

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

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This Programmatic Agreement (Agreement), by and between the Federal Highway Administration, United States Department of Transportation (FHWA) and the State of Arkansas, acting by and through The Arkansas Department of Transportation (ARDOT), hereby provides as follows:

WITNESSETH:

WHEREAS, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321-4370h (2014), and the Regulations for Implementing the Procedural Provisions of NEPA (40 C.F.R. 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 C.F.R. §1.81(a)(5));

WHEREAS, the FHWA's NEPA implementing procedures (23 C.F.R. §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;

WHEREAS, the Arkansas Department of Transportation 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 ARDOT projects (23 C.F.R. §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 in 23 C.F.R. §771.117(g) implementing the authorities in section 1318(d), effective November 6, 2014;

NOW, THEREFORE, the FHWA and ARDOT 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 Arkansas Department of Transportation (ARDOT).

## **II. PURPOSE**

The purpose of this Agreement is to authorize ARDOT to determine on behalf of FHWA whether a project qualifies for a CE specifically listed in 23 C.F.R. §771.117.

## **III. AUTHORITIES**

This agreement is entered into pursuant to the following authorities:

- A. National Environmental Policy Act, 42 U.S.C. §§4321 - 4370
- B. Moving Ahead for Progress in the 21st Century Act, P.L. 112-141, 126 Stat. 405, Sec. 1318(d)
- C. 40 C.F.R. parts 1500 - 1508
- D. DOT Order 5610.1C
- E. 23 C.F.R. §771.117

## **IV. RESPONSIBILITIES**

A. ARDOT is responsible for:

- 1. 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. ARDOT may decide, or FHWA may require, additional studies prior to making a CE approval or the preparation of an EA or EIS.
- 2. For actions qualifying for a Tier 1 CE listed in Appendix A (CEs established in 23 CFR 771.117(c)) and a Tier 2 CE listed in Appendix B (CEs established in 23 CFR 771.117(d)) that do not exceed the thresholds in Section IV(A)(3) below, ARDOT may make a CE approval on behalf of FHWA. ARDOT will:
  - a. Identify the applicable level CE.
  - b. Ensure all conditions or constraints are met.

- c. Verify that unusual circumstances do not apply.
- d. Address any and all other environmental requirements.
- e. Complete the review with a signature evidencing approval.

No separate review or approval of the Programmatic CE by FHWA will be required.

- 3. Actions listed in Appendices A and B that exceed the thresholds identified below may not be approved by ARDOT. FHWA review and approval is required if the action:
  - a. Results in capacity expansion of a roadway by the addition of through lanes.
  - b. Involves permanent changes in access control that would affect traffic patterns and/or require an Interchange Justification Report. Changes that would not affect traffic patterns include actions such as breaks in access control for maintenance or emergency access or minimal alterations or adjustments to driveways.
  - c. Involves the construction of temporary access or the closure of an existing road, bridge, or ramp that would result in major traffic disruptions. Major traffic disruption is defined as an action that will require the use of a temporary road, detour, or ramp closure unless the following conditions are met.
    - i. Provisions are made for access by local traffic and so posted.
    - ii. Through-traffic dependent businesses will not be adversely affected.
    - iii. The temporary road, detour, or ramp closure does not substantially change the environmental consequences of the action.
    - iv. No substantial controversy is associated with the use of the temporary road, detour, or ramp closure.
  - d. Involves acquisitions of more than a minor amount of right-of-way, defined as 5.0 acres (this threshold does not apply to approvals for disposal of excess right-of-way).
  - e. Involves acquisitions that result in any residential or non-residential displacements.
  - f. Includes acquisition of land for hardship or protective purposes, or early acquisition pursuant to a Federally funded acquisition project (23 U.S.C. §108(d)).
  - g. Results in a determination of adverse effect on historic properties pursuant to Section 106 of the National Historic Preservation Act.
  - h. Requires the use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. §303).

- i. Requires the acquisition of lands under the protection of Section 6(f) of the Land and Water Conservation Act of 1965, the Federal Aid in Sport Fish Restoration Act, the Federal Aid in Wildlife Restoration Act, or other unique areas or special lands that were acquired in fee or easement with public-use money and have deed restrictions or covenants on the property.
  - j. Involves a known hazardous material site within the proposed right-of-way.
  - k. Results in the loss of 0.5 acre or more of waters of the U.S. (including wetland) or impact to 300 linear feet or more of intermittent and ephemeral stream bed.
  - l. Requires a U.S. Coast Guard bridge permit.
  - m. Requires work that will result in an increase of more than 1 foot of surface water elevation in the base floodplain (100-year flood); increase the risk of damage to property and loss of human life; or result in modification of a watercourse.
  - n. Requires construction in, across, or adjacent to a river designated as a component of, or proposed for inclusion in, the National System of Wild and Scenic Rivers published by the U.S. Department of the Interior/U.S. Department of Agriculture.
  - o. Is not included in or is inconsistent with the statewide transportation improvement program, and in applicable urbanized areas, the transportation improvement program.
  - p. May affect federally listed or candidate species, or proposed or designated critical habitat.
  - q. Is defined as a "Type I project" per 23 C.F.R. §772.5 and ARDOT noise policy.
  - r. Does not conform to the State Implementation Plan (SIP) in air quality non-attainment areas, which is approved or promulgated by the U.S. Environmental Protection Agency.
  - s. Requires a qualitative or quantitative mobile source air toxic analysis.
4. Meeting applicable documentation requirements in Section VI for State CE approvals on FHWA's behalf, applicable approval and re-evaluation requirements in Section VII, and applicable quality control, monitoring, and performance requirements in Section VIII.
  5. Relying only upon employees directly employed by the State (not consultants contracted by the State to act on the State's behalf) to make CE approvals submitted to FHWA under this agreement. While third parties (i.e., consultants, local government staff, and other State agency staff) may prepare NEPA documents on behalf of ARDOT in accordance with this agreement, ARDOT may not delegate its responsibility for CE approvals to third parties.

**B. The FHWA is responsible for:**

1. Providing timely advice and technical assistance on CEs to ARDOT, as requested.
2. Providing timely input and review of CEs. FHWA will base its approval of CE actions on the project documentation submitted by ARDOT under this Agreement.
3. Conducting an annual program/process review of randomly selected projects processed under this Agreement during the previous Federal Fiscal Year (October 1 through September 30).
4. Overseeing the implementation of this Agreement in accordance with the provisions in Section VIII, including applicable monitoring and performance provisions.

**V. CE TIER LEVELS**

- A. Activity types that define Tier 1 and Tier 2 CE actions for purposes of this agreement are defined in Appendices A and B. If a project does not meet the criteria for a Tier 1 or Tier 2 CE, the project will be processed as either a Tier 3 CE, an EA, or an EIS as determined by FHWA through consultation with ARDOT. Tier 1 and Tier 2 CEs will be approved by ARDOT officials as outlined in Section VII(A).

**VI. DOCUMENTATION OF ARDOT CE APPROVALS**

- A. ARDOT will maintain a project record for CE approvals it makes on FHWA's behalf and for each CE submitted to FHWA for approval. This record will 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 ARDOT's approval or FHWA's final approval.
- B. Any electronic or paper project records maintained by ARDOT will be provided to FHWA at their request. ARDOT 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 ARDOT of its project or program recordkeeping responsibilities under 2

C.F.R. §200.333 or any other applicable laws, regulations, or policies.

## **VII. NEPA APPROVALS AND RE-EVALUATIONS**

- A. ARDOT's CE approvals and CEs submitted to FHWA for approval may only be made by officers or offices specifically identified below:
1. Tier 1 CEs will be approved by the Division Head of ARDOT Environmental Division.
  2. Tier 2 CEs will be approved by ARDOT Assistant Chief Engineer - Planning.
  3. Tier 3 CEs will be submitted by ARDOT Environmental Division to FHWA for approval.
- B. Re-evaluations must follow the procedures as outlined in the Re-evaluation Process of Federal-aid Transportation Projects (Appendix C). The signature authority for re-evaluations will be the same as for the original CE document unless the re-evaluation indicates a change in the level of document needed. Retention of re-evaluation documents and records will be in accordance to the stipulations in Section VI(B).

## **VIII. QUALITY ASSURANCE & PERFORMANCE MONITORING**

### **A. ARDOT Quality Assurance**

ARDOT agrees to carry out regular 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. FHWA Oversight and Monitoring**

1. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of ARDOT, as well as ARDOT's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of ARDOT's CE approvals, CE submissions to FHWA for approval, adequacy and capability of ARDOT staff and consultants, and the effectiveness of ARDOT's administration of its internal CE approvals.
2. FHWA will conduct an annual program review as part of its oversight activities, during the term of this Agreement. By November 15 of each year, ARDOT will provide to the FHWA Division Office a list of CEs produced during the previous Federal Fiscal Year.
3. By December 1, the FHWA Division Office will randomly select documents for review. ARDOT will provide the selected documents and all backup information in electronic form to the FHWA Division Office by January 15. The Division Office will complete a review of the selected documents to

determine, at a minimum, whether:

- a. The project was correctly processed as a CE based on the thresholds in Section IV(A)(3).
- b. The project was in the TIP/STIP (with the TIP/STIP sheet included in the electronic file).
- c. The appropriate United States Fish and Wildlife Service (USFWS) letter or MOA was attached.
- d. The appropriate State Historic Preservation Office (SHPO) letter or MOU was attached.

After the review is completed, the FHWA Division Office will prepare a report, which will be forwarded to ARDOT by March 1. The report will include observations, required actions, and recommendations.

4. ARDOT shall prepare and implement a corrective action plan to address any findings, required actions, or observations identified in the FHWA review. ARDOT will draft the corrective action plan within 45 days of FHWA finalizing its review. Consideration of the results of the review and corrective actions taken by ARDOT shall occur at the time this Agreement is considered for renewal.
5. Nothing in this Agreement prevents FHWA from undertaking other monitoring or oversight actions, including audits, with respect to ARDOT's performance under this Agreement. The FHWA may require ARDOT 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.
6. ARDOT agrees to cooperate with FHWA in all oversight and quality assurance activities.

## **IX. AMENDMENTS**

If the parties concur to amend this Agreement, then FHWA and ARDOT 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. ARDOT 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 ARDOT requests renewal and FHWA determines that ARDOT 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 by giving at least 30 days written notice to the other party.
- D. Expiration or termination of this Agreement shall mean that ARDOT 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.



Angel Correa  
Division Administrator, Arkansas Division  
Federal Highway Administration

10/31/2019  
Date



Scott E. Bennett, P.E.  
Director  
Arkansas Department of Transportation

10/30/19  
Date



## APPENDIX A

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### Tier 1 CE Actions as Listed in 23 CFR 771.117(c) – 30 Actions

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. 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 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 of Federal funds; or
  - ii. With a total estimated cost of not more than \$30,000,000 and Federal funds

comprising less than 15 percent of the total estimated project cost.

24. Localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.
25. Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. 1341; 1342)) carried out to address water pollution or environmental degradation.
26. Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes).
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.
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.

**Unusual Circumstances (23 CFR 771.117(b)) include:**

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

## APPENDIX B

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### Tier 2 CE Actions as Listed in 23 CFR 771.117(d) – 9 Actions

1. Transportation corridor fringe parking facilities.
2. Construction of new truck weigh stations or rest areas.
3. 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.
4. Changes in access control.
5. 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.
6. 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.
7. 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.
8. 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.
9. Acquisition of land for hardship or protective purposes for a particular parcel only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects.
  - 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.
  - ii. Protective acquisition is done to prevent imminent development of a parcel which 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.

### **Unusual Circumstances (23 CFR 771.117(b)) include:**

- Significant environmental impacts;
- Substantial controversy on environmental grounds;
- Significant impact on properties protected by section 4(f) of the DOT Act or section

106 of the National Historic Preservation Act; or

- Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action

## APPENDIX C

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### **NEPA Re-Evaluation Joint Guidance for Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), & Federal Transit Administration (FTA) Issued on August 14, 2019**

The National Environmental Policy Act (NEPA) requires Federal agencies to consider and disclose the environmental impacts of their proposed actions as part of their decisionmaking. Sometimes there are changes to the proposed action, new information or circumstances, or there is a lapse of time between preparation of the environmental document and implementation of the action. This may trigger the need to revisit the NEPA analysis if there is a remaining Federal action. The Federal Highway Administration, Federal Transit Administration, and Federal Railroad Administration (the Agencies) joint NEPA regulations (23 CFR part 771) contain a process in 23 CFR 771.129 for re-evaluating environmental documents or decisions to determine whether the original document or decision remains valid, or a supplemental or new analysis (e.g., supplemental environmental impact statement (EIS) or environmental assessment (EA)) is needed. The Agencies have developed this guidance to provide clarity and consistency to the re-evaluation process consistent with their regulations. This guidance document is not legally binding in its own right and conformity with this document (as distinct from existing statutes and regulations cited in this document) is voluntary only.

#### **1. What is a re-evaluation?**

A re-evaluation is a review conducted by the Agency<sup>1</sup> of any proposed change in an action, affected environment, anticipated impact, applicable requirements, or mitigation measure as they relate to the environmental document or decision. The purpose of a re-evaluation is to determine whether an environmental document or decision remains valid for Agency decisionmaking. A re-evaluation is a continuation of the project development process, though it does not necessarily re-open the NEPA decision. However, it does not serve as the supplemental analysis or supplemental documentation under 23 CFR 771.130.

The re-evaluation can occur at any point after completion of the project's environmental document (for example, draft or final EIS) or decision (for example, issuance of a record of decision (ROD), combined final EIS/ROD, finding of no significant impact (FONSI), or CE determination), but only to the extent there are remaining Federal approvals for the project. The re-evaluation should be concise and tailored to the change in circumstances. If the Agency determines, based on the re-evaluation, there are changes that make the existing environmental document or decision no longer valid for Agency decisionmaking, the Agency will decide the nature and scope of the supplemental analysis and documentation needed.

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<sup>1</sup>Here and in the following questions, the "Agencies or the Agency" means FHWA, FTA, FRA, or a State transportation agency with authority to conduct NEPA reviews under 23 U.S.C. 327. With respect to categorical exclusion (CE) determination, it would also include State transportation agencies with authority to make CE determinations under 23 U.S.C. 326 (CE Assignment) or 23 CFR 771.117(g) (programmatic CE agreements).

## **2. When is a written re-evaluation triggered for EISs?**

For EISs, there are two circumstances that require a written re-evaluation:

- 1) When an acceptable final EIS is not received by the Agency within three years from the date of the draft EIS circulation (23 CFR 771.129(a)); and
- 2) When the project sponsor requests further approvals if major steps to advance the project (for example, authority to acquire a significant portion of right-of-way or to undertake final design) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Agency approval or grant (23 CFR 771.129(b)).

## **3. When is a re-evaluation consultation required?**

After the NEPA decision has been rendered (that is, a final EIS/ROD, ROD, FONSI or CE determination), applicants must consult with the appropriate Agency prior to requesting any major approvals or grants to determine if the document or CE designation remains valid for the action. While this type of re-evaluation does not have to be in writing, it is best practice to document its determination.

## **4. Who is responsible for determining whether a re-evaluation is required?**

The lead Federal Agency is responsible for determining whether the conditions for re-evaluation have been met or there is a need for supplemental documentation (23 CFR 771.129 and 771.130). The Agency should coordinate with the project sponsor in making that determination. The project sponsor is responsible for providing the Agency with relevant information regarding project changes or new circumstances that could affect the validity of the environmental document or decision (23 CFR 771.109).<sup>2</sup>

## **5. What information is needed for a re-evaluation?**

The Agency determines the information and level of documentation needed for the re-evaluation. The project sponsor should contact the Agency to discuss the information needs. The analysis and documentation in a re-evaluation should focus on and be commensurate with the situation triggering a re-evaluation. For example, if no substantial changes to surrounding circumstances or analysis have occurred since the approval of the environmental document or decision, then the analysis and documentation should be minimal (for example, verbal exchange with memo to the file, e-mail, etc.).<sup>3</sup> If the re-evaluation is triggered because of a change in conditions, the analysis and documentation should:

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<sup>2</sup> Where there is no project sponsor, the Agency is responsible for developing any required re-evaluation.

<sup>3</sup> Subject to the written re-evaluation requirements in 23 CFR 771.129(a)-(b).

- 1) Clearly document the change that triggers the re-evaluation (for example, changes in project scope, design, affected environment, impacts, mitigation, or applicable requirements) and the reason for or circumstances causing the proposed change.
- 2) Document the changes in environmental impacts or mitigation (as applicable) and describe how the impact will be different from what was previously described.
- 3) Determine whether the original environmental decision remains valid after comprehensively considering the changes.

#### **6. What formats are available for written re-evaluations?**

There is no required format for written re-evaluations. Documentation may be simple, such as a checklist, an e-mail exchange between the Agency and project sponsor, or a memorandum to the project file. Usually for the simplest and least environmentally intrusive projects, a re-evaluation may be done verbally, followed by documentation to the project file.

For more complex or controversial projects, additional analysis may be warranted for the Agency to determine if the original environmental document remains valid. Field reviews, additional environmental studies (as necessary), and coordination with other agencies should be undertaken as appropriate to analyze any new impacts or issues. In these complex situations, the results could be included in a multi-page technical memorandum complete with attachments.

Regardless of the format of the re-evaluation, it should be concise and document whether the original environmental document or decision remains valid.

#### **7. Do re-evaluations require public involvement?**

No, re-evaluations generally do not require public involvement. However, public involvement may be required in situations where there are changes to the project or circumstances that involve other environmental review laws that have their own public involvement requirements (for example, Section 4(f) (23 U.S.C. 138/49 U.S.C. 303) requirements and Section 106 of the National Historic Preservation Act).

Although re-evaluations generally do not require public involvement, the Agency, in consultation with the project sponsor, may determine that some form of public involvement is appropriate. Note that re-evaluation documentation is treated as part of the project file and may be made available consistent with the Freedom of Information Act.



**8. Should consultation with Federal resource agencies occur as part of a re-evaluation?**

The changes or circumstances that trigger a re-evaluation may require additional consultation with Federal resource agencies. The Agency will determine on a case-by-case basis whether consultation is warranted based on the context of the re-evaluation, type of project, the anticipated changes, or the environmental impacts. However, cooperating agencies under NEPA should be notified if there are changes to environmental issues under their jurisdiction or special expertise.