



Memorandum

Subject: **ACTION:** Programmatic Agreements
for Categorical Exclusions

Date: October 28, 2015

From: Gloria M. Shepherd *Gloria M. Shepherd*
Associate Administrator for Planning,
Environment, and Realty

In Reply Refer To: HEPE

To: Division Administrators
Directors of Field Services

This memorandum updates and modifies my memorandum of February 4, 2015, regarding Programmatic Agreements for Categorical Exclusions (PCE). The primary change involves which draft PCE agreements must be reviewed in Washington Headquarters.

Section 1318(d)(2) of the Moving Ahead for Progress in the 21st Century Act granted FHWA the authority to enter into programmatic agreements with State departments of transportation (SDOT) to allow them to make CE determinations on FHWA's behalf. On October 6, 2014, we issued a final rule on this authority in 23 CFR 771.117(g). These regulations required all existing PCE agreements to be revised and updated.

Until now, we have asked that after completing a draft PCE agreement with the SDOT, you forward the draft to the Office of Project Development and Environmental Review (HEPE) and the Office of Chief Counsel (HCC) for review. Our experience in reviewing draft PCE agreements has prompted us to draw several conclusions. We found that draft PCEs that followed the optional template agreement closely tended not to have any significant issues. However, revisions and further discussions were needed when the proposed PCEs departed from the guidance in areas such as identification of parties to the agreement, the legal authorities for entering into the agreements, documentation expectations, and the process for reviewing the State's performance.

Based on our experience, we are no longer requesting that every revised PCE agreement be forwarded for HEPE and HCC review. Division offices may review and approve revised PCE agreements that closely follow the template agreement.

For other PCE agreements, our experience over the last 9 months has identified the following situations where HEP and HCC review of the revised PCE agreements is warranted:

- When the SDOT wants to add CE language not specifically listed in 23 CFR 771.117;
- When the SDOT wants to list actions as examples that go beyond the text of the CEs in 23 CFR 771.117;
- When the agreement references a State agency other than the SDOT as potential beneficiaries of the PCE agreement;
- When the PCE agreement incorporates by reference and relies on State guidance that has never been reviewed by FHWA to expand on terms or procedures (e.g., environmental justice, floodplain, and Section 4(f));
- When the PCE agreement paraphrases an FHWA requirement;
- When language in the PCE agreement seems to indicate FHWA's "pre-approval" of State actions; or
- When the Division is unclear as to its role in the review of projects that qualify for the open-ended list authority in 23 CFR 771.117(d), or in the monitoring of the SDOT's compliance.

We encourage division offices to consult with HEPE and their respective field HCC offices on these agreements, regardless of whether any of these issues arise. These offices may offer perspectives and experience that could improve clarity and goals of the agreement.

You will find my memorandum of February 4, 2015, including the agreement template, guidance for updating agreements, and the current updated agreements on our Web site at: https://www.environment.fhwa.dot.gov/strmlng/programmatic_ce.asp.

Thank you in advance for your cooperation with these revised procedures. If you have any questions about this matter, please contact April Marchese, Acting Director of HEPE, at (202) 366-2037, Owen Lindauer of HEPE at 202 366-2655, or Jomar Maldonado of HCC at (202) 366-1373.