

**PROGRAMMATIC AGREEMENT
BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION, NEW JERSEY DIVISION
AND
THE NEW JERSEY DEPARTMENT OF TRANSPORTATION
REGARDING THE PROCESSING OF ACTIONS CLASSIFIED AS CATEGORICAL
EXCLUSIONS FOR FEDERAL-AID PROJECTS**

THIS PROGRAMMATIC AGREEMENT, made and entered into this 29 day of APRIL 2021, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION and the STATE of NEW JERSEY, acting by and through its DEPARTMENT OF TRANSPORTATION, THE NEW JERSEY DEPARTMENT of TRANSPORTATION hereby provides as follows:

WITNESSETH:

Whereas, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*, and the Regulations for Implementing the Procedural Provisions of 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 an 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 the 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 CFR 1.81(a)(5));

Whereas, the FHWA's NEPA implementing procedures (23 CFR part 771) list a number of categorical exclusions (CE) for certain actions that FHWA has determined normally do not have a significant effect on the human environment and therefore do not require the preparation of an EA or EIS;

Whereas, the New Jersey Department of Transportation (NJDOT) is a State agency that undertakes transportation projects using Federal funding received under the Federal-aid Highway Program and must assist FHWA in fulfilling its obligations under NEPA for NJDOT projects (23 CFR 771.109);

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 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; and

Whereas, FHWA regulations implementing the authorities in section 1318(d), are codified in 23 CFR 771.117(g); and

Whereas, this Agreement supersedes the previous programmatic agreement between FHWA and NJDOT regarding the processing of actions classified as Categorical Exclusions dated December 8, 2015;

Now, therefore, the FHWA and the NJDOT enter into this Programmatic Agreement ("Agreement") for the processing of CEs.

I. PARTIES

The Parties to this Agreement are the FHWA and the NJDOT.

II. PURPOSE

The purpose of this Agreement is to authorize NJDOT to determine on behalf of FHWA whether a project qualifies for a CE specifically listed in 23 CFR 771.117 (listed in Appendices A and B of this Agreement). This Agreement also authorizes NJDOT to certify to FHWA an action that it cannot approve on behalf of FHWA according to the terms of this Agreement, but meeting the CE criteria in 40 CFR 1501.4 and 1508.1(d) and 23 CFR 771.117, qualifies for a CE as long as there are no unusual circumstances present that would require the preparation of either an EA or EIS.

III. AUTHORITIES

This Agreement is subject to the following authorities:

- A. National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.*;
- B. Moving Ahead for Progress in the 21st Century Act, P.L. 112-141, 126 Stat. 405, Sec. 1318(d) (July 6, 2012);
- C. Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94, 129 Stat. 1312, Sec. 1315 (December 4, 2015);
- D. 40 CFR parts 1500 – 1508 (and any successor regulations);
- E. Procedures for Considering Environmental Impacts, USDOT Order 5610.1C (and any successor order or regulations); and
- F. 23 CFR 771.117 (and any successor order or regulations).

IV. RESPONSIBILITIES

A. The NJDOT 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 Appendix A (CEs established in 23 CFR 771.117(c)) and Appendix B (certain CEs established in 23 CFR 771.117(d)), that do not exceed the thresholds in Section IV(A)(1)(b) below, the NJDOT may make a CE approval on behalf of FHWA. The NJDOT will identify the applicable CE from Appendices A or B, 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 for these actions.
- b. The NJDOT may not approve actions listed in Appendices A or B that exceed the thresholds. The NJDOT may certify to FHWA that the action qualifies for a CE, and FHWA may provide approval if FHWA determines the certification and supporting information qualify as a basis for FHWA's approval of a CE for the action. Alternatively, FHWA may object to the certification. An action requires FHWA CE review and approval based on the NJDOT certification if the action:
 - i. Involves acquisitions or more than a minor amount of right-of-way;
 - ii. Involves acquisitions that result in residential or non-residential displacements;
 - iii. Results in capacity expansion of a roadway by addition of through lanes;
 - iv. Involves the construction of temporary access, or the closure of existing road, bridge, or ramps, that would result in major traffic disruptions;
 - v. Involves changes in access control;
 - vi. Results in a determination of adverse effect on historic properties pursuant to Section 106 the National Historic Preservation Act (54 U.S.C § 306108);
 - vii. Requires the use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. § 303/23 U.S.C § 138) that cannot be documented with an FHWA *de minimis* determination, or a programmatic Section 4(f) evaluation other than the programmatic evaluation for the use of historic bridges;
 - viii. Requires the acquisition of lands under the protection of Section 6(f) of the Land and Water Conservation Act of 1965 (54 U.S.C. § 200305), the Federal Aid in Fish Restoration Act (16 U.S.C. 777-777k; 64 Stat. 430), the Federal Aid in Wildlife Restoration Act (16 U.S.C. 669-669i; 50 Stat. 917), or other unique areas or special lands that were acquired in fee or easement with public-use money and have deed restrictions or covenants on the property;
 - ix. Requires a U.S. Army Corps of Engineers Section 404 (33 U.S.C § 1344) permit other than a Nationwide Permit or a General Permit;

- x. Requires a U.S. Coast Guard bridge permit (33 U.S.C. § 401);
 - xi. Requires work encroaching on a regulatory floodway or work affecting the base floodplain (100-year flood) elevations of a water course or lake, pursuant to Executive Order 11988 and 23 CFR 650 subpart A;
 - xii. Requires construction in, across, or adjacent to a river designated as a component of, or proposed for inclusion in, the National System of Wild and Scenic Rivers published by the U.S. Department of the Interior/U.S. Department of Agriculture;
 - xiii. Is defined as a "Type I project" per 23 CFR 772.5 and any NJDOT noise manual for purposes of a noise analysis;
 - xiv. Involves a finding of "may affect, likely to adversely affect" federally listed or candidate species, or proposed or designated critical habitat, or projects with impacts subject to the conditions of the Bald and Golden Eagle Protection Act;
 - xv. Includes acquisition of land for hardship or protective purposes, or early acquisition pursuant to Federal acquisition project (23 U.S.C. § 108(d));
 - xvi. Does not conform to the State Implementation Plan which is approved or promulgated by the U.S. Environmental Protection Agency in air quality non-attainment areas;
 - xvii. Is not included in or is inconsistent with the statewide transportation improvement program, and in applicable urbanized areas, the transportation improvement program; or
 - xviii. Is not consistent with the State's Coastal Zone Management Plan.
- c. The NJDOT may not approve actions not specifically listed as CEs in Appendices A or B. Instead, if the NJDOT believes that an action meets the requirements of a CE under 1501.4 and 40 CFR 1508.1(d) and 23 CFR 771.117(a), the NJDOT may certify that an action will not result in significant environmental impacts if the NJDOT concludes that the action qualifies for a CE, and the action does not involve unusual circumstances that warrant the preparation of an EA or EIS. The NJDOT shall submit this certification to FHWA for approval under 23 CFR 771.117(d) prior to the time FHWA contemplates its next approval or grant action for the project. FHWA may provide approval if FHWA determines the certification and supporting information qualify as a basis for FHWA's approval of a CE for the action. Alternatively, FHWA may object to the certification.

- i. If requested by the New Jersey Division Office, the NJDOT shall provide a copy of the CE documentation prepared for the actions(s) in accordance with Section V of this Agreement.
 - ii. If any project requires a Section 4(f) *de minimis* determination or programmatic evaluation, the NJDOT shall submit the 4(f) documentation for FHWA determination and approval.
 - iii. The NJDOT may request notice to proceed with final design, acquisition of right-of-way, or construction from FHWA once NJDOT has completed its certification that a project is a CE and FHWA has issued its approval.
 - iv. The New Jersey Division Office's objection to a NJDOT certification may not constitute a disapproval of the action, but signifies that FHWA will need to engage in project-specific review to verify that the certification is adequate, which may include consultation with other agencies.
2. Providing a summary list of certified actions, pursuant to this Agreement, to the New Jersey Division Office semi-annually. The list of actions certified will contain the following information:
 - a. The NJDOT project number and a project name, including the route number or facility name where the project will occur;
 - b. Identification of the CE action listed in Appendices A or B, or if the action is not listed in 23 CFR 771.117, identification of the action as "CE not categorized";
 - c. Consultations or technical analyses that are pending (if applicable); and
 - d. Whether the project included a 4(f) *de minimis* or programmatic evaluation.
3. Consulting with FHWA for actions that involve unusual circumstances (23 CFR 771.117(b)), to determine the appropriate class of action for environmental analysis and documentation. The NJDOT may decide to have, or FHWA may require, additional studies to be performed prior to FHWA making a CE approval, or the preparation of an EA or EIS.
4. Meeting applicable documentation requirements in Section V for State CE approvals on FHWA's behalf and State CE certifications to FHWA, applicable approval and re-evaluation requirements in Section VI, and applicable quality control/quality assurance, monitoring, and performance requirements in Section VII.
5. Relying only upon employees directly employed by the State to make CE approvals or certifications submitted to FHWA under this agreement. The NJDOT may not delegate its responsibility for CE approvals or certifications to third parties (e.g., consultants, local government staff, and other State agency staff).

B. The FHWA is responsible for:

1. Providing timely advice and technical assistance on CEs to NJDOT, as requested.
2. Providing timely input and review of certified actions. FHWA will base its approval of CE actions on the project documentation and certifications prepared by NJDOT under this Agreement.
3. Overseeing the implementation of this Agreement in accordance with the provisions in Section VII, including applicable monitoring and performance provisions.

V. DOCUMENTATION OF NJDOT CE APPROVALS AND CERTIFICATIONS

A. For State CE approvals and State CE certifications to FHWA for approval, the NJDOT shall ensure that it fulfills the following responsibilities for documenting the project-specific determinations made:

1. For actions listed in Appendices A or B, the NJDOT shall identify the applicable action, ensure any conditions specified in FHWA regulation are met, verify that unusual circumstances do not apply, address all other environmental requirements, and complete the review with a NJDOT signature evidencing approval.
2. In addition, for actions listed in 23 CFR 711.117(d), NJDOT shall prepare documentation that supports the CE determination and finding that no unusual circumstances exist that would make the CE approval inappropriate.

B. The NJDOT should maintain a project record for CE approvals it makes on FHWA's behalf and 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 of FHWA-approved public involvement policy;
3. Any stakeholder communication, correspondence, consultation, or public meeting documentation;
4. The name and title of the document approver and the date of NJDOT's approval or FHWA's final approval; and
5. 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).

- C. The NJDOT shall provide any electronic or paper project records generated and /or maintained by the NJDOT to the FHWA at its request. The NJDOT must retain all records, including all letters and comments received from governmental agencies, the public, and others for a period of no less than three (3) years after completion of project construction. This three (3)-year retention provision does not relieve NJDOT of its project or program recordkeeping responsibilities under 2 CFR 200.333 or any other applicable laws, regulations, or policies.

VI. NEPA APPROVALS AND RE-EVALUATIONS

- A. The NJDOT's CE approvals and CEs submitted to FHWA for approval may only be made by officers or offices specifically identified below:
 - 1. Approval of Appendix A CEs is delegated to the Division of Environmental Resources and the Bureau of Landscape Architecture and Environmental Solutions.
 - 2. Approval of Appendix B CEs is delegated to the Division of Environmental Resources and the Bureau of Landscape Architecture and Environmental Solutions.
 - 3. Certification of CEs is delegated to the Division of Environmental Resources and the Bureau of Landscape Architecture and Environmental Solutions.
- B. The NJDOT shall submit a Categorical Exclusion Documentation form for actions that it certifies as meeting the CE requirements, for FHWA approval. FHWA will either approve or respond to NJDOT with comments within 30 days of receipt of the documentation.
- C. Pursuant to 23 CFR 771.129(c), NJDOT shall re-evaluate its CE determinations and certifications for projects, consult with FHWA, and, as necessary, prepare additional documentation to ensure that CE determinations are still valid for the requested FHWA action. These re-evaluations will be completed when project changes have occurred and/or other project milestones have been reached. These milestones shall be considered authorization requests for funding of various stages in the project development process, e.g., Design, ROW, Utilities and Construction.

VII. QUALITY CONTROL/QUALITY ASSURANCE, MONITORING & PERFORMANCE

A. NJDOT Quality Control & Quality Assurance

The NJDOT shall carry out regular quality control and quality assurance activities to ensure that its CE approvals and CE submissions to FHWA for approval are made in accordance with applicable law and this Agreement.

B. NJDOT Performance Monitoring and Reporting.

1. The FHWA and NJDOT shall cooperate in monitoring performance under this Agreement and work to assure quality performance.
2. The NJDOT shall annually submit to FHWA (electronically or hard copy) a report summarizing its performance under this Agreement. The report will identify any areas where improvement is needed and what measures NJDOT is taking to implement those improvements. The report will include a description of actions taken by NJDOT as part of its quality control efforts under Section VII(A).

C. FHWA Oversight and Monitoring

1. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of NJDOT, as well as NJDOT's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of NJDOT's CE approvals, CE submissions to FHWA for approval, adequacy and capability of NJDOT staff and consultants, and the effectiveness of NJDOT's administration of its internal CE approvals.
2. FHWA will conduct one or more program reviews as part of its oversight activities, during the term of this Agreement. The NJDOT shall prepare and implement a corrective action plan to address any findings or observations identified in the FHWA review. The NJDOT shall draft the corrective action plan (if needed) within forty-five (45) days of FHWA's finalizing its review. The results of that review and corrective actions taken by NJDOT shall be considered at the time this Agreement is considered for renewal.
3. Nothing in this Agreement prevents FHWA from undertaking other monitoring or oversight actions, including audits, with respect to NJDOT's performance under this Agreement. The FHWA may require NJDOT to perform such other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with applicable Federal laws and regulations.
4. The NJDOT agrees to cooperate with FHWA in all oversight and quality assurance activities.

VIII. AMENDMENTS


If the parties agree to amend this Agreement, then FHWA and NJDOT may execute an amendment with new signatures and dates of the signatures. The term of this Agreement shall remain unchanged unless otherwise expressly stated in the amended Agreement.


IX. TERM, RENEWAL, AND TERMINATION

- A. This Agreement shall have a term of five (5) years, effective on the date of the last signature. NJDOT shall post and maintain an executed copy of this Agreement on its website, available to the public.

- B. This Agreement is renewable for additional five (5)-year terms if the NJDOT requests renewal and FHWA determines that NJDOT has satisfactorily carried out the provisions of this Agreement. In considering any renewal of this Agreement, the FHWA will evaluate the effectiveness of this Agreement and its overall impact on the environmental review process.
- C. Either party may terminate this Agreement at any time only by giving at least thirty (30) days' written notice to the other party.
- D. Expiration or termination of this Agreement shall mean that NJDOT is not able to make CE approvals on FHWA's behalf.

Execution of this Agreement and implementation of its terms by both parties provides evidence that both 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.


 Michael Russo
 Assistant Commissioner
 Planning, Multimodal & Grants Administration
 Department of Transportation


 Robert Clark
 Division Administrator, NJ Division
 Federal Highway Administration

Date: 4/20/2021

Date: 4/29/2021

Attest: _____
 Secretary
 New Jersey Department of Transportation

Attest: _____

Approved as to form:

GURBIR S. GREWAL
 ATTORNEY GENERAL OF NEW JERSEY

By: 
 Rebecca J. Karol
 Deputy Attorney General

Date: 4/23/2021

Appendix A

CEs Established in 23. CFR 771.117 (c)

- (1) Activities which do not involve or lead directly to construction, such as planning and research activities; grants for training; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid system.
- (2) Approval of utility installations along or across a transportation facility.
- (3) Construction of bicycle and pedestrian lanes, paths, and facilities.
- (4) Activities included in the State's highway safety plan under 23 U.S.C. § 402
- (5) Transfer of Federal lands, pursuant to 23 U.S.C. § 107 (d) and/or 23 U.S.C. § 317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA.
- (6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.
- (7) Landscaping
- (8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.
- (9) The following actions for transportation facilities damaged by an incident resulting in an emergency declared by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. § 512):
 - (i) Emergency repairs under 23 U.S.C. § 125; and
 - (ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:
 - (A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and
 - (B) Is commenced within a two (2)-year period beginning on the date of the declaration.
- (10) Acquisition of scenic easements.

- (11) Determination of payback under 23 U.S.C. §156 property previously acquired with Federal-aid participation
- (12) Improvements to existing rest areas and truck weigh stations.
- (13) Ridesharing activities.
- (14) Bus and rail car rehabilitation
- (15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.
- (16) Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.
- (17) The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a CE.
- (18) Track and railbed maintenance and improvements when carried out within the existing right-of-way.
- (19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site
- (20) (Not Applicable) Promulgation of rules, regulations, and directives.
- (21) Deployment of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience. Examples include, but are not limited to, traffic control and detector devices, lane management systems, electronic payment equipment, automatic vehicle locaters, automated passenger counters, computer-aided dispatching systems, radio communications system, dynamic message signs, and security equipment including surveillance and detection cameras on roadways and in transit facilities and on buses.
- (22) Projects, as defined in 23 U.S.C. § 101, that would take place entirely within the existing operational right-of-way as fully defined in 23 CFR 771.117 (c) 22. Existing operational right-of-way (ROW) refers to ROW that has been disturbed for an existing transportation facility or is maintained for a transportation purpose.

- (23) Federally-funded projects:
- (i) That receive less than \$5,000,000 of Federal Funds; or
 - (ii) With a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated project cost.
- (24) Localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.
- (25) Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under Sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. §§1341-1342) carried out to address water pollution or environmental degradation.
- (26) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes), if the action meets the constraints in paragraph IV (A)(1)(b) of this Agreement.
- (27) Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints in Section IV (A)(1)(b) of this Agreement.
- (28) Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings, if the actions meet the constraints in Section IV (A)(1)(b) of this Agreement.
- (29) Purchase, construction, replacement, or rehabilitation of ferry vessels (including improvements to the ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities which themselves are within a CE.
- (30) Rehabilitation or reconstruction of existing ferry facilities that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in the existing facility's capacity. Example actions include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.

Appendix B

CEs Established in 23 CFR 771.117 (d)

- (31) Transportation corridor fringe parking facilities.
- (32) Construction of new truck weigh stations or rest areas.
- (33) Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.
- (34) Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.
- (35) Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.
- (36) Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks, and related street improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.
- (37) Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.
- (38) Acquisition of land for hardship or protective purposes.