

PROGRAMMATIC AGREEMENT
AMONG
THE FEDERAL HIGHWAY ADMINISTRATION
THE NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC
PRESERVATION
AND
THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION
FOR THE RECREATIONAL TRAILS PROGRAM

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 C.F.R. 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 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 C.F.R. §1.81(a)(5));

WHEREAS, the Division Administrator, FHWA, is the "Agency Official" responsible for compliance with the NEPA and implementing regulations (23 C.F.R. 771.117);

WHEREAS, The New York State Department of Transportation (NYSDOT), as the statewide recipient of the federal-aid program, is responsible for compliance with all federal laws and regulations pursuant to 23 C.F.R. 1.36;

WHEREAS, the New York State Office of Parks, Recreation and Historic Preservation (OPRHP), through NYSDOT, administers federally funded Recreational Trails Program (RTP) projects throughout the State of New York as authorized by 23 U.S.C. 206;

WHEREAS, the FHWA's NEPA implementing procedures (23 C.F.R. §771.117) 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 activities that are eligible for Federal funding through the OPRHP administered RTP, are established in the Moving Ahead for Progress in the 21st Century Act (MAP-21) and defined in the OPRHP application requirements titled "Eligible Activities";

WHEREAS, Section 1318(d) of MAP-21, Pub. L. 112-141, 126 Stat. 405 (July 6, 2012), allows FHWA to enter into programmatic agreements with the States that establish efficient

administrative procedures for carrying out environmental and other required project reviews, including agreements that allow a State to determine whether a project qualifies for a CE on behalf of FHWA;

WHEREAS, the FHWA developed regulations in 23 C.F.R. §771.109(g) implementing the authorities in section 1318(d).

WHEREAS, the RTP is designed to provide and maintain recreational trails for both motorized and non-motorized recreational trails purposes including pedestrian activities including wheelchair use, skating or skateboarding, equestrian activities including carriage driving, nonmotorized snow trail activities including skiing, bicycling or use of other human-powered vehicles, aquatic or water activities; and motorized vehicular activities including all-terrain vehicle riding, motorcycling, snowmobiling, use of off-road light trucks or other off-road motorized uses. FHWA has determined that given the nature of the RTP and the fact that RTP activities are generally in keeping with those activities of 23 C.F.R. §771.117(c) and (d) and, as such, are considered categorical exclusions;

WHEREAS, the RTP Legislation (23 U.S.C. 206, Section (h)(2) exempts the program from the requirements of Section 4(f) of the Department of Transportation Act of 1966 (23 U.S.C. 138; 49 U.S.C. 303);

WHEREAS, the RTP is within Title I of MAP-21 and the FAST Act, and the NYSDOT is responsible for the Disadvantaged Business Enterprise (DBE) Requirement;

WHEREAS, the RTP is consistent with the Statewide Long Range Transportation Plan, the Statewide Transportation Improvement Program (STIP), and applicable Metropolitan or Rural Planning Organizations' Transportation Improvement Programs (TIPs) and Long Range Transportation Plans, and is exempt from regional air quality conformity determinations (40 CFR parts 51 and 93);

WHEREAS, projects under the RTP will be coordinated with the State Historic Preservation Officer (SHPO) to determine the potential for effects on properties on or eligible for *the National Register of Historic Places* pursuant to 36 C.F.R. 800, as amended;

WHEREAS, projects under RTP will be consistent with the U.S. Army Corps of Engineers (U.S.A.C.E.) finding requirements and EEO 19900 Protection of Wetlands and will not impact wetlands or if it will impact wetlands, either a programmatic finding or an individual finding will be used as needed;

WHEREAS, OPRHP will be responsible for ensuring that projects have been reviewed under the State Environmental Quality Review Act;

WHEREAS, the RTP project sponsor (grantee) will develop project bid documents, advertise and bid for construction, administer the construction, monitor and report to NYSDOT EEO and DBE utilization during construction, as applicable, provide and maintain the project for a term measured by the useful life of the facility (refer to the corresponding New York State Master Contract for Grants for the applicable term for public access and maintenance of the project).

NOW, THEREFORE, the FHWA, NYSDOT, and the OPRHP enter into this Programmatic Agreement (“Agreement”) for the processing of categorical exclusions.

I. RESPONSIBILITIES

A. The OPRHP 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 23 C.F.R. §771.117(c) (“c list”) that do not exceed the thresholds in Section I(A)(1)(b) below, the OPRHP may make a CE approval on behalf of FHWA. The OPRHP will identify the applicable listed CE, ensure any conditions or constraints are met, verify that unusual circumstances do not apply, address any and all other environmental requirements, and complete the review with a signature evidencing approval. No separate review or approval of the CE by FHWA is required. The following activities may be designated as CEs under this Agreement pursuant to the 23 C.F.R. §771.117(c) without further approval or documentation provided they do not cause any impacts listed in the following section (b):
 - i. Purchase and lease of recreational trail construction and maintenance equipment, materials, and supplies (e.g., mowers, tractors, groomers, etc.);
 - ii. Development and rehabilitation of trailside and trailhead facilities and trail linkages for recreational trails;
 - iii. Maintenance and restoration of existing recreational trails including re-grading of existing trail and/or parking, striping/re-striping, debris removal;
 - iv. Construction of new recreational trails, as defined in 23 USC 206;
 - v. Acquisition of easements and fee simple title to property for recreational trails or recreational trail corridors;
 - vi. Operation of educational programs to promote safety and environmental protection related trails;
 - vii. Installation, repair, or replacement of signage, kiosks, trail markers, fencing, guiderails, retaining walls, berms and puncheon;
 - viii. Alterations to the surface of a trail and/or parking lot;
 - ix. Minor or cosmetic repair of bridges;
 - x. Repair or improvement of existing drainage (e.g. culverts);
 - xi. Landscaping;
 - xii. Alterations to facilities in order to make them accessible for elderly persons and persons with disabilities (Americans with Disabilities Act compliance) including the following:
 1. Ramps;
 2. Railing;

3. Re-surfacing;
 4. Parking and trail access;
 5. Signage;
 6. Port-a-potties;
- xiii. Permanent installation of ancillary facilities including the following:
1. Port-a-potties;
 2. Bike racks;
 3. Lighting;
 4. Benches;
 5. Trash receptacles
 6. Course design features (jumps, par course equipment, picnic benches).
- b. Actions listed in 23 C.F.R. §771.117(c) that exceed the thresholds may not be approved by the OPRHP. FHWA review and approval is required if the action:
- i. Involves acquisitions of more than a minor amount of right-of-way;
 - ii. Involves acquisitions that would result in any residential or non-residential displacements;
 - iii. New construction or replacement of bridges;
 - iv. Results in a finding of “adverse effect” to historic properties under Section 106 of the National Historic Preservation Act;
 - v. Requires 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;
 - vi. Results in a finding of “may affect, likely to adversely affect” threatened or endangered species or critical habitat under the Endangered Species Act;
 - vii. Requires construction of temporary access, or the closure of existing road, bridge, or ramps, that would result in major traffic disruptions;
 - viii. Requires changes in access control (Interstate);
 - ix. Requires construction in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.
- c. For actions not specifically listed as CEs in 23 C.F.R. §771.117(c), but meeting the requirement of a CE under 40 CFR §1508.4 and 23 C.F.R. §771.117(a), the OPRHP agrees to contact FHWA to collaboratively determine the NEPA classification.
2. Consulting with FHWA for actions that involve unusual circumstances (23 C.F.R. §771.117(b)), to determine the appropriate class of action for environmental analysis and documentation. The OPRHP may decide or FHWA may require that

additional studies be performed prior to making a CE approval, or the preparation of an EA or EIS.

3. Meeting applicable documentation requirements in Section II of this Agreement for OPRHP CE approvals on FHWA's behalf and applicable approval and re-evaluation requirements in Section III.
4. Relying only upon employees directly employed by the OPRHP (not consultants contracted by the OPRHP to act on the OPRHP's behalf) to make CE approvals submitted to FHWA under this Agreement. While third parties (i.e. consultants) may prepare NEPA documents on behalf of the OPRHP in accordance with this Agreement, the OPRHP may not delegate its responsibility for CE approvals to third parties.

B. The FHWA is responsible for:

1. Providing timely advice and technical assistance on CEs to the OPRHP as requested.
2. Providing timely input and review of CEs, with reviews completed within 30 days of receipt. FHWA will base its approval of CE actions on the project documentation prepared by the OPRHP under this Agreement.
3. Conducting a periodic program review as part of its oversight activities, by reviewing a sampling of "c list" CEs produced and approved during the previous federal fiscal year.
4. Overseeing the implementation of this Agreement.

II. DOCUMENTATION OF OPRHP CE APPROVALS

- A. For OPRHP CE approvals, the OPRHP shall ensure that it fulfills the following responsibilities for documenting the project-specific determinations made:
 1. For "c list" CEs (23 C.F.R. §771.117(c)), the OPRHP should identify the applicable action, ensure any conditions specified in FHWA regulations are met, verify that unusual circumstances do not apply, address all other environmental requirements, and complete the review with a OPRHP signature evidencing approval. The OPRHP must complete and submit the *FEDERAL ENVIRONMENTAL APPROVAL WORKSHEET (FEAW)* and documentation of the NEPA determination to the FHWA for environmental clearance of categorical exclusions. The OPRHP must provide the FHWA with the *FEAW* and documentation of the NEPA determination when seeking federal authorization for construction.
- B. The OPRHP should maintain a project record for CE approvals it makes on FHWA's behalf and for each CE submitted to FHWA for approval. 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;

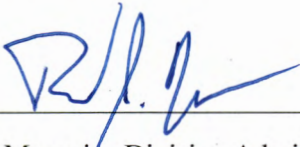
2. A summary of public involvement complying with the requirements noted in the RTP Application Guidance Document;
 3. Any stakeholder communication, correspondence, consultation, or public meeting documentation;
 4. The name and title of the individual who made the NEPA determination and the date when the NEPA determination was made; and
 5. For cases involving re-evaluations of the NEPA determination, any written re-evaluation (when required) or a statement that a re-evaluation was completed for a project but that a written re-evaluation was not necessary.
- C. Any electronic or paper project records maintained by the OPRHP should be provided to the NYSDOT or FHWA at their request. The OPRHP should retain those records, including all letters and comments received from governmental agencies, the public, and others for a period of no less than six (6) years after completion of project construction. The 6-year retention provision does not relieve the OPRHP of its project or program recordkeeping responsibilities under 2 C.F.R. §200.333 or any other applicable laws, regulations, or policies.

III. ADMINISTRATIVE CONDITIONS:

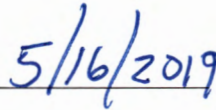
- A. **Applicability:** This Agreement applies to all RTP projects that are administered by the OPRHP and funded in part by the FHWA.
- B. **Disputes:** It is the intent of the FHWA to become actively involved in the resolution of disagreements pertinent to findings of Section 106 eligibility and effects should they arise.
- C. **Monitoring:** The FHWA may monitor any activities carried out pursuant to this Agreement. FHWA will cooperate with the NYSDOT and OPRHP in carrying out these monitoring and review responsibilities.
- D. **Amendments:** Any party to this Agreement may, from time to time, request that changes be made to this Agreement. Such changes, mutually agreed upon by and between OPRHP, FHWA, and NYSDOT, shall be incorporated in written amendments executed by the duly authorized representatives of all parties to this Agreement; The parties agree to address written requests to amend this Agreement within 30 days of receipt of such written request.
- E. **Termination:** Any party to this Agreement may terminate it by providing 30 days written notice to the other parties, provided that the parties will consult during the period prior to the termination to seek agreements on amendments or other actions that would avoid termination.
- F. **Regulatory Revisions:** In the event that revised regulations are promulgated, it is the intent of the signatories of this Agreement to continue to allow OPRHP and NYSDOT and/or their designee to independently conduct the work required in the equivalent provisions of the new regulations on behalf of the FHWA and to consult to amend this Agreement accordingly.

G. **Re-evaluation:** The FHWA, NYSDOT, and OPRHP may from time to time re-evaluate the list of eligible activities for possible new inclusions and/or deletions.

FEDERAL HIGHWAY ADMINISTRATION



Rick Marquis, Division Administrator, FHWA Albany

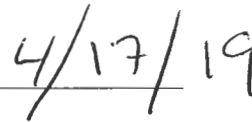


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NEW YORK STATE DEPARTMENT OF TRANSPORTATION

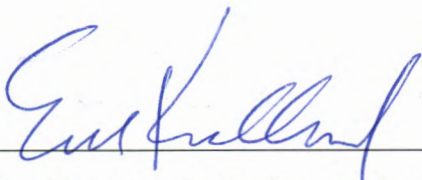


Ronald L. Epstein, Executive Deputy Commissioner, NYSDOT

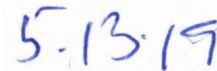


Date

NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION



Erik Kulleseid, Acting Commissioner, OPRHP



Date