

A Practitioner's Guide to FHWA Programmatic Agreements for Categorical Exclusion

A. Introduction

Programmatic Agreements between FHWA and State Departments of Transportation (SDOTs) that allow SDOTs to process categorical exclusions (CEs) under the National Environmental Policy Act (NEPA), 4321 *et seq.*, have been effective in producing time savings in the project delivery process. These agreements provide benefits such as: (1) specifying roles and responsibilities of those involved; (2) standardizing coordination and compliance procedures; (3) facilitating the development of greater trust relationships; and (4) allowing staff and resources to be focused and effective. The CE decision is a determination whether or not a proposed project fits in the category of actions not requiring the preparation of an Environmental Impact Statement (EIS) or an Environmental Assessment (EA), based on a designation of the CE in regulation or based on FHWA experience combined with a finding that no unusual circumstances exist that would require the preparation of an EA or EIS. This NEPA determination is also the basis for an approval for the project to proceed to the next step in the project development process.

Section 1318(d)(2) of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405 (July 6, 2012), created express authority for FHWA to enter into programmatic CE (PCE) agreements with SDOTs to allow them to make CE approvals on FHWA's behalf. FHWA issued a final rule establishing standard requirements applicable to PCE agreements in 23 CFR 771.117(g) on October 6, 2014. The final rule is accessible at: <http://www.gpo.gov/fdsys/pkg/FR-2014-10-06/pdf/2014-23660.pdf>. Section 1315 of the Fixing America's Surface Transportation (FAST) Act Pub. L. 114-94, 129 Stat. 1312 (Dec. 4, 2015), directed FHWA to conduct a rulemaking to allow PCE agreements to include responsibility for making CE determinations for actions described in 23 CFR 771.117(c)-(d), and for CE determinations that meet the criteria for a CE as defined in 40 CFR 1508.4 and that are identified in the PCE agreement.

The regulations establish some basic requirements for all PCE agreements.¹ PCE agreements must:

1. Set forth the SDOT's responsibilities for making CE determinations on FHWA's behalf (an SDOT decision) or alternatively, CE certifications (an SDOT recommendation to FHWA for the NEPA approval);
2. Set forth the SDOT's responsibilities for documenting the determinations made;
3. Set forth the SDOT's responsibilities for achieving acceptable quality control and quality assurance;
4. Provide for FHWA's monitoring of the SDOT's compliance with the terms of the agreement;
5. Provide for the SDOT's execution of any needed corrective action;
6. Include stipulations for amendment and termination of the agreement; and
7. Include stipulations for public availability of the agreement once it has been executed.

In addition, PCE agreements must not have a term of more than five years, but are renewable for additional five-year periods.

¹ 23 CFR 771.117(g).

FHWA has developed a model PCE agreement to assist practitioners in drafting PCE agreements that meet these requirements.

B. Approaches for PCE Agreements

The regulations recognize two types of approaches for processing CEs under these agreements: (1) allowing an SDOT to decide whether an action qualifies for a CE on behalf of FHWA and proceed without individual FHWA review and approval, and (2) allowing an SDOT to certify to FHWA that an action meets the criteria for a CE determination, but not to proceed until there is a FHWA approval.² Regardless of the type of approach selected, the Division Office must review and approve documented CEs for actions not specifically listed on the (d)-list unless a CE covering the action has been designated for the State and it is listed in the PCE agreement.³

1. SDOT CE Approvals on behalf of FHWA

The regulation establishes an SDOT's authority to determine whether a project qualifies for a CE on behalf of FHWA. The SDOT is responsible for evaluating the project's potential impacts, and preparing and approving any necessary CE documentation, including the SDOT's CE decision. FHWA does not have a review or approval role under this method; however, FHWA retains general responsibilities for program oversight including specific responsibilities specified in the PCE agreement.⁴

The SDOT's decision-making authority extends to the CE actions listed in 23 CFR 771.117(c) that meet the definition of a CE under 40 CFR 1508.4 and are listed in the PCE agreement. It also includes CEs designated for the State (i.e., State-specific CEs). FHWA Division Offices may limit the set of CE actions that the SDOT may review and approve to only actions that do not have certain impacts.

The process to designate a new CE entails gathering substantiation, based on the State's experience or other information, to show that such types of actions typically do not have significant environmental impacts. FHWA then consults with the Office of the Secretary of Transportation (OST) and the President's Council on Environmental Quality (CEQ) for the new CE(s). This normally involves an informal consultation with those offices, informed by any public comments received through the required notice-and-comment process, and a formal approval by OST and CEQ. Once this designation of new CE process is complete, those CE actions can be included among the actions that an SDOT may review and approve on FHWA's behalf. The new State-specific CEs must be identified in the appendix to the PCE agreement.

2. SDOT Prepares CE Document/Documentation for FHWA Approval ("Certifications")

The regulation also allows for a PCE agreement that permits the SDOT to evaluate CE projects, prepare CE documentation, and set forth expectations for expeditious FHWA CE approvals.⁵ This approach can be used for any CE action that the SDOT is not allowed to review and approve on FHWA's behalf. The

² 23 CFR 771.117(d).

³ 23 CFR 771.117(g).

⁴ *Id.*

⁵ *Id.*

approach is also available for a project determined to qualify as a CE not specifically included on the (c)- or (d)-list. FHWA is responsible for review and approval of the recommended CE determination before authorizing any post-NEPA project work, but does so in a predictable and expeditious manner.

In this type of approach FHWA may agree to review and approve batched certifications submitted by the SDOT as well as individual certifications within an agreed upon span of time. FHWA may also agree that if the SDOT does not receive a response within the specified time frame, the SDOT may assume FHWA approval of the submittal. The time allotted should be sufficient for review and approval [for example, not less than 5 business days]. The submittal should provide sufficient information about the project(s) and be received by an FHWA individual who can complete the review and approval. The Division Office staff is responsible for defining these parameters in the agreement.

3. Agreements with both approaches

SDOTs and Division Offices have the option to develop a PCE agreement that allows the SDOT to make NEPA approval actions for some CE actions listed in 23 CFR 771.117(c) and (d); and to submit CE certification with documentation for those actions that FHWA must approve because the project is an action not listed in regulation or the project has certain impacts. In these situations, the agreement should describe how the SDOT makes CE approvals for CE actions listed in regulation and the SDOT certification process, including how FHWA would provide for predictable and expeditious CE approvals. FHWA's model PCE agreement follows this approach.

C. Considerations Before Developing the Agreement

SDOTs and Division Offices should consider a number of options in developing the PCE agreement. The choices made should be informed and grounded in the particular experience that the SDOT and Division Office have with their prior agreements and the technical environmental expertise available to the SDOT. Within the parameters described in the preceding sections of the guide, the Division Office and SDOT may tailor the PCE agreement in a way that best suits their circumstances. Some options are discussed below.

1. CE Grouping

Many existing PCE agreements have divided CEs into different groups based on expected levels of detail for documentation as well as whether the SDOT can make approvals on FHWA's behalf or not. The CEs are grouped according to the type of CE, environmental context in which the action will take place, or project impacts. The grouped CEs take into account the organizational and approval structure within the SDOT, reserving more complex CE approvals and certifications to officers at a higher level within the organization. The model PCE agreement provides an example by establishing three groups using appendices to make the differences easier to understand: Appendix A for (c)-list CEs, Appendix B for (d)-list CEs, and Appendix C for State-specific CE actions.

SDOTs and Division Offices should discuss what approach best suits their needs. They should ensure that adequate controls and the necessary oversight are in place, but should avoid creating a complex tiered structure that would complicate the agreement and its implementation.

2. Environmental Resource Impact Thresholds

The Division Office has discretion on whether to establish impact thresholds in their agreements that would result in either fewer or greater numbers of projects available for SDOT review and approval. They should consider: (1) the level of technical expertise available to the SDOT, (2) the sensitivity of impacts to resources that are particular to the State, (3) the level of coordination that may be needed with other Federal agencies, (4) the role the Division would like to retain for projects with particular impacts, and (5) any regulatory restrictions that could affect the SDOT's ability to take on some of the consultation responsibilities without obtaining formal assignment.

PCE agreements establish expectations for the SDOT to utilize environmental resource impact thresholds in determining the appropriate intensity of review and method of approval for a project. This is done because some project actions can occur in sensitive environmental settings, or may need a higher level of scrutiny not requiring an environmental assessment or environmental impact statement. As an example, some SDOTs have established specific thresholds for acquisition of properties (more than 10 acres, more than 1 acre, or any acquisition) that if surpassed, require FHWA approval. SDOTs and Division Offices should discuss what areas or environmental considerations deserve a threshold for varying degrees of review and approval.

At the same time, PCE agreements may be used to provide details or specific thresholds to address the constraints identified in 23 CFR 771.117(e) to apply to CEs (c)(26) (modernization of highways), (c)(27) (highway safety or traffic operation improvements), and (c)(28) (bridge rehabilitation and construction of grade separation). For example, the PCE agreement may establish what threshold the SDOT should use for the terms "more than minor amount of right-of-way" (§ 771.117(e)(1)), "major traffic disruption" (§ 771.117(e)(4)), and "changes in access control" (§ 771.117(e)(5)) given the unique characteristics of the State's environment.

3. Documentation/Recordkeeping

PCE agreements should define documentation expectations for the CE actions processed under the agreements. The documentation required for (c)-list CEs is less compared with (d)-list CEs. For example, PCE agreements may include an appendix with a CE checklist for SDOT staff to use for CE actions that do not typically trigger the need for exhaustive analyses.

The PCE agreement must describe documentation expectations for (c)-list CEs and (d)-list CEs or provide reference to other FHWA-SDOT developed manuals or documents that outline these expectations.⁶ Such descriptions should include how the SDOT records its CE approvals and its CE submissions to FHWA for approval. It may discuss how the State maintains project records (e.g., retention time, access to records, etc.). All CE project records, including those for (c)-list CEs, must: (1) reflect the consideration of unusual circumstances, (2) indicate any conditions or constraints for use of a CE have been met, and (3) show that any other environmental requirements have been satisfied.

Documentation for (d)-list CEs should include any environmental analyses and consultations that support that the CE determination is appropriate. If an SDOT has developed forms or templates,

⁶ 23 CFR 771.117(g)(1).

examples may be attached to the agreement as appendices or references provided to other FHWA-SDOT developed manuals or documents that outline these expectations.

4. Certification process

If a State completes CE document submissions to FHWA, the agreement must describe the SDOT's certification process and the subsequent predictable and expeditious process for FHWA approval of SDOT-certified projects or provide reference to other FHWA-SDOT developed manuals or documents that outline these expectations.⁷ The FHWA approval process must set forth how CE projects submitted to FHWA for approval are reviewed and approved prior to project implementation.⁸ The agreement may specify that the SDOT submits certified projects to FHWA on a project-by-project basis, weekly, bi-weekly, monthly, or semi-annual basis. Alternatively, FHWA may make the CE approval when it processes the next approval-action for the project.

D. PCE Agreement Content

There are certain critical elements in a PCE agreement. The following list describes which elements should be included in a PCE agreement, and whether they are "required" or "optional."

- **Whereas clauses** – The purpose of the "whereas" clauses is to provide a background and context to the reader of the reasons and authorities for the agreement. The "whereas" clauses do not establish requirements for the parties, but give a context that can facilitate the interpretation of the agreement. The inclusion of "whereas" clauses in the PCE agreement is **optional**.
- **Parties** – PCE agreements must identify the parties to the agreement. The parties should be FHWA and the State Department of Transportation. It would be very unusual for a State agency other than the SDOT to enter into a PCE agreement with FHWA. The identification of the parties in the agreement is **required**.
- **Purpose** – This section summarizes the intent of the parties with the agreement. The description of the purpose of the PCE agreement is **required**.
- **Authorities** – This section lays out the legal authorities for the PCE agreement. The authorities are based on NEPA and include the implementing procedures from CEQ, U.S. DOT, and FHWA. A description of the legal authorities is **required**.
- **Responsibilities** – The responsibilities section is the heart of the agreement because it establishes the decision-making and other responsibilities of the parties and the review process for CE actions. In this section, the parties: (a) establish the review approach (certification, approval on behalf of FHWA, or a combination); (b) define any limitation on the scope of actions that the SDOT may approve on FHWA's behalf; (c) establish the decision-making structure (who has authority to approve which types of CEs); (d) establish the method and reporting frequency for SDOT approvals and certifications; and (e) define FHWA's

⁷ *Id.*

⁸ *Id.*

responsibilities under the agreement (providing technical assistance and for overseeing the implementation of the agreement). A clear statement of the responsibilities of both the SDOT and FHWA is **required**.

Actions – The PCE agreement must identify the list of CE actions (in an appendix) that the SDOT may review and approve on behalf of FHWA. Normally the list of actions would include all or most actions listed in 23 CFR 771.117(c) [the (c)-list] and 23 CFR 771.117(d) [the (d)-list]. If a State and Division Office wish to include actions not already listed in regulation and that also meet the definition of a CE, they will need to go through the process identified in B.1 above to designate State-specific CEs and to identify them on a list of State-specific CEs in the agreement. Inclusion of a list of actions for which the State may make CE approvals on behalf of FHWA is **required**.

The list of environmental resource impact thresholds (that might limit the scope of projects the SDOT could approve on FHWA’s behalf) provided in the model PCE agreement is an example based on FHWA’s past experience with PCE agreements. The Division Office and SDOT should determine those that are applicable based on the State’s environmental setting and context. The decision also should be based on the comfort level between the SDOT and the Division Office given the consultations or coordination needed with other agencies, level of public controversy, and SDOT in-house environmental expertise. Establishing thresholds is **optional**.

The model PCE agreement also illustrates the approach to certification that allows the SDOT to provide a list of certified CEs and gives the FHWA Division Office a certain amount of time to object to the certifications. This approach is **optional**, but if used must be consistent with the parameters discussed in the Certification Process section above.

- **Documentation** – The purpose of this section is to establish shared expectations for SDOT documentation of CE reviews and decisions or certifications. PCE agreements may rely upon CE checklists for minor actions with few or no impacts that do not warrant in-depth review and more detailed documentation for those CE actions that involve greater impacts. A clear description of the documentation for all types of CE actions that will be processed under the agreement is **required**.
- **Approvals and Re-evaluations** – This section describes the entities within the SDOT that have authority to make CE approvals on behalf of FHWA. The model PCE agreement uses an approach followed by a number of SDOTs that provide approval authority for certain CEs (e.g., 23 CFR 771.117 c-list CEs) to qualified non-technical staff or regional staff. Other actions that have project impacts (like 23 CFR 771.117 (d)-list CEs) must be reviewed and approved only by environmental experts in SDOT or higher level officials. The approach followed by the model PCE agreement is **optional**.

This section also discusses how re-evaluations of CE approvals would be addressed. The language in the model PCE agreement is rooted in 23 CFR 771.129. It complies with the requirement for re-evaluation of CE determinations. This element of the PCE agreement is

optional, and the regulation applies regardless of whether the provision is included in the agreement.

- **Quality Assurance/Quality Control (QA/QC), Monitoring, and Performance** – This section describes how and who conducts monitoring of the SDOT’s commitments made in the agreement. The section describes expectations for SDOT corrective action. Provisions on monitoring and the SDOT taking corrective action are **required**. The model PCE agreement provides general language. SDOTs and Division Offices may establish more specific standards (such as process and timing).
- **Amendments and Administrative Modifications** – This section describes how the PCE agreement may be modified. Provisions on modifications and amendments are **required**.
- **Term, Renewal, and Termination** – This section describes the term of the agreement (a maximum of 5 years, but the agreement may be renewed), the process for renewal, and termination of the agreement. These provisions are **required**.

FHWA has developed a model PCE agreement (separate attachment) that includes the required and optional PCE agreement contents listed above. The model PCE agreement is a resource available for your consideration to facilitate drafting new PCE agreements that are consistent with the new regulations. Although certain aspects of the model are mandatory, Division Offices are not required to use the precise format or text of the model.