

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

THIS PROGRAMMATIC AGREEMENT (“Agreement”), made and entered into this 25 day of _____ May 2022, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION (“FHWA”) and the STATE of INDIANA, acting by and through its Indiana Department of Transportation (“INDOT”) 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 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 part 771) list a number of categorical exclusions (CE) 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 (23 CFR 771.117(c)-(d));

Whereas, the Indiana Department of Transportation (INDOT) 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 INDOT 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;

Whereas, the FHWA developed regulations implementing the authorities in section 1318(d), effective November 6, 2014 (23 CFR 771.117 (g));

Now, therefore, the FHWA and INDOT enter into this Programmatic Agreement (“Agreement”) for the processing of categorical exclusions.

I. PARTIES

The Parties to this Agreement are the Federal Highway Administration (“FHWA”) and the Indiana Department of Transportation (“INDOT”).

II. PURPOSE

The purpose of this Agreement is to authorize INDOT to determine on behalf of FHWA whether a project qualifies for a CE specifically listed in 23 CFR 771.117. This Agreement also authorizes INDOT to certify to FHWA that an action 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, 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. Infrastructure Investment and Job Act, Pub. L. 117-58, 135 Stat., Sec.527 (Nov. 15, 2021)
- E. 40 CFR parts 1500 - 1508
- F. DOT Order 5610.1C
- G. 23 CFR 771.117

IV. RESPONSIBILITIES

A. INDOT is responsible for:

1. Ensuring the following process is completed for each project that qualifies for a CE:
 - a. For actions qualifying for CEs established in 23 CFR 771.117(c) and 23 CFR 771.117(d)), that do not exceed a CE Level 3 in the thresholds chart in Appendix A, INDOT may make a CE approval on behalf of FHWA. INDOT will identify the applicable listed CE, 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.

- b. For actions qualifying for CEs established in 23 CFR 771.117(c) and 23 CFR 771.117(d)), that exceed a CE Level 3 in the thresholds chart in Appendix A, INDOT may certify to FHWA that the action qualifies for a CE. FHWA may then accept this certification and approve the CE. FHWA and INDOT may also require FHWA approval on a case by case basis.
 - c. For actions not specifically listed as CEs in 23 CFR 771.117, but that meet the requirements of a CE under 40 CFR 1508.4 and 23 CFR 771.117(a), INDOT may certify to FHWA that the action qualifies for a CE if the action does not involve unusual circumstances that warrant the preparation of an EA or EIS. After review, FHWA shall either accept the INDOT certification or object to the certification. Objections shall be resolved by FHWA in cooperation with INDOT.
2. Providing a list of certified actions, pursuant to this Agreement to the Division Office semi-annually and allow the Division Office 10 business days to either agree that some or all certifications are a basis for FHWA's approval of a CE for these actions, or to object to the certification(s). The list of actions certified will contain the following information:
 - a. The INDOT project number and a project name; including the route number or facility name where the project will occur
 - b. Identify the CE action listed in the regulation, or if the action is not listed in 23 CFR 771.117, identify the process as "CE not categorized."
 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. INDOT may decide or FHWA may require additional studies to be performed prior to 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, 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. INDOT may not delegate its responsibility for CE approvals or certifications to third parties (i.e., consultants, local government staff, and other State agency staff).
- B. FHWA is responsible for:
1. Providing timely advice and technical assistance on CEs to INDOT, 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 INDOT 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 INDOT CE APPROVALS AND CERTIFICATIONS

- A. For State CE approvals and State CE certifications to FHWA for approval, INDOT shall ensure that it fulfills the following responsibilities for documenting the project-specific determinations made:
 1. For actions listed in 23 CFR 711.117 (c) and 23 CFR 711.117 (d), INDOT should 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 INDOT signature evidencing approval.
 2. In addition, for actions listed in 23 CFR 711.117 (d), INDOT shall prepare documentation that supports the CE determination and that no unusual circumstances exist that would make the CE approval inappropriate.
 3. The INDOT CE Manual shall be updated as needed to ensure CE guidance is up to date. FHWA shall review updated manual prior to finalization.
- B. INDOT shall 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 INDOT'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. Any electronic or paper project records maintained by INDOT should be provided to FHWA at their request. INDOT should 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 INDOT 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. INDOT'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 1-2 is delegated to the Environmental Policy Manager, NEPA Document Review Team Lead, or District Environmental Supervisor at INDOT.
 - 2. Approval of Appendix A CEs 3 is delegated to the Environmental Policy Manager or NEPA Document Review Team Lead at INDOT.
- B. In accordance with 23 CFR 771.129, INDOT shall re-evaluate its determinations and certifications for projects, consult with FHWA, and as necessary, prepare additional documentation to ensure that determinations are still valid.

VII. NEPA CLASS DETERMINATIONS

- A. FHWA is responsible for making a NEPA class determination on projects where FHWA is considered the lead agency. INDOT will cooperate with FHWA early in project development to determine which activities and studies should be initiated to provide information to FHWA so a NEPA class determination can be made for each project that is not clearly a CE. The agencies will also develop a detailed project development schedule that will include a targeted date for making a NEPA class determination. A NEPA class determination shall follow the process outlined in Appendix B to request FHWA make a NEPA class determination.

VIII. QUALITY CONTROL/QUALITY ASSURANCE, MONITORING & PERFORMANCE

- A. INDOT Quality Control & Quality Assurance

INDOT 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. INDOT Performance Monitoring and Reporting.
 - 1. FHWA and INDOT agree to cooperate in monitoring performance under this Agreement and work to assure quality performance.
 - 2. INDOT agrees to annually submit to FHWA (electronically or hard copy) a report summarizing its performance under this Agreement relative to guidance documents and on any other concerns. The report will identify any areas where improvement is needed and what measures INDOT is taking to implement those improvements. The report

will include a description of actions taken by INDOT 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 INDOT, as well as INDOT's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of INDOT's CE approvals, CE submissions to FHWA for approval, adequacy and capability of INDOT staff and consultants, and the effectiveness of INDOT'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. INDOT shall prepare and implement a corrective action plan to respond to or address any findings or observations identified in the FHWA review. INDOT should draft the corrective action plan within 45 days of FHWA finalizing its review. The results of that review and corrective actions taken by INDOT 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 INDOT's performance under this Agreement. FHWA may require INDOT 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. INDOT agrees to cooperate with FHWA in all oversight and quality assurance activities.

IX. AMENDMENTS

If the parties agree to amend this Agreement, then FHWA and INDOT 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.

X. TERM, RENEWAL, AND TERMINATION

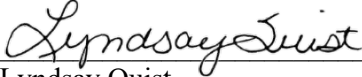
- A. This Agreement shall have a term of five (5) years, effective on the date of the last signature. INDOT shall post and maintain an executed copy of this Agreement on its website, available to the public.
- B. This Agreement is renewable for additional five (5) year terms if INDOT requests renewal and FHWA determines that INDOT 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.
- C. Either party may terminate this Agreement at any time only by giving at least 30 days written notice to the other party.

D. Expiration or termination of this Agreement shall mean that INDOT 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.

Jermaine R. Hannon
Administrator
Indiana Division
Federal Highway Administration

Date



Lyndsay Quist
Deputy Commissioner
Indiana Department of Transportation

5/24/2022

Date

Appendix A: Categorical Exclusion Level Thresholds Table

Categorical Exclusion Level Thresholds

| | PCE | Level 1 | Level 2 | Level 3 | Level 4 ¹ |
|---|--|---|-------------------------------------|------------------------------|--|
| Section 106 | Falls within guidelines of Minor Projects PA | "No Historic Properties Affected" | "No Adverse Effect" | - | "Adverse Effect" Or Historic Bridge involvement ² |
| Stream Impacts³ | No construction in waterways or water bodies | < 300 linear feet of stream impacts | ≥ 300 linear feet of stream impacts | - | USACE Individual 404 Permit ⁴ |
| Wetland Impacts³ | No adverse impacts to wetlands | < 0.1 acre | - | < 1.0 acre | ≥ 1.0 acre |
| Right-of-way⁵ | Property acquisition for preservation only or none | < 0.5 acre | ≥ 0.5 acre | - | - |
| Relocations⁶ | None | - | - | < 5 | ≥ 5 |
| Threatened/Endangered Species (Species Specific Programmatic for Indiana bat & northern long eared bat)* | "No Effect", "Not likely to Adversely Affect" (With select AMMs ⁷) | "Not likely to Adversely Affect" (With any AMMs or commitments) | - | "Likely to Adversely Affect" | Project does not fall under Species Specific Programmatic ⁸ |
| Threatened/Endangered Species (Any other species)* | Falls within guidelines of USFWS 2013 Interim Policy or "No Effect" | "Not likely to Adversely Affect" | - | - | "Likely to Adversely Affect" |
| Environmental Justice | No disproportionately high and adverse impacts | - | - | - | Potential ⁹ |
| Sole Source Aquifer | No Detailed Groundwater Assessment | - | - | - | Detailed Groundwater Assessment |
| Floodplain | No Substantial Impacts | - | - | - | Substantial Impacts |
| Section 4(f) Impacts | None | - | - | - | Any ¹⁰ |
| Section 6(f) Impacts | None | - | - | - | Any |
| Permanent Traffic Alteration | None | - | - | - | Any |
| Noise Analysis Required | No | - | - | - | Yes |
| Air Quality Analysis Required | No | - | - | - | Yes ¹¹ |
| Approval Level | Concurrence by | | | | |
| <ul style="list-style-type: none"> • District Env. (DE) • Env. Serv. Div. (ESD) • FHWA | DE or ESD | DE or ESD | DE or ESD | DE and/or ESD | DE and/or ESD; and FHWA |

¹ Coordinate with INDOT Environmental Services Division. INDOT will then coordinate with the appropriate FHWA Environmental Specialist.

² Any involvement with a bridge processed under the Historic Bridge Programmatic Agreement.

³ Total permanent impacts to streams (linear feet) and wetlands (acres).

⁴ US Army Corps of Engineers Individual 404 Permit

⁵ Total permanent and temporary right-of-way. This does not include reacquisition of existing apparent right-of-way.

⁶ If any relocations are within an area with a known or suspected Environmental Justice (EJ) or disadvantaged population, or has greater than 5 relocations, a conversation with FHWA, through INDOT ESD, is needed to confirm NEPA classification and outreach plan for the project.

⁷ Avoidance and Mitigation Measures (AMMs) determined by the IPAC determination key to be required that are not tree AMMs, bridge AMMs, or structure AMMs.

⁸ Projects that do not fall under a Species Specific Programmatic and results in a "Likely to Adversely Affect". Other findings can be processed as a lower-level CE.

⁹ Potential for causing a disproportionately high and adverse impact.

¹⁰ Section 4(f) use resulting in an Individual, Programmatic, or *de minimis* evaluation. The only exception is a *de minimis* evaluation for historic properties (Effective January 2, 2020). If a historic property *de minimis* and no other use, mark the *None* column.

¹¹ Hot Spot Analysis and/or MSAT Quantitative Emission Analysis.

* Includes the threatened/endangered species critical habitat

Note: Substantial public or agency controversy may require a higher-level NEPA document.

Appendix B: INDOT/FHWA NEPA Class Determination Process



U.S. Department
of Transportation
**Federal Highway
Administration**

Indiana Division

September 1, 2020

575 N. Pennsylvania Street, Room 254
Indianapolis, IN 46204
Main (317) 226-7475
Fax (317) 226-7341
www.fhwa.dot.gov/indiv

In Reply Refer To:
HDA-IN

Ms. Laura Hilden, Director of Environmental Services
Indiana Department of Transportation
100 North Senate Avenue Room
Indianapolis, Indiana 46204-2249

Dear Ms. Hilden:

Thank you for your August 12, 2021, letter proposing the formal process for making a NEPA class determination on future projects that are likely Environmental Assessment (EA) level projects. The process outlined includes submittal of a letter by INDOT to FHWA containing project information and supporting documentation. If FHWA concurs, a response via letter will be considered the initiation of the timeline associated with the development of an EA, as outlined in 40 CFR 1501.10(b)1. As you state in the letter, project initiation for EIS level projects is outlined in 40 CFR 1501(b)2 and begins with the publication of the Notice of Intent.

FHWA would like to note that it would be best to formalize the NEPA class determination process for EA level projects in the Programmatic Agreement between FHWA, Indiana Division and INDOT Regarding the Processing of Actions Classified as Categorical Exclusions when it is next revised.

Sincerely,
MICHELLE
B ALLEN

Digitally signed by
MICHELLE B ALLEN
Date: 2021.09.01
10:17:39 -04'00'

for Jermaine R. Hannon
Division Administrator

ecc: Travis Underhill, Deputy Commissioner, INDOT
Lyndsay Quist, Managing Director of Program Delivery
Ron Bales, Environmental Services Division, INDOT
Kari Carmany-George, Planning and Environmental Specialist, FHWA-IN



INDIANA DEPARTMENT OF TRANSPORTATION

100 North Senate Avenue
Room N758
Indianapolis, Indiana 46204

PHONE: (317) 552-9692

Eric Holcomb, Governor
Joe McGuinness, Commissioner

August 12, 2021

Jermaine R. Hannon
Division Administrator
Federal Highway Administration
575 N. Pennsylvania Street, Room 254
Indianapolis, IN 46204

Dear Mr. Hannon;

The Indiana Department of Transportation is aware that as of September 1, 2020, Environmental Assessment (EA) documents must be completed 12 months after initiation, and Environmental Impact Statement (EIS) documents completed in 24 months, in compliance with 40 CFR 1501.10. FHWA is responsible for making a NEPA class determination on projects where FHWA is considered the lead agency. INDOT proposes to work with FHWA early in project development to determine which activities and studies should be initiated to provide information to FHWA so a NEPA class determination can be made for each likely EA or EIS level project. The agencies will also develop a detailed project development schedule that will include a targeted date for making a NEPA class determination.

For projects that are likely EA level projects, an INDOT representative will provide a letter of initiation to the appropriate FHWA Planning and Environmental Specialist requesting that the NEPA document be classed as an EA. This letter will contain the following:

1. Basic project information (a location map and preliminary project milestones as attachments).
2. A summary of the activities and studies conducted to inform the NEPA class determination.
3. A detailed schedule that maps a path to NEPA completion within one year of the level determination.
4. A list of other Federal approvals (e.g., Section 404 permits) anticipated to be necessary for the proposed project.
5. A statement specifying whether the document will be prepared according to 23 CFR 771.119 or 23 USC 139.

A draft of the template letter is attached. If FHWA agrees to the NEPA class determination, they will respond in writing via letter to formalize the initiation of the EA time limit.

For EIS level projects, the INDOT official authorized to sign EISs (or that official's designee) will provide a letter applying to initiate the project to the Division Administrator. This letter of application will meet the requirements of 23 USC 139 (e) and will contain the following:

1. The type of work, termini, length, general location, and planning history of the proposed project.
2. A list of other Federal approvals (e.g., Section 404 permits) anticipated to be necessary for the proposed project.
3. The timeframe within which the environmental review process should be started.
4. A draft of the Notice of Intent (NOI).
5. Supporting documentation.

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The Division has 45 days to either initiate the EIS project or provide comments back to the applicant. INDOT and FWHA will publish the (NOI) in accordance with 40 CFR 1501.9(d), and 40 CFR 1501.10(b)(2) stating that the agencies will complete the EIS within two years of the publication of the NOI.

Please provide formal confirmation that this approach is acceptable, and please contact me or Ron Bales (317-515-7908) with any questions.

Sincerely,



Laura Hilden
Director of Environmental Services

ecc: Travis Underhill, Deputy Commissioner, INDOT
Lyndsay Quist, Managing Director of Program Delivery
Ron Bales, Environmental Services Division, INDOT
Michelle Allen, Planning, Environment, Air Quality and Realty, FHWA-IN