PROGRAMMATIC AGREEMENT

BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION, NEW YORK DIVISION, AND THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION REGARDING THE PROCESSING OF ACTIONS CLASSIFIED AS CATEGORICAL EXCLUSIONS FOR FEDERAL-AID HIGHWAY PROJECTS

This Programmatic Agreement, made and entered into on this twentieth day of September 2017, by and between the New York Division of the Federal Highway Administration, United States Department of Transportation, and the State of New York, acting by and through its Department of Transportation, hereby provides as follows:

WITNESSETH:

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 discretionary Federal actions subject to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq.;

Whereas, the Secretary of Transportation has delegated to the FHWA the authority to carry out functions of the Secretary under NEPA as they relate to matters within the FHWA's primary responsibilities (49 CFR 1.81(a)(5));

Whereas, the Regulations for Implementing the Procedural Provisions of the 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 FHWA's NEPA implementing procedures (23 CFR part 771) list a number of Categorical Exclusions (CE) for certain actions that the FHWA has determined do not individually or cumulatively have any significant environmental impacts (23 CFR 771.117(c)-(d));

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 the 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 Department of Transportation to determine that a project qualifies as a CE on behalf of the FHWA;

Whereas, the FHWA developed regulations implementing the authorities in section 1318(d), effective November 6, 2014 (23 CFR 771.117(g)), wherein such agreements are subject to certain conditions, including that the agreement must set forth the State DOT's responsibilities for making CE determinations, documenting the determinations, and achieving acceptable quality control and quality assurance (23 CFR 771.117(g)(1); and

Whereas, the New York State Department of Transportation (NYSDOT) is a State agency that undertakes or administers transportation projects using Federal funding received under the Federal-aid Highway Program and must assist the FHWA in fulfilling its obligations under NEPA for the
NYSDOT projects (23 CFR 771.109) including those projects being progressed as locally administered Federal-aid projects.

Now, therefore, the FHWA and the NYSDOT enter into this Programmatic Agreement ("Agreement") for the processing of CEs that meet the criteria contained within this Agreement.

I. PARTIES
The Parties to this Agreement are the New York Division of the Federal Highway Administration and the New York State Department of Transportation.

II. PURPOSE
For Federal-aid projects and other Federal actions administered or undertaken by NYSDOT (referred to in this Agreement collectively as "Projects"), the purpose of this Agreement is to:

A. Authorize the NYSDOT to determine on behalf of the FHWA that a project qualifies as a CE listed in 23 CFR 771.117;
B. Define the conditions under which the NYSDOT may make a CE determination; and
C. When the conditions are not met for NYSDOT to make a CE determination, specify how the NYSDOT recommends and requests that the FHWA determine that a project qualifies as a CE.

III. AUTHORITIES
This agreement is entered into pursuant to the following authorities:

D. 40 CFR parts 1500 - 1508
E. DOT Order 5610.1C
F. 23 CFR 771.117
G. 2015 FHWA-NY/NYSDOT Stewardship and Oversight Agreement (SOA)

IV. RESPONSIBILITIES
A. The NYSDOT is responsible for:

1. Ensuring the following process is completed for each project that qualifies as a CE:
   a. For projects qualifying as a CE listed in 23 CFR 771.117(c)-(d), if the project meets the thresholds for the topics listed in Section IV(A)(1)(b) below, and the delegation provisions of the SOA, then the NYSDOT will determine the project qualifies as a CE on behalf of the FHWA and no separate review of the CE by the FHWA is required. The NYSDOT will:
      i. Verify that there are no unusual circumstances per 23 CFR 771.117(b);
      ii. Identify the applicable CE listed in 23 CFR 771.117(c)-(d);
iii. Identify any conditions or constraints of the applicable CE and ensure they are met;

iv. Record that the thresholds in Section IV(A)(1)(b) were applied via the Federal Environmental Approval Worksheet (FEAW), and as found in the Environmental Manual (TEM) Section 4.1.1;

v. Address and document applicable environmental requirements within the Design Approval Document (DAD); and

vi. Complete the review with a signature evidencing the NYSDOT's determination that the project qualifies as a CE.

b. The NYSDOT may determine a project qualifies as a CE on behalf of the FHWA if listed in 23 CFR 771.117(c)-(d), if the required environmental determinations identified in the FEA have been issued, and if the project meets the FEA thresholds detailed in TEM 4.1.1 for the following topics:

i. Effects to a threatened or endangered species or critical habitat under the Endangered Species Act;

ii. Effects to historic properties under the National Historic Preservation Act;

iii. Use (including Constructive Use) of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (Section 4(f));

iv. Encroachment in a floodplain;

v. Certain permit categories under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899;

vi. Construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers;

vii. Projects which require a bridge permit from the U.S. Coast Guard;

viii. Property acquisition;

ix. Projects which would result in traffic disruptions; and

x. Changes in access control.

c. For projects that qualify as a CE listed in 23 CFR 771.117(c)-(d) that do not meet the thresholds referenced in Section IV (A)(1)(b), the NYSDOT may not make the CE determination on the FHWA's behalf. The NYSDOT may recommend and request that the FHWA determine the project qualifies as a CE. The NYSDOT recommendation and request must be in accordance with the following:

i. The NYSDOT shall submit the recommendation and request to the FHWA for review and determination prior to, or at, the time the FHWA contemplates its next approval or grant action for the project;

ii. The NYSDOT recommendation will include information to support the requirements listed in Section IV (A)(1)(a)(i-v) above; and

iii. The NYSDOT will complete the review with a signature, in accordance with Section VI of this Agreement, below; evidencing the NYSDOT's recommendation that the project qualifies as a CE.

d. For projects that are not specifically listed in 23 CFR 771.117(c)-(d), the NYSDOT may not determine the projects qualify as a CE on the FHWA's behalf. If the NYSDOT believes the project will meet the requirements of a CE under 40
CFR 1508.4 and 23 CFR 771.117(a), then the NYSDOT may recommend and request that the FHWA determine the project qualifies as a CE. The NYSDOT recommendation and request must be in accordance with the following:

i. The NYSDOT shall submit the recommendation and request to the FHWA for review and determination prior to, or at, the time the FHWA contemplates its next approval or grant action for the project;

ii. The NYSDOT recommendation will include the information listed in Section IV (A)(1)(a)(i-v) above;

iii. The NYSDOT will identify that the CE being progressed is "not specifically listed" for completion of Section IV (A)(1)(a)(ii); and

iv. The NYSDOT will complete the review with a signature, in accordance with Section VI of this Agreement, below; evidencing the NYSDOT's recommendation that the project qualifies as a CE.

e. For all projects qualifying as a CE, the NYSDOT shall submit to the FHWA the appropriate documentation specified in the FEAW instructions;

f. The NYSDOT may request Design Approval, notice to proceed with Final Design, acquisition of Right-of-Way, or Construction Authorization after the NYSDOT has completed its recommendation or determination that a project is a CE in accordance with the procedures of the NYSDOT Project Design Manual.

g. The FHWA's objection to a NYSDOT CE recommendation may not constitute a disapproval of the project, but signifies that the FHWA will need to engage in project-specific review to verify that the determination is adequate.

2. Consulting with the FHWA, through the NYSDOT Main Office Project Liaison, for projects that may involve unusual circumstances (23 CFR 771.117(b)).

B. The FHWA is responsible for:

1. Providing timely advice and technical assistance to the NYSDOT, as requested.

2. Providing timely review and response to any recommendation and request from the NYSDOT for the FHWA to determine the project qualifies as a CE.

V. DOCUMENTATION OF CE DETERMINATIONS

A. The NYSDOT will provide the project records maintained by the NYSDOT to the FHWA, at its request. These records will be recorded within the DAD for the project, or maintained for inspection separately.

B. The NYSDOT shall retain the project records, for a period of no less than three (3) years after completion of project construction. This 3-year retention provision does not relieve the NYSDOT of its project or program recordkeeping responsibilities under 2 CFR 200.333, or the Record Disposition Authorizations the NYSDOT has on file with the State Archives and Records Administration (or any other applicable laws, regulations, or policies).

C. For the purposes of this Agreement, the NYSDOT shall ensure that the project records include the following information.

1. The information listed in Section IV (A)(1)(a)(i-v) above;

2. The NYSDOT signature completing either NYSDOT CE determination or NYSDOT recommendation and request for the FHWA to determine the project is CE;
3. Any other forms, documents and exhibits that summarize the consideration of project effects and potential unusual circumstances;

4. A summary of public involvement complying with the requirements of the FHWA-approved public involvement policy;

5. Any stakeholder communication, correspondence, consultation, or public meeting documentation including all letters and comments received from governmental agencies, the public, and others;

6. The name and title of the DAD approver and the date of the NYSDOT's approval or the FHWA's final approval; and

7. 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).

VI. NEPA DETERMINATION AUTHORITY AND DELEGATION

A. The NYSDOT may not delegate its responsibility for determining projects qualify as CEs or recommendations regarding CE determinations to third parties (i.e., consultants, local government staff, and other State agency staff). Only the offices or officials specifically identified below may make the NYSDOT's CE determinations and CE recommendations submitted to the FHWA for determination.

1. The NYSDOT determination that project qualifies as a CE is delegated to those officials identified in Exhibit 4-2, The Design–Related Approval Matrix in the NYSDOT Project Development Manual; and

2. The NYSDOT recommendation and request that the FHWA determine that a project qualifies as a CE is delegated to those officials identified in Exhibit 4-2, The Design–Related Approval Matrix in the NYSDOT Project Development Manual.

VII. NEPA REEVALUATIONS

A. In accordance with 23 CFR 771.129, the NYSDOT will reevaluate its determinations and recommendations for projects, consult with the FHWA, and as necessary, prepare documentation in accordance with the NYSDOT Project Development Manual and Section V of this Agreement, to determine if the documentation and environmental decision remain valid.

VIII. QUALITY CONTROL, QUALITY ASSURANCE, MONITORING & PERFORMANCE

A. The NYSDOT shall follow the procedures in its own internal control documents (i.e. Project Development Manual and TEM) to ensure that its determinations that a project qualifies as a CE on behalf of the FHWA and its recommendations and requests that the FHWA determine a project qualifies as a CE are made in accordance with the Authorities listed in Section II, above and this Agreement.

B. NYSDOT Performance Monitoring and Reporting

1. The FHWA and the NYSDOT agree to cooperate in monitoring performance under this Agreement and work to assure quality performance.

2. The NYSDOT agrees to submit to the FHWA (electronically or hard copy) an annual report summarizing its performance under this Agreement, including a list of all projects determined to qualify as CEs (by either NYSDOT or FHWA) within the reporting period.
The report must identify any areas where improvement is needed and what measures the NYSDOT is taking to implement those improvements. The report must include a description of actions taken by the NYSDOT as part of its quality control efforts under Section VIII(A). Specifically, the list of projects determined to be CEs, must contain the following information:

a. The NYSDOT Project Identification Number and project name, including the route number or facility name where the project is located, and a full description of the scope of work;

b. Identification of the applicable CE from 23 CFR 771.117(c)-(d);

c. Consultations or technical analyses that are pending (if applicable);

d. Whether the project included a Section 4(f) de minimis or Programmatic Evaluation; and

e. Location of the completed FEAW.

C. FHWA Oversight and Monitoring

1. Monitoring by the FHWA will include consideration of the technical competency and organizational capacity of the NYSDOT and consultants, as well as the NYSDOT's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of the NYSDOT's CE determinations on the FHWA's behalf, recommendations and requests to the FHWA for CE determination, and the effectiveness of the NYSDOT's administration of its internal CE determinations.

2. The FHWA will conduct one or more program reviews as part of its oversight activities, during the term of this Agreement. The NYSDOT shall prepare and implement a corrective action plan to address any findings or observations identified in the FHWA review. The NYSDOT should draft the corrective action plan within 45 days of the FHWA finalizing its review. The results of that review and corrective actions taken by the NYSDOT shall be considered at the time this Agreement is considered for renewal.

3. Nothing in this Agreement prevents the FHWA from undertaking additional monitoring or oversight activities, including audits, with respect to the NYSDOT's performance under this Agreement. The FHWA may require the NYSDOT to perform other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with applicable Federal laws, rules, and regulations.

4. The NYSDOT agrees to cooperate with the FHWA in all oversight and quality assurance activities.

IX. AMENDMENTS

A. If the parties agree to amend this Agreement, then the FHWA and the NYSDOT 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.

X. TERM, RENEWAL, AND TERMINATION

A. This Agreement shall have a term of five (5) years, effective on the date of the last signature.

B. The NYSDOT 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 the NYSDOT requests renewal, and the FHWA determines that the NYSDOT has satisfactorily carried out the provisions of this Agreement. In considering any renewal of this Agreement, the FHWA will evaluate the effectiveness of the Agreement and its overall impact on the environmental review process.

D. Either party may terminate this Agreement at any time by giving at least 30 days written notice to the other party.

E. Expiration or termination of this Agreement shall mean that the NYSDOT is not able to make CE determinations on FHWA's behalf.

Execution of this Agreement provides evidence that the involved 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.

Name: Michael Canavan
Chief Operating Officer
Federal Highway Administration, New York Division

Name: Wahid Albert, PE
Chief Engineer and Assistant Commissioner
New York State Department of Transportation

Date

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