

**Programmatic Agreement
Between
State of Ohio, Department of Transportation, Federal Highway Administration, State of Ohio,
Department of Natural Resources, and National Park Service
For
Interagency Coordination
For
Highway Projects Which Involve Section 6(f) Land and Water Conservation Fund Properties**

PREAMBLE

WHEREAS, On June 27, 2013 the Ohio Department of Transportation (ODOT), Federal Highway Administration (FHWA), Ohio Department of Natural Resources (ODNR) and the National Park Service (NPS) [‘the Agencies’ hereafter] met to discuss coordination procedures for Ohio highway projects funded with either federal-aid or State highway funding that impact properties that have been funded with Land & Water Conservation Fund (LWCF) State Assistance Program monies; and,

WHEREAS, the federal LWCF Act (Public Law 88-578) was passed by Congress on September 3, 1964 and became effective January 1, 1965. Additional federal legislation authorized the LWCF program to continue until December 31, 2015. Purposes of the LWCF Act are “...to assist in preserving, developing and assuring accessibility to all citizens of the United States of America of present and future generations...such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable... by (1) providing funds for and authorizing federal assistance to the states in planning, acquisition, and development of needed land and water areas and facilities, and (2) providing funds for the federal acquisition and development of certain lands and other areas;” and,

WHEREAS, once LWCF funds have contributed to the acquisition or development of a state, local, or municipal recreation area, the area identified in the LWCF grant agreement is subject to the provisions of the LWCF Act. Section 6(f) of the LWCF Act applies to the conversion of certain recreation lands to non-recreational purposes and is applicable to all recreation lands that have received LWCF financial assistance; and,

WHEREAS, Section 6(f)(3) of the LWCF Act states that no property acquired or developed with LWCF assistance shall be converted to other than public outdoor recreation uses without the approval of the Secretary of the United States Department of the Interior (DOI). These protected properties are known as Section 6(f) properties; and,

WHEREAS, ODNR administers the LWCF grant program. The ODNR is responsible for establishing statewide LWCF funding priorities, soliciting applications, and rating and ranking eligible applications through an open project selection process. Selected projects are then submitted to NPS for approval. The ODNR is also responsible for monitoring compliance with all LWCF regulations, particularly Section 6(f)(3); and,

WHEREAS, Any land conversions on property that has received LWCF money must be approved by NPS (FHWA, 1987). Section 6(f) also requires that any applicable land converted to non-recreational uses must be replaced with land of equal or greater fair market value, location, and usefulness; and,

WHEREAS, ODOT proposes highway projects and desires to apply for Federal-aid funding for those projects and in doing so, the FHWA Ohio Division must comply with National Environmental Policy Act (NEPA); and,

WHEREAS, FHWA is responsible for making all NEPA decisions for highway projects in Ohio and FHWA may delegate the task of analyzing environmental impacts and preparing environmental documentation for NEPA compliance pursuant to 42 U.S.C. 4332(2)(D); and,

WHEREAS, FHWA must comply with 23 U.S.C. 138 and 49 U.S.C. 303, known as Section 4(f), in highway projects that might impact parks, recreational areas, wildlife and waterfowl refuges, and historic sites that may include Section 6(f) properties; and,

WHEREAS, based on past experience, review comments and discussions at the meeting, the Agencies agree that the establishment of a standardized coordination process affords a streamlined project review, provided that standard practices are followed to document resource impacts and any avoidance and/or mitigation, if applicable; and,

WHEREAS, this Programmatic Agreement (PA) includes project specific notification from ODOT to ODNR and NPS to ensure that unique resources or concerns can be addressed where warranted; and,

WHEREAS, this PA includes project specific notification from ODOT to ODNR and NPS to comply with the LWCF Act; and,

NOW THEREFORE, the Agencies enter into this Agreement for the processing of projects which involve 6(f) LWCF Act properties subject to the following terms and conditions:

Section A: Agreement

When ODOT undertakes all applicable actions in this Agreement for projects which involve Section 6(f) properties, the agencies agree that the coordination requirements of the Land and Water Conservation Act of 1965, Public Law 88-578, Title 16, U.S.C. have been met. These actions will constitute consultation and fulfill the requirements as part of FHWA's obligations to address impacts to Section 6(f) properties under the NEPA. The NPS agrees to accept FHWA's project level Section 4(f) evaluation(s) and finding(s) as the basis to satisfy their own NEPA obligations.

Section B: Coordination with ODNR and/or NPS Not Required

1. Maintenance Type Projects of Section 6(f) property
 - a. Maintenance type projects include projects that reconstruct, repair, or replace an outdoor recreational feature like a pedestrian bridge, a bikeway, or a support feature such as a retaining wall, a trailhead parking lot, or even a park owned road that exists solely to provide access to the park; and
 - b. The staging area or construction areas will be in place, preventing public access, for a term of less than 6 months.

Section C: Coordination with ODNR Required

1. Temporary Non-Conforming Use of a Section 6(f) property
 - a. Temporary Non-Conforming Uses are temporary non-recreation activities for a term of less than 6 months, preventing public access within a Section 6(f) protected public park or recreation area.

- b. Please refer to the NPS LWCF Federal Financial Assistance Manual for more detail.

Section D: Coordination with NPS Required

1. Conversions of Section 6(f) Properties

The basic legal requirements of the LWCF State Assistance Program applicable to completed projects are found in the provisions of Section 6(f) of the LWCF Act. This section requires that property acquired or developed with LWCF assistance shall be retained and used for public outdoor recreation in perpetuity. Any property so acquired and/or developed shall not be wholly or partly converted to other than public outdoor recreation uses without the approval of NPS pursuant to Section 6(f)(3) of the LWCF Act and these regulations. The conversion provisions of Section 6(f)(3), 36 CFR Part 59, and these guidelines apply to each area or facility for which LWCF assistance is obtained, regardless of the extent of participation of the program in the assisted area or facility and consistent with the contractual agreement between NPS and the State. These provisions are a mandatory requirement of law for which the NPS has no authority to waive.

- a. A conversion occurs when properties acquired or developed with LWCF funds are converted to a use other than public outdoor recreation. Conversions are categorized as:
 - i. Full Conversion
 - ii. Partial Conversion
 - iii. Small Conversion

Full and partial conversion proposals are processed following the procedures and prerequisites established in the LWCF Federal Financial Assistance Manual and 36 CFR Part 59.3. Because many small conversion proposals are less complex, an abbreviated process has been established if the circumstances qualify. The NPS identifies a small conversion as an occurrence where there are no environmental or historic properties impacts, the conversion is not controversial, the replacement property is contiguous to the original 6(f) property, and the converted property is 5 acres or less, or <10% of the 6(f) property, whichever is less. Please refer to the NPS LWCF Federal Financial Assistance Manual for more detail.

Under all situations, when determining the actual area of the Section 6(f) property impacted all direct impacts and all relevant indirect impacts that may affect recreation use are included in the assessment.

Section D: Consultation Package

By this Agreement, NPS accepts the FHWA project level Section 4(f) evaluation(s) and finding(s) in order to satisfy its NEPA obligations. The ODOT and ODNR have jointly developed a standardized form for Section 4(f) and Section 6(f) to replace the NPS Proposal Description and Environmental Screening Form (PD/ESF). In doing so, this streamlines the process and eliminates the need for duplicative information. The consultation package will be prepared in accordance with ODOT-OES Section 6(f) guidance and will be submitted electronically. ODOT and ODNR may modify this form as needed for efficiency.

For projects requiring an Individual Section 4(f) evaluation, the documentation standard for consultation remains the same under this agreement. The required consultation procedures will be inclusive of the requirements for processing an Individual Section 4(f) evaluation between the Agencies.

For projects that are funded with State or local money, ODOT agrees to follow the terms of this agreement

with regards to Section 6(f) coordination. For these types of projects, when a FHWA Section 4(f) finding is not required, ODOT shall still provide the documentation described in this section to enable ODNR and NPS to make sound decisions regarding the action pursuant to Section 6(f).

Section E: Appraisal Process

A state certified appraisal(s) or waiver valuation(s) (as applicable for all subject properties) will be provided by ODOT to ODNR in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act), per ODOT-OES guidance.

Section F: Coordination

Please refer to the ODOT-OES Section 6(f) guidance for the Maintenance Type coordination process.

The Agencies agree that any communication, review or approval action should be transmitted electronically to the other parties to ensure timeliness.

1. Temporary Non-Conforming Use

- a. Districts must confirm with ODOT-OES and ODNR when a Temporary Non-Conforming Use is required. Coordination with ODOT-OES and ODNR is required prior to approval of the NEPA document.
- b. An electronic version of the coordination package will be submitted by ODOT-OES to ODNR via e-mail. ODNR will review and provide approval and/or comments to ODOT-OES via e-mail, and provide a copy to NPS.

2. Conversions

- a. Districts must confirm with ODOT-OES, ODNR and NPS when a conversion is required. Consultation with ODOT-OES, ODNR and NPS is required prior to approval of the NEPA document. Identification of the replacement property will be part of this consultation requiring concurrence from NPS. This concurrence will form the basis for the FHWA NEPA decision regarding the Section 6(f) property.
- b. ODOT-OES will submit an electronic version of the coordination package to ODNR via e-mail. ODNR will review and submit to NPS. The NPS will then review and provide approval and/or comments to ODNR via e-mail, with copy to ODOT.

The review and approval of any submittal will take 30 calendar days per agency. ODOT-OES may submit consultation packages to both ODNR and NPS for a concurrent 30 calendar day review where warranted. The 30 calendar day review period may be shortened or lengthened on a case-by-case basis as long as the Agencies are in agreement. ODOT-OES shall make a concurrent review request by e-mail to ODNR, and NPS. FHWA shall be copied on these requests.

A summary of the consultation and coordination shall be included in the NEPA document prepared for a project that involves a Section 6(f) property.

Section G: Commitments

Environmental Commitments developed by ODOT are made in order to avoid, minimize and mitigate impacts to Section 6(f) properties. These are made in accordance with the Council on Environmental

Quality (CEQ) regulations stated in 40 CFR 1500.2(f) and FHWA regulation 23 CFR 771.109(b). These environmental commitments are incorporated into a project during the NEPA process and are required to be implemented as a condition of FHWA's NEPA approval . Failure to implement environmental commitments will likely jeopardize the federal funding for a project.

ODOT commits to the following procedures and conditions for all projects eligible for review under this Agreement:

- ODOT-OES shall document the project level requirements as a result of the consultation and shall transmit these to the ODOT District Environmental Coordinator for inclusion as environmental commitment(s) to the project. This includes conversions and other mitigative requirements as determined by the project consultation.
- ODOT shall be responsible to track and ensure these commitments are executed in accordance with the consultation process. The ODOT Districts must keep ODOT-OES apprised of progress toward commitment fulfillment.
- The conversion process including the appraisal and acquisition of the replacement property may be done as an environmental commitment so long as it is completed prior to final acceptance of the construction project by the engineer. This includes all activities beyond the identification and concurrence of the use of a potential replacement property under Section F of this Agreement.

Section H: Additional Provisions

1. Emergency Situations

For the purposes of this Agreement, emergencies are defined as actions that require emergency transportation system/facility repairs that are necessary to:

- Protect the life, safety or health of the public;
- Minimize the extent of damage to the transportation system/facilities;
- Protect remaining transportation facilities; and
- Restore essential traffic.

The FHWA Emergency Relief program allows for the ODOT to react quickly to damaged roadway locations on the federal-aid highway system. This program allows the State to use its own or contract forces to conduct the needed repairs without following the traditional FHWA requirements for project development. For a project to qualify there must be an established event declared by the Governor and FHWA. Each project site must be related to the declared event. Each site must be visited by the FHWA Emergency Engineer and a detailed Damage Survey Report (DSR) must be written and approved by FHWA.

After a DSR has been approved by FHWA, the ODOT is authorized to proceed with any needed design, right-of-way acquisition or construction. The work necessary to restore the facility to its original condition may proceed once the DSR is approved by FHWA. ODOT-OES will notify the Agencies of a emergency repair action involving a 6(f) property via email as a courtesy. Any necessary agency coordination may occur after the repair work has been completed. If possible, ODOT-OES will conduct agency coordination prior to construction; however due to the nature of these types of actions, this might not be possible.

The work required to restore the damaged facility to its original condition shall not exceed the scope of the emergency repair. In the event the scope of work expands beyond these parameters, the project shall be otherwise processed in accordance with this Agreement. In these situations, ODOT-OES or FHWA may request expedited review by ODNR and NPS.

2. Post Review Discoveries

In the event that a previously unidentified property afforded protections under the LWCF be discovered after FHWA has made a NEPA approval, but prior to construction, ODOT-OES in consultation with ODNR, shall carry out the necessary consultation and coordination activities in accordance with this Agreement.

Should a post-review discovery of impacts to Section 6(f) properties be made after the FHWA NEPA approval, ODOT shall complete a NEPA re-evaluation of the environmental document per 23 CFR 771.129.

In the event that issues arise during construction that require new or additional impact to property afforded protections under the LWCF, that portion of the project will stop immediately pursuant to Section 203.04 of ODOT's Construction and Material Specifications (and any successors to those specifications). The project engineer will immediately contact ODOT-OES through the ODOT District Environmental Coordinator. ODOT-OES shall notify FHWA within one business day of the discovery to initiate consultation. Coordination among ODOT-OES, ODNR, FHWA and NPS shall occur until the Agencies concur on how to proceed.

ODOT-OES shall notify ODNR, FHWA, and NPS upon a post review discovery during construction to begin consultation procedures. Per the LWCF Manual, ODNR will provide written notification to ODOT to discontinue the unauthorized conversion activities immediately and to commence consultation of any required conversion process pursuant to 36 CFR 59.3. The process followed for conversion will proceed under the LWCF Manual, Chapter 8-3, Section E. Conversion of Use, Paragraph 10. Discovering unauthorized conversions.

Section I: Administrative Provisions

1. Dispute Resolution

Should any party to this agreement object within the review period to any actions proposed or findings submitted for review, ODOT-OES shall consult with the objecting party(ies) to resolve the objection. If ODOT-OES determines that such objection(s) cannot be resolved, it shall request FHWA's assistance in resolving the objection. If FHWA determines that the objection remains unresolved, FHWA will first try to resolve the dispute at the program manager level between FHWA and NPS. If this fails to resolve the process, then the dispute will be elevated per each agency's procedures for settling disputes among federal agencies. If there is a dispute between FHWA and ODOT, FHWA will follow the dispute resolution process as established in the current Stewardship and Oversight Agreement between FHWA and ODOT.

2. Annual Review

On an annual basis, all parties shall discuss and assess the Agencies' mutual functioning under this agreement. The review will focus on trends, concerns, recommendations, and all other aspects pertaining to coordination activities. To help facilitate the review, a yearly database of projects coordinated under this agreement will be maintained by ODOT and FHWA. The annual review will

also include a NPS review of a sample of Temporary Non-Conforming Use Determinations made by ODNR on their behalf to ensure quality.

ODOT will be responsible to generate a report in conjunction with FHWA for review and acceptance by all the parties of the annual findings. Any issues will be addressed prior to final acceptance of the annual report by implementation of process corrections or clarifications, or by the inclusion of needed corrections or clarifications in the annual report with identification of action items to be addressed by the responsible party. The annual review will include a summary of any outstanding action items from the previous year to ensure completion.

3. Amendment

This agreement may be amended when such an amendment is agreed to in writing by all signatories.

4. Right to Terminate

Any party to this agreement may terminate it by providing written notice thirty (30) days in advance to the other parties, provided that the parties will consult during the period before termination to seek agreement on amendments or other action that would avoid termination. In the event of termination, the FHWA shall comply with 36 CFR Part 59 with regard to the individual projects covered by this agreement.

5. Duration

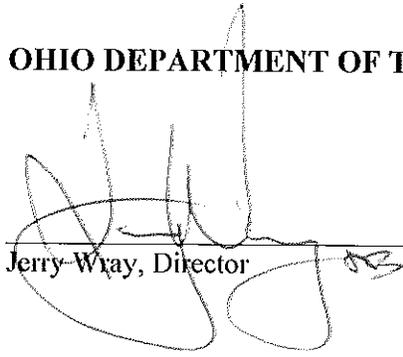
This agreement will terminate December 31, 2015. Prior to that date, the Agreement may be reviewed and extended if no regulatory changes have been proposed during this timeframe. During the reauthorization of the LWCF, if regulatory changes are proposed to the LWCF that have the potential to affect this Agreement, the Agreement will be reviewed for appropriate modifications. If at the end of the term of this agreement, no party objects, the term of the agreement will be extended for five (5) years without re-execution.

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**Reviewed as to Form
Office of Chief Legal Counsel
Ohio Department of Transportation**
 4/9/14

APPROVED:

OHIO DEPARTMENT OF TRANSPORTATION


Jerry Wray, Director

4-11-2014
(date)

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APPROVED:

U.S. NATIONAL PARK SERVICE



Michael Reynolds, Regional Director, Midwest Region, National Park Service (date)

4/10/14

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APPROVED:

OHIO DEPARTMENT OF NATURAL RESOURCES

James Zehfinger, Director



4.8.14
(date)

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APPROVED:

FEDERAL HIGHWAY ADMINISTRATION



Laura S. Leffler, Division Administrator

4-14-14
(date)