

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

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 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 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 771) list a number of categorical exclusions (CEs) for certain actions that FHWA has determined do not individually or cumulatively have a significant effect on the human environment and therefore do not require the preparation of an EA or EIS;

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

**Whereas**, transportation projects proposed by WisDOT for Federal-aid funding or approvals often qualify as CEs, and WisDOT seeks to assist in reducing the paperwork and processing time for certain Federal actions that do not have significant impacts on the human and natural environment pursuant to 40 CFR 1500.5(k) and 23 CFR 771.117;

**Whereas**, Wisconsin Administrative Code TRANS 400 *Wisconsin Environmental Policy Act Procedures for Department Actions* defines a list of State CE actions which are substantially similar to the FHWA list of CE actions in 23 CFR 771.117, and specifies standard documentation and nomenclature for these actions;

**Whereas**, 23 CFR 771.117(g) allows FHWA to enter with a State into a programmatic agreement that establishes efficient administrative procedures for carrying out environmental

and other required project reviews, including allowing a State to determine whether a project qualifies for a CE on behalf of FHWA;

**Whereas**, the FHWA and WisDOT executed a programmatic agreement for processing CEs on August 7, 2015, they have adequately performed according to the terms of that agreement based on monitoring conducted by FHWA and WisDOT, and desire to renew that agreement for a period of five years;

**Now, therefore**, the FHWA and WisDOT enter into this Programmatic Agreement (Agreement) for the processing of categorical exclusions, subject to the following terms and conditions:

## **I. PARTIES**

The Parties to this Agreement are the Federal Highway Administration, Wisconsin Division (FHWA), and the Wisconsin Department of Transportation (WisDOT).

## **II. PURPOSE**

The purpose of this Agreement is to authorize WisDOT to determine on behalf of FHWA whether a project qualifies for a categorical exclusion (CE) specifically listed in 23 CFR 771.117 (included in the Appendix of this Agreement). This Agreement also authorizes WisDOT to certify to FHWA that a CE action not delegated to WisDOT for approval or not specifically listed in 23 CFR 771.117, but meeting the CE criteria in 40 CFR 1508.4 and 23 CFR 771.117(a), qualifies for a CE as long as there are no unusual circumstances present that would require the preparation of either an environmental assessment (EA) or an environmental impact statement (EIS).

## **III. AUTHORITIES**

This agreement is entered into pursuant 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 (MAP-21), Pub. 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 (Dec. 4, 2015)
- D. 40 CFR 1500 – 1508
- E. DOT Order 5610.1C

F. 23 CFR 771.117

**IV. DEFINITION OF ACTIONS THAT DO NOT HAVE SIGNIFICANT IMPACTS ON THE HUMAN AND NATURAL ENVIRONMENT**

- A. Projects processed under this Agreement shall be actions that meet the definition of an action (as applicable) in 23 CFR 771.111(f), the definitions of a categorical exclusion in 40 CFR 1508.4 and 23 CFR 771.117(a), and are actions which do not individually or cumulatively have a significant effect on the human environment and for which neither an EA nor an EIS is required. Projects that meet FHWA's requirements in 23 CFR 771.117(a):
1. Do not induce significant impacts to planned growth or land use for the area;
  2. Do not require the relocation of significant numbers of people;
  3. Do not have a significant impact on any natural, cultural, recreational, historic, or other resource;
  4. Do not involve significant air, noise, or water quality impacts;
  5. Do not have significant impacts on travel patterns; or
  6. Do not otherwise, either individually or cumulatively, have any significant environmental impacts.
- B. For a proposed action that WisDOT concludes qualifies for a CE, WisDOT shall document through a certification that the action will not result in significant environmental impacts.
- C. For a proposed action that WisDOT concludes does not meet the definition of a CE due to the potential for significant environmental impacts, WisDOT shall prepare either an EA or an EIS. FHWA will review WisDOT's class of action proposal in its process initiation letter for an EA or EIS.

**V. CONSIDERATION OF UNUSUAL CIRCUMSTANCES**

- A. For each project processed under this Agreement, WisDOT shall consider whether a normally categorically excluded action may include unusual circumstances that would require additional environmental study to determine whether a CE classification is proper. 23 CFR 771.117(b) contains a list of unusual circumstances including:
1. Significant environmental impacts;
  2. Substantial controversy on environmental grounds;
  3. Significant impacts on properties protected by Section 4(f) requirements or Section 106 of the National Historic Preservation Act; or
  4. Inconsistencies with any Federal, State, or local law, requirement, or administrative determination relating to the environmental aspects of the action.
- B. For a proposed action that WisDOT concludes qualifies for a CE, WisDOT shall document through a certification that the action does not include unusual circumstances that warrant the preparation of an EA or EIS.

- C. Any action that includes unusual circumstances, auxiliary lanes, and/or capacity expansion will require WisDOT to consult with FHWA to determine the appropriate class of action for environmental analysis and documentation. Unusual circumstances may require additional studies to be performed prior to making a CE determination, or the preparation of an EA or EIS.

## VI. NEPA APPROVALS

- A. FHWA and WisDOT will base their approval of CE actions on the project documentation and certifications prepared by WisDOT under this Agreement. WisDOT shall ensure that the certifications and documentation for each project prepared under this Agreement will be made available prior to or at the time FHWA contemplates its approval of the next major project phase following preliminary design/ NEPA.
- B. Approval authority of CE documentation under this Agreement is delegated as follows:
1. WisDOT may make a CE determination on behalf of FHWA for the following project types; FHWA individual review and approval will not be required prior to WisDOT's request to proceed with final design, acquisition of right-of-way, or construction, so long as WisDOT has completed a CE determination. FHWA will rely on the certifications and approvals made by WisDOT as the basis for the CE determination and for the approval of subsequent project phases.
    - a. Actions listed in 23 CFR 771.117(c), including actions proposed as CEs under 23 CFR 771.117(c)(26-28) that do not exceed the environmental impact criteria in 23 CFR 771.117(e).
    - b. Approvals for disposal of excess right-of-way that FHWA has delegated to WisDOT for approval under the FHWA and WisDOT Stewardship and Oversight Agreement. These actions are covered by 23 CFR 771.117(d)(6).
    - c. Approvals for changes in Interstate System access that FHWA has delegated to WisDOT for approval under the WisDOT Facilities Development Manual (FDM) or other agreement. These actions are covered by 23 CFR 771.117(d)(7).
  2. The following project types will require review and approval by FHWA prior to WisDOT's request to proceed with final design, acquisition of right-of-way, or construction:
    - a. All other actions listed in 23 CFR 771.117(d).
    - b. Any actions not specifically listed in 23 CFR 771.117 that meet the requirements in Section IV and V.
    - c. Actions proposed as CEs under 23 CFR 771.117(c)(26-28) that exceed the environmental impact criteria in 23 CFR 771.117(e).
    - d. All actions proposed for processing under 23 CFR 771.117(h) with a CE from the Federal Railroad Administration (23 CFR 771.116) or the Federal Transit Administration (23 CFR 771.118). WisDOT will consult FHWA to determine

the appropriate level of environmental documentation and coordination, before submitting project information for FHWA approval.

- C. The Appendix of this Agreement contains copies of the CE lists from FHWA regulations and the 23 CFR 771.117(e) criteria. FHWA and WisDOT have established certain state-specific definitions for 23 CFR 771.117(e) criteria, including:
1. 23 CFR 771.117(e)(1) – A minor amount of right-of-way is defined as fee or permanent limited easement taking of less than or equal to one (1) acre per mile on average for (c)(26) actions, and less than or equal to one half (0.5) acre total for (c)(27)&(28) actions.
  2. 23 CFR 771.117(e)(4) – Projects resulting in major traffic disruptions are those that require a Transportation Management Plan Type 3, as defined in FDM 11-50-5.
  3. 23 CFR 771.117(e)(5) – Existing access may be modified without exceeding this criterion as long as access is maintained in a similar fashion as it existed prior the project being implemented. Creation of new access for the purposes of new development, removal of existing access without replacement or existing appropriate alternate access being available, or substantial changes that would modify existing circulation patterns on the parcel would disqualify the project from processing under 23 CFR 771.117(c)(26-28) and Section VI.B.1.a of this Agreement.
- D. For any CE, if the project includes a Section 4(f) *de minimis* determination, programmatic evaluation, or individual evaluation, the WisDOT Region shall submit the Section 4(f) documentation for review by WisDOT Central Office and review and approval by FHWA prior to internally approving or seeking FHWA approval of the CE documentation and requesting to proceed with subsequent project phases. The draft CE documentation shall be submitted as supporting documentation to the Section 4(f) determination or evaluation in these cases.
- E. In accordance with 23 CFR 771.129, WisDOT shall re-evaluate its documentation and certifications for projects, consult with FHWA, and as necessary, prepare additional documentation to ensure that determinations are still valid under the following circumstances:
1. At each subsequent approval or grant action following the environmental process, including proceeding with final design, purchasing right-of-way, and proceeding to construction.
  2. When there is a change in the scope or location of the project such that new impacts or a change in impacts may occur that were not previously considered.
  3. When there is a change in the environmental conditions in the vicinity of the project such that new impacts or a change in impacts may occur that were not previously considered.
  4. When there is a change in laws, regulations, or requirements that apply to resources in the vicinity of the project such that new compliance actions are

necessary, or new impacts or a change in impacts may occur that were not previously considered.

5. When there is a change in the environmental mitigation measures or commitments contained in the approved environmental document.

## **VII. ACCEPTABLE DOCUMENTATION FOR CATEGORICALLY EXCLUDED ACTIONS**

- A. WisDOT has developed environmental analysis procedures and documentation for different types of categorically excluded actions. These procedures and documentation meet State requirements for environmental analysis and have been developed with FHWA consultation and approval to also satisfy FHWA environmental documentation requirements. Lists of FHWA CEs are included in the Appendix. Subject to the terms of this Agreement, FHWA will accept the following types of WisDOT environmental documentation approved by FHWA for FHWA CE actions:
  1. For projects delegated to WisDOT for preparation, review, and approval on behalf of FHWA under Section VI.B.1, WisDOT shall complete the appropriate *Categorical Exclusion Checklist* (CEC). The most current version of the CEC forms can be found on WisDOT's Environmental Programs Forms and Tools website.
  2. For projects retained by FHWA for review and approval under Section VI.B.2, WisDOT shall complete *Environmental Report* (ER) documentation. The most current versions of the ER forms can be found on WisDOT's Environmental Programs Forms and Tools website.
  3. Notwithstanding the above and subject to FHWA approval, WisDOT may prepare a higher level of environmental documentation (e.g. ER instead of CEC) to better evaluate and disclose project impacts, or to provide project documentation to comply with requirements of other laws (e.g. Section 106 of the National Historic Preservation Act, Section 404 of the Clean Water Act, etc.). Conversely, WisDOT may prepare a lower level of environmental documentation (e.g. CEC instead of ER) for simple projects that do not result in many impacts. WisDOT shall consult with and obtain approval from FHWA before proceeding to prepare a different type of environmental documentation than what is otherwise required under Sections VII.A.1 and VII.A.2. If these cases include unusual circumstances, FHWA may determine that a different type of CE documentation, an EA, or an EIS is required.
- B. For projects, regardless of project type, located partially or entirely on Tribal lands in trust, allotted, or reservation status, WisDOT Region or other WisDOT staff shall consult with WisDOT Central Office Environmental Staff prior to preparing CE documentation. In certain cases, the involvement of Tribal land may warrant preparing higher level environmental documentation (e.g. ER instead of CEC) than what is defined in Section VII.A of this Agreement. WisDOT Central Office Environmental Staff will ensure adequate Tribal consultation by WisDOT and engage FHWA in consultation when necessary.

- C. All projects, regardless of the CE type, must meet the following requirements for conformity with certain plans required by FHWA regulations and other State and Federal agencies:
1. Projects must conform to the State Implementation Plan which is approved or promulgated by the U.S. Environmental Protection Agency in air quality non-attainment areas.
  2. Projects must be included in and consistent with the Statewide Transportation Improvement Program (STIP), and in applicable urbanized areas, the Transportation Improvement Program (TIP).
- D. Notwithstanding any other provision of this Agreement, any action that does not satisfy the requirements for a CE described in Sections IV-VII of this Agreement is disqualified from processing under this Agreement and will require preparation of an EA or EIS. Disqualification may occur at any time during the environmental process if WisDOT or FHWA determines that the project fails to meet the CE criteria.

## **VIII. PERFORMANCE, QUALIFICATIONS, QUALITY CONTROL, REPORTING, AND RECORDKEEPING REQUIREMENTS**

- A. Required Resources, Qualifications, Standards, and Training
1. WisDOT must maintain adequate organizational and staff capability to effectively carry out the provisions of this Agreement. This includes, without limitation:
    - a. Using appropriate technical and managerial expertise to perform the functions set forth under this Agreement; and
    - b. Devoting adequate financial and staff resources to carry out the certification, documentation, and approval of projects under this Agreement.
  2. WisDOT may procure through consultant services some or all of the environmental and other technical expertise needed to prepare environmental documentation under this Agreement. However, consultants may not certify and recommend for approval or approve CE documentation.
  3. WisDOT will maintain a list of qualified staff who internally review, certify, and recommend CE documentation for approval. The list will be updated annually and provided to FHWA with the report required under Section VIII.C.2 of this Agreement. At a minimum, all WisDOT staff shall meet the following requirements:
    - a. Hold a position as Region Environmental Coordinator or as a staff member in the WisDOT Central Office Bureau of Technical Services, Environmental Services Section or Environmental Process and Documentation Section.
    - b. Have completed one of the following trainings in addition to the WisDOT internal NEPA training:
      - i. *Introduction to NEPA and Transportation Decisionmaking – WEB-BASED* (FHWA-NHI-142052)
      - ii. *NEPA and Transportation Decisionmaking* (FHWA-NHI-142005)
      - iii. Other training approved by FHWA.

- c. Have at least 1 year of experience preparing and reviewing NEPA documents for transportation projects.
  4. CE documentation delegated to WisDOT for approval under Section VI.B.1 shall only be approved by WisDOT Region or Central Office Project Managers, or by members of the WisDOT Central Office Bureau of Technical Services Environmental Services Section or Environmental Process and Documentation Section.
  5. All individuals participating in the preparation, certification, and approval of project documentation under this Agreement shall be familiar with and follow State laws, State regulations, WisDOT environmental policy in the FDM, relevant WisDOT and FHWA policy memoranda, and applicable regulations, policy, and guidance from FHWA and other agencies.
- B. WisDOT Quality Control
  1. WisDOT and its consultants shall prepare CE documentation and supporting environmental documentation with a high level of quality, consistency, and accuracy.
  2. WisDOT agrees to carry out regular quality control activities to ensure that its CE certifications and approvals are made in accordance with applicable laws and this Agreement.
  3. WisDOT shall monitor its processes and check for errors and omissions relating to project approvals, certifications, environmental analysis, tracking, and project file documentation. WisDOT shall take corrective action as needed. WisDOT shall document its quality control activities and any needed corrective actions taken in the annual report to FHWA required under Section VIII.C.2 of this Agreement.
  4. WisDOT shall regularly provide internal and external trainings to maintain an adequate pool of qualified staff.
  5. If WisDOT implements training to meet the capability requirements of this Agreement or as a corrective action, WisDOT shall be responsible for the training. WisDOT shall provide notice of the training to FHWA. FHWA will determine whether the training satisfies the criterion for document reviewer, certifier, and recommender qualification under Section VIII.A.3.b.iii of this Agreement.
- C. WisDOT Performance Monitoring and Reporting
  1. FHWA and WisDOT shall cooperate in monitoring performance under this Agreement and each party shall modify its practices to assure quality performance.
  2. WisDOT shall electronically submit to FHWA a report summarizing its performance under this Agreement every calendar year. WisDOT and FHWA will meet every January to consult on the content and due date for the report that will cover the previous calendar year. At a minimum, the report will include:
    - a. Any areas where improvements are needed and what measures WisDOT is taking to implement those improvements.
    - b. A current list of qualified staff under Section VIII.A.3.
    - c. A description of actions taken by WisDOT as part of its quality control efforts under Section VIII.B.



- d. A comprehensive list and summary statistics for all CEs approved during the calendar year.
- e. A list of any projects reviewed for quality control purposes and the findings of those reviews.
- f. Other content identified through consultation with FHWA.

D. Project Documentation and Recordkeeping.

1. WisDOT will maintain an electronic list of its CE approvals. The electronic list will be available to FHWA. At a minimum, the list shall include:
  - a. The WisDOT project identification number,
  - b. The Federal project number (if one exists),
  - c. Whether the project is being prepared to FHWA or other USDOT NEPA standards (23 CFR 771 *et seq.*), or WEPA standards,
  - d. A descriptive project name,
  - e. The project improvement type,
  - f. The route or facility name where the project will occur,
  - g. The type of documentation used (CEC or ER),
  - h. The number of the applicable CE from 23 CFR 771.117(c) or (d), or from 23 CFR 771.116 or 771.118 if processed under 23 CFR 771.117(h), and a brief text description of that CE,
  - i. The type of Section 4(f) evaluation or determination used (e.g. individual, *de minimis*, or type of programmatic), if applicable,
  - j. The environmental process start date,
  - k. The name of the document approver (WisDOT or FHWA staff), and
  - l. The date of WisDOT's or FHWA's final CE approval.
2. WisDOT will create a project record for each action it certifies under the terms of this Agreement. This project record shall be available to FHWA for review upon request. This record shall include at a minimum:
  - a. The appropriate environmental documentation specified by Sections IV-VII of this Agreement.
  - b. Any checklists, forms, documents, and exhibits that summarize the consideration of project effects and unusual circumstances.
  - c. A public involvement plan complying with the requirements of FDM Chapter 6 (WisDOT's FHWA-approved public involvement policy).
  - d. Any stakeholder communication, correspondence, consultation, or public meeting documentation.
  - e. Any project documentation to comply with requirements of other applicable laws (e.g. Section 106 of the National Historic Preservation Act, Section 4(f), Section 404 of the Clean Water Act, etc.).
  - f. 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).
3. WisDOT shall maintain electronic or paper project records and records pertaining to its administration of the certification and approval process for individual projects. WisDOT shall provide FHWA with copies of any project records FHWA

may request. WisDOT shall retain those 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 3-year retention provision does not relieve WisDOT of its project or program recordkeeping responsibilities under 2 CFR 200.333 or any other applicable laws, regulations, or policies.

4. WisDOT shall ensure that project records are available to the public consistent with the Wisconsin Public Records Law (Wis. Stat. 19.31-19.39) and, as applicable, the requirements for Federal agencies under 5 U.S.C. 552 (the Freedom of Information Act, as amended), NEPA, and FHWA regulation, policy, and guidance.

E. FHWA Oversight.

1. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of WisDOT, as well as WisDOT's performance of its CE processing functions. Performance considerations will include, without limitation: the quality and consistency of WisDOT's project certifications and approvals, the adequacy and capability of WisDOT staff and consultants, and the effectiveness of WisDOT's administration of its internal CE approvals.
2. At a minimum, FHWA will conduct one review as part of its oversight activities during the term of this Agreement. The results of that review shall be considered along with WisDOT's annual performance reports at the time this Agreement is considered for renewal. WisDOT will implement agreed upon improvement actions to address any findings or observations identified in the FHWA review.
3. Nothing in this Agreement shall prevent FHWA from undertaking other monitoring or oversight actions, including audits, with respect to WisDOT's performance under this Agreement. FHWA may require WisDOT to perform other quality assurance activities, including other types of monitoring, that may be reasonably required to ensure compliance with applicable Federal laws and regulations.
4. WisDOT agrees to cooperate with FHWA in all oversight and quality assurance activities.

## **IX. AMENDMENTS AND ADMINISTRATIVE MODIFICATIONS**

- A. Either party to this Agreement may request that it be amended or administratively modified, whereupon the parties shall consult to consider such an amendment.
- B. If the parties agree to amend this Agreement, then FHWA and WisDOT 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.
- C. Minor updates to the content and format of the WisDOT CE documentation described in Section VII will not require a formal amendment to this Agreement. However,

when changes in Federal or State laws, regulations, or policies dictate substantial updates to CE designations or processes, WisDOT will consult FHWA to determine whether an amendment to the Agreement will be required prior to implementing changes in the CE documentation or approval process.

#### **X. TERM, RENEWAL, AND TERMINATION**

- A. This Agreement shall have a term of 5 years, effective on the date of the last signature.
- B. To comply with 23 CFR 771.117(g)(4), WisDOT shall make this agreement available to the public once it has been executed by posting and maintaining it on the WisDOT public website in such a way that it may be easily found by a member of the public.
- C. This Agreement is renewable for additional terms of 5 years if WisDOT requests renewal and FHWA determines that WisDOT has satisfactorily carried out the provisions of this Agreement. In considering any renewal of this Agreement, FHWA will evaluate the effectiveness of the Agreement and its overall impact on the environmental review process.
- D. At least 6 months prior to the end of each 5-year term, WisDOT and FHWA shall meet to discuss the results under the Agreement and consider amendments to this Agreement.
- E. If the parties do not renew the Agreement, then it shall expire at the end of the term then in effect.
- F. Either party may terminate this Agreement at any time by giving at least 30 days written notice to the other party.
- G. If this Agreement expires or is terminated, WisDOT shall no longer make any CE approvals on FHWA's behalf, and processing and approval of CE actions will revert to the process and standards specified in 23 CFR 771.117.

## XI. SIGNATURES

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.

### Wisconsin Department of Transportation

DocuSigned by:  
*Craig Thompson*  
AFB5314177024C5...  
\_\_\_\_\_  
Craig Thompson, Secretary

07 August 2020  
\_\_\_\_\_  
Date

### Federal Highway Administration – Wisconsin Division

DocuSigned by:  
*Glenn D. Fulkerson*  
8E8BB578DAA44ED...  
\_\_\_\_\_  
Glenn D. Fulkerson, Division Administrator

07 August 2020  
\_\_\_\_\_  
Date

## Appendix

### 23 CFR 771.117 FHWA categorical exclusions.

(a) CEs are actions that meet the definition contained in 40 CFR 1508.4, and, based on FHWA's past experience with similar actions, do not involve significant environmental impacts. They are actions that: Do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

(b) Any action that normally would be classified as a CE but could involve unusual circumstances will require the FHWA, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:

- (1) Significant environmental impacts;
- (2) Substantial controversy on environmental grounds;
- (3) Significant impact on properties protected by Section 4(f) requirements or Section 106 of the National Historic Preservation Act; or
- (4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

(c) The following actions meet the criteria for CEs in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section and normally do not require any further NEPA approvals by the FHWA:

- (1) Activities that 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 that establish classes of highways on the Federal-aid highway 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. 5121):

- (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 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 for 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 that 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) 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 systems, 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. Existing operational right-of-way means all real property interests acquired for the construction, operation, or mitigation of a project. This area includes the features associated with the physical footprint of the project including but not limited to the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway. This also includes fixed guideways, mitigation areas, areas maintained or used for safety and security

of a transportation facility, parking facilities with direct access to an existing transportation facility, transportation power substations, transportation venting structures, and transportation maintenance facilities.

(23) Federally funded projects:

(i) That receive less than \$5,000,000 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see [www.fhwa.dot.gov](http://www.fhwa.dot.gov) or [www.fta.dot.gov](http://www.fta.dot.gov)) of Federal funds; or

(ii) With a total estimated cost of not more than \$30,000,000 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see [www.fhwa.dot.gov](http://www.fhwa.dot.gov) or [www.fta.dot.gov](http://www.fta.dot.gov)) 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 (e) of this section.

(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 paragraph (e) of this section.

(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 paragraph (e) of this section.

(29) Purchase, construction, replacement, or rehabilitation of ferry vessels (including improvements to 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 that 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.

(d) Additional actions that meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after Administration approval unless otherwise authorized under an executed agreement pursuant to paragraph (g) of this section. The applicant must submit documentation that demonstrates that the specific conditions or criteria for these CEs are satisfied, and that significant environmental effects will not result. Examples of such actions include but are not limited to:

(1)-(3) [Reserved]

(4) Transportation corridor fringe parking facilities.

- (5) Construction of new truck weigh stations or rest areas.
- (6) 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.
- (7) Approvals for changes in access control.
- (8) 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.
- (9) 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.
- (10) 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.
- (11) 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.
- (12) Acquisition of land for hardship or protective purposes. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.
  - (i) Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.
  - (ii) Protective acquisition is done to prevent imminent development of a parcel that may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.
- (13) Actions described in paragraphs (c)(26), (c)(27), and (c)(28) of this section that do not meet the constraints in paragraph (e) of this section.

(e) Actions described in (c)(26), (c)(27), and (c)(28) of this section may not be processed as CEs under paragraph (c) if they involve:

- (1) An acquisition of more than a minor amount of right-of-way or that would result in any residential or non-residential displacements;
- (2) An action that needs a bridge permit from the U.S. Coast Guard, or an action that does not meet the terms and conditions of a U.S. Army Corps of Engineers nationwide or general permit under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899;



(3) A finding of “adverse effect” to historic properties under the National Historic Preservation Act, the use of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (section 4(f)) except for actions resulting in *de minimis* impacts, or a finding of “may affect, likely to adversely affect” threatened or endangered species or critical habitat under the Endangered Species Act;

(4) Construction of temporary access or the closure of existing road, bridge, or ramps that would result in major traffic disruptions;

(5) Changes in access control;

(6) A floodplain encroachment other than functionally dependent uses (e.g., bridges, wetlands) or actions that facilitate open space use (e.g., recreational trails, bicycle and pedestrian paths); or construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.

(f) Where a pattern emerges of granting CE status for a particular type of action, the FHWA will initiate rulemaking proposing to add this type of action to the list of categorical exclusions in paragraph (c) or (d) of this section, as appropriate.

(g) FHWA may enter into programmatic agreements with a State to allow a State DOT to make a NEPA CE certification or determination and approval on FHWA's behalf, for CEs specifically listed in paragraphs (c) and (d) of this section and that meet the criteria for a CE under 40 CFR 1508.4, and are identified in the programmatic agreement. Such agreements must be subject to the following conditions:

(1) 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;

(2) The agreement may not have a term of more than five years, but may be renewed;

(3) The agreement must provide for FHWA's monitoring of the State DOT's compliance with the terms of the agreement and for the State DOT's execution of any needed corrective action. FHWA must take into account the State DOT's performance when considering renewal of the programmatic CE agreement; and

(4) The agreement must include stipulations for amendment, termination, and public availability of the agreement once it has been executed.

(h) Any action qualifying as a CE under §771.116 or §771.118 may be approved by FHWA when the applicable requirements of those sections have been met. FHWA may consult with FRA or FTA to ensure the CE is applicable to the proposed action.