

**PROGRAMMATIC AGREEMENT BETWEEN THE FEDERAL HIGHWAY
ADMINISTRATION, RHODE ISLAND DIVISION
AND
THE RHODE ISLAND 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 14 day of SEPT, 2022, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION ("FHWA") and the STATE of RHODE ISLAND acting by and through its DEPARTMENT OF TRANSPORTATION ("RIDOT") 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 .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 Rhode Island Department of Transportation (RIDOT) 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 RIDOT 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 (encoded in regulation at 23 CFR 771.117(g));

Now, therefore, the FHWA and Rhode Island Department of Transportation 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 Rhode Island Department of Transportation (hereinafter "RIDOT").

II. PURPOSE

The purpose of this Agreement is to authorize RIDOT to determine on behalf of FHWA whether a project qualifies for a CE action specifically listed in 23 CFR 771.117 (listed in Appendix A of this Agreement). This Agreement also authorizes RIDOT to certify to FHWA that an action not specifically listed in 23 CFR 771.117 but meeting the CE criteria in 40 CFR 1501.4 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. 40 CFR parts 1500-1508
- E. DOT Order 5610.1C
- F. 23 CFR 771.117

IV. RESPONSIBILITIES

- A. The RIDOT is responsible for:
 - 1. Ensuring the following process is completed for each project that qualifies as a CE:
 - a. For actions qualifying for a CE listed in Appendix A (CEs established in 23 CFR 771.117(c) and 23 CFR 771.117(d), that do not exceed the thresholds in Section IV(A)(1)(b) below, the RIDOT may make a CE approval on behalf of FHWA. Prior to the CE approval, the RIDOT will identify the applicable listed CE, ensure any conditions or constraints are met, verify that unusual circumstances do not apply, address 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. Actions listed in Appendix A that exceed the thresholds below may not be approved by the RIDOT. In these cases, RIDOT will certify to FHWA that the action qualifies as a CE. An action requires FHWA CE review and approval based on the RIDOT certification if the action:

- i. Involves acquisitions of more than a minor amount of right-of-way or acquisitions that result in residential or non-residential displacements;
- 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. Major traffic disruption is defined as a case-by-case scenario, when the RIDOT, in consultation with FHWA, agree that the project scope will interrupt traffic patterns beyond normal project conditions;
- v. Involves change in access control that pertain to interstate, or where RIDOT concludes that an access modification may have wide-reaching effects;
- vi. Results in a determination of adverse effect on historic properties pursuant to Section 106 of the National Historic Preservation Act (54 U.S.C. §306108);
- vii. Requires use of properties protected by Section 4(f) (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 Sport 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 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 (33 U.S.C. §1344) permit pursuant to Section 10 of the Rivers and Harbors Act or Section 404 of the Clean Water Act 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, in such a way that results in a more than nominal increase in base flood elevations;
- xii. Results in a significant or adverse impact on floodplain values, or creates a significant risk to human life or property;
- xiii. Will have more than a negligible impact on water quality, meaning that quality cannot be made measurably worse by the action;
- xiv. 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. Dept. of the Interior/U.S. Dept. of Agriculture;

- xv. Is defined as "Type I Project" per 23 CFR 772.5 and any RIDOT noise manual for purposes of a noise analysis;
 - xvi. May affect federally listed or candidate species, or proposed or designated critical habitat of species protected by the Endangered Species Act or Migratory Bird Treaty Act, or results in impacts subject to the conditions of the Bald and Golden Eagle Protection Act or the Marine Mammal Protection Act;
 - xvii. Includes acquisition of land for hardship or protective purposes, or early acquisition pursuant to Federal acquisition project (23 U.S.C. § 108(d));
 - xviii. 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;
 - xix. Is not included in, or is inconsistent with the statewide transportation improvement program, and in applicable urbanized areas, the transportation improvement program; or
 - xx. Is not consistent with the State's Coastal Zone Management Plan.
- c. The RIDOT may not approve actions not specifically listed as CEs in Appendix A but meet the requirements of a CE under 40 CFR 1501.4 and 23 CFR 771.117(a). Instead, the RIDOT shall certify to FHWA, in accordance with Section IV (A)(1)(c)(i), that an action will not result in significant environmental impacts, and that the action qualifies for a CE and does not involve unusual circumstances that warrant the preparation of an EA or EIS. The FHWA shall either agree in writing that the action qualifies as a CE or direct RIDOT to prepare an EA or EIS.
- i. If requested by the Division Office, RIDOT shall provide a copy of the CE documentation prepared for the action(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 RIDOT shall submit the 4(f) documentation for FHWA determination and approval.
 - iii. The RIDOT may request notice to proceed with final design, acquisition of right-of-way, or construction from FHWA once RIDOT has completed its certification that a project is a CE.
 - iv. The Division Office's objection to a RIDOT certification may not constitute a disapproval of the action, rather it 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. Maintaining a log of approved CEs for review by FHWA. A copy of the log will be provided to FHWA on a semi-annual basis. At a minimum, the log will contain the following information:
- a. The RIDOT project number and a project name, including the route number or facility name where the project will occur;

- b. The CE action number; 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);
 - d. Whether the project included a Section 4(f) *de minimis* or programmatic evaluations.
- 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 RIDOT 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 application 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 on employees directly employed by the State to make CE approvals or certifications submitted to FHWA under this Agreement. The RIDOT 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. The FHWA is responsible for:
 - 1. Providing timely advice and technical assistance on CEs to the RIDOT, 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 RIDOT 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 RIDOT CE APPROVALS AND CERTIFICATIONS

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

- 1. For CE approvals made on behalf of FHWA, the RIDOT shall prepare documentation included in Appendix B, identifying the applicable action, ensuring any conditions specified in FHWA regulations are met, verifying that unusual circumstances do not apply, addressing all other environmental requirements, and completing the review with a RIDOT signature evidencing approval.
- 2. For actions listed in 23 CFR 711.117(d), the RIDOT shall prepare documentation that supports the CE determination and that no unusual circumstances exist that would make the CE approval inappropriate.

B. The RIDOT 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 checklist, 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 the 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 RIDOT'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 RIDOT should provide any electronic or paper project records maintained by the RIDOT to FHWA at its request. The RIDOT 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 RIDOT 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 RIDOT's CE approvals, and certifications of CEs submitted to FHWA for approval, may only be made by officers or offices specifically identified below:
 1. The Project Manager of the RIDOT Project will be the Submitter of the CE document.
 2. The Managing Engineer (NEPA) of the Division of Project Management will be an Approver of the CE document.
 3. The Administrator of the Division of Project Management will be an Approver of the CE document.
- B. In accordance with 23 CFR 771.129, the RIDOT shall re-evaluate its determinations for projects, consult with FHWA, and as necessary, prepare additional documentation to ensure that determinations are still valid.

VII. QUALITY CONTROL/QUALITY ASSURANCE, MONITORING & PERFORMANCE

- A. RIDOT Quality Control & Quality Assurance

The RIDOT 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. RIDOT Performance Monitoring and Reporting
 1. The FHWA and RIDOT agree to cooperate in monitoring performance under this Agreement and work to assure quality performance.
 2. The RIDOT agrees to annually submit to FHWA (electronically or hard copy) a report summarizing its performance under this Agreement where improvement is needed and what measures RIDOT is taking to implement those improvements. The report will include a description of actions taken by RIDOT 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 RIDOT, as well as RIDOT's performance of its CE processing

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

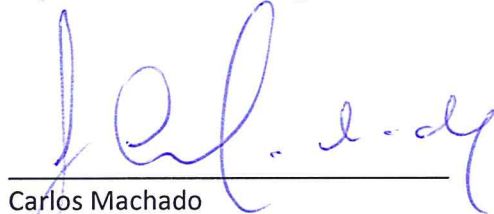
VIII. AMENDMENTS

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

IX. TERM, RENEWAL, AND TERMINATION

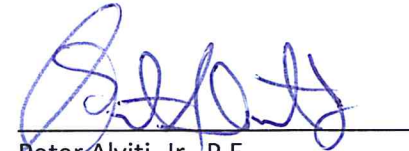
- A. This Agreement shall have a term of five (5) years, effective on the date of the last signature. The RIDOT shall post and maintain an executed copy of this Agreement on its website, available to the public.
- B. This Agreement is renewable for additional five (5) year terms if RIDOT requests renewal, and FHWA determines that RIDOT 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 RIDOT 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.



Carlos Machado
Division Administrator
Rhode Island Division
Federal Highway Administration

9/14/22
Date



Peter Alviti, Jr., P.E.
Director
Rhode Island Department of Transportation

9/7/22
Date

APPENDIX A

CE Actions Applicable to this Agreement

This Agreement applies to a group of actions which, in the collective experience of the signatories, has shown never or almost never causes significant environmental impacts and can be classified as CEs. Such actions include all those listed in 23 CFR 771.117(c) and most of those listed in 23 CFR 771.117(d).

CEs listed in 23 CFR 771.117(c) "The C List"

- (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 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 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.
- (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 refers to right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose. This area includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, etc.) and other areas maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities. Portions of the right-of-way that have not been disturbed or that are not maintained for transportation purposes are not in the existing operational right-of-way.

(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 or 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 or 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.

(27) Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting.

(28) Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings.

(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 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.

CEs Listed in 23 CFR 771.117(d) "The D List"

(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) Approvals for changes in access control.

(35) 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.

(36) 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.

(37) 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.

(38) 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.