), installation of panel mounted reflective object markers, installation of reflective object markers not mounted on panels, and removal of fixed objects (utility poles, non breakaway signs, and pipe headwalls).

### **Drainage Related Projects**

18. Routine cleaning, maintenance, and repair of existing drainage system elements, such as catch basins, pipes, stormwater management, and water quality facilities and devices. Retrofitting or redesign of existing drainage system elements as long as such work occurs within the previously disturbed areas of the roadway right-of-way. Minor safety-related improvements involving drainage system elements, including but not limited to, converting existing drop inlets to traversable designs; installation, replacement, or removal of pipes and headwalls; installation, replacement, and extensions of pipes; and addition of pipe end sections as long as such work occurs within the previously disturbed areas of the roadway right-of-way.

## **Electrical Related Projects**

19. Traffic Signal and Safety Improvement Projects where all work occurs within previously disturbed areas of the roadway right-of-way except on or adjacent to National Register eligible or listed bridges, districts or properties.

Note: This would only involve existing traffic signal replacement or upgrade projects.

20. Intelligent Transportation System projects (except on National Register eligible or listed bridges, districts, or properties), such as installation of ramp metering systems; installation of closed circuit television cameras or highway advisory radio systems, including remote controlled flashing signs, support structures, and variable message signs; and installation of computer links to monitor and control traffic volumes throughout the roadway system.

## **Rest Area Projects**

21. Maintenance and minor improvements to existing rest areas, fringe parking facilities, park and ride lots, weigh stations and other highway-related maintenance, storage, and office facility construction provided that no new right-of-way is required, that there is no demolition of buildings greater than 50 years in age, and that no excavation occurs outside of previously disturbed areas.

## **Bicycle/Pedestrian Facility Projects**

22. Projects involving construction of bicycle and pedestrian lanes, paths, and facilities; and multi-use paths and facilities, except on National Register eligible or listed bridges, districts, or properties, and provided that no new disturbance would occur. These projects include, but are not limited to, handicapped access ramps and ways, designations of certain highways as bike routes, painting of existing paved shoulders as bike lanes, and bikeway/pedestrian ways. They also include Rail-to-Trail projects provided that all disturbance activities occur within the existing railroad bed; and the project does not require the modification or removal of the railroad bed or existing bridges or viaducts.

## **Lighting and Signing Projects**

23. Restoration, replacement, upgrading, or addition of highway lighting systems (includes under-deck, conventional, high mast and offset lighting systems) on controlled access highways. For other highways, in-kind replacement or repair of highway lighting systems (essentially the same size, material, color or texture).
24. Installation or replacement of highway signs (including overhead and electronic variable message signs) on controlled access highways. For other highways, in-kind replacement or repair of highway signs (essentially the same size, material, color or texture).

### **Miscellaneous Projects**

25. Removal and disposal of any hazardous waste materials from the existing right-of-way.
26. Replacement or repair of highway fencing.
27. Emergency repairs under 23 USC 125 necessary to restore essential travel.
28. Repair or construction of erosion control and protection measures including, but not limited to, rockfall mitigation, slope stabilization, slide repair, or riprap.
29. The installation of noise barriers within the existing roadway right-of-way or alterations to existing publicly owned buildings to provide for noise reduction, provided that public comment was sought and a record of that public comment was kept.