PROGRAMMATIC AGREEMENT

BETWEEN

THE FEDERAL HIGHWAY ADMINISTRATION IDAHO
DIVISION

AND

THE IDAHO TRANSPORTATION DEPARTMENT

REGARDING

APPROVAL OF ACTIONS CLASSIFIED AS
CATEGORICAL EXCLUSIONS FOR FEDERAL-AID
HIGHWAY PROJECTS

THIS PROGRAMMATIC AGREEMENT, made and entered into this 28th day of February 2018, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION (FHWA) and the STATE OF IDAHO, acting by and through its DEPARTMENT OF TRANSPORTATION [Idaho Transportation Department] (ITD) 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 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 from those requirements;

Whereas, 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, 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;

Whereas, the Idaho Transportation Department (ITD) 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 ITD projects (23 CFR 771.109);

Whereas, Section 1318(d) of the Moving Ahead for Progress in the 21st Century Act (MAP-21), P. 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, Section 1315 of the Fixing America’s Surface Transportation Act (FAST Act), P.L. 114-94, 129 Stat. 1312, requires the Secretary of Transportation to allow programmatic agreements that include the responsibility for making categorical exclusion determinations; to develop a template programmatic agreement that can be used by states; and to measure the outcomes of 23 CFR 771.117 which are evaluated and documented using these provisions;

Whereas, FHWA developed regulations implementing the authorities in section 1318(d), allowing States to determine and approve whether an action qualifies for a listed CE on behalf of FHWA without further FHWA review and approval;

Now, therefore, FHWA and ITD enter into this Programmatic Categorical Exclusion Agreement (Agreement) for the processing of categorical exclusions.
I. PARTIES

The Parties to this Agreement are the Federal Highway Administration (FHWA) and the Idaho Transportation Department (ITD).

II. PURPOSE

The purpose of this Agreement is to authorize ITD to determine and approve on behalf of FHWA whether a project qualifies for a CE listed in 23 CFR 771.117 provided it does not exceed the thresholds described in Section IV.A.1.d[hereinafter referred to as programmatic categorical exclusion (PCE) approvals].

This Agreement applies to all projects by ITD and applicable sub-recipients (e.g., LHTAC) using Federal-aid funds.

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)


D. 40 CFR parts 1500 - 1508

E. DOT Order 5610.lC

F. 23 CFR 771.117

IV. RESPONSIBILITIES

A. ITD is responsible for:

1. Ensuring the following process is completed for each project that qualifies for a PCE:

   a. The ITD may approve on behalf of FHWA those CEs specifically listed in 23 CFR 771.117 (c) and (d), that do not exceed the thresholds in Section IV.A.1.d of this Agreement. ITD will identify the applicable listed CE from 771.117 (c) and/or (d), 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 PCE by FHWA is required. ITD may not delegate its responsibility for PCE approvals to third parties (i.e., consultants, local government staff, or other state agency staff.)

b. Class of Action review: ITD will initiate early coordination with FHWA to determine the appropriate class of action, required studies or signature authority for projects that:

i. Are not explicitly listed in 771.117 (c) or (d) but when appropriately documented may qualify as CEs (as described under 23 CFR §771.117 (a) and (b)).

ii. May involve unusual circumstances as described under 23 CFR §771.117(b) including but not limited to potential for substantial controversy (public or agency opposition) on environmental grounds.

iii. 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, ITD may decide, or FHWA may require, additional studies to be performed prior to making a PCE approval, CE approval, or preparation of an EA or EIS.

c. Prior to approval of the PCE by ITD as described herein, ITD shall submit to FHWA the following documents as applicable for review and approval/action:

i. Type I traffic noise studies.

ii. Section 106 Adverse Effect and MOA documents.

iii. Biological Assessments prepared for formal consultation under the Endangered Species Act with a “may effect, likely to adversely affect” determination.

d. If any substantial public controversy or interagency disagreement on environmental grounds is anticipated, ITD will discuss the potential for controversy with FHWA to determine if the project can be processed under the terms of this Agreement.

e. If the following thresholds are met or exceeded, notwithstanding the listing of the action in 23 CFR 771.117 (c) or (d), ITD may not approve the PCE and must instead defer to FHWA for review and approval of the action. An action requires FHWA CE review and approval if the action:

i. Results in a determination of Adverse Effect on a National Historic Landmark designated by the Secretary of Interior, or on Property of Traditional Religious or Cultural Importance (PTRCI) or historic properties for which a Native American Tribe has expressed objections or significant concerns;

ii. Request from a Tribe for formal consultation or other direct engagement with FHWA;

iii. Involves use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. 303 and 23 CFR 774) that require preparation of an individual Section 4(f) Evaluation (programmatic and de minimis impact findings may be approved by ITD);

iv. Requires a U.S. Army Corps of Engineers Individual Permit under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act;
v. Results in an increase to the base (100-yr) floodplain in a regulatory floodway that will require a flood map revision as determined by the appropriate state or local authority, pursuant to Executive Order 11988 and 23 CFR 650 subpart A;

vi. Requires a U.S. Coast Guard permit for bridges on navigable lakes or rivers under USCG jurisdiction;

vii. Requires a Wild and Scenic River Section 7 determination and the river administering agency has determined the project has a direct and adverse effect on the river’s free-flowing condition, water quality, and outstandingly remarkable values (ORVs).

viii. Results in changes that substantially affect traffic patterns temporarily or permanently. Substantially is defined as closure of existing road, bridge or ramps unless the following conditions are satisfied:

• Through traffic dependent businesses would not be adversely affected;
• There is not substantial controversy associated with the temporary access or road, bridge, or ramp closure.

ix. Requires the acquisition of property that:

• Includes any displacement or relocation of owners and/or tenants (either business or residential);
• Affects the function of the primary use of the property;

x. Requires conversion of properties acquired under Section 6(f) of the Land and Water Conservation Fund Act.

xi. Does not conform to the Air Quality State Implantation Plan due to adverse effects to air quality (as determined in accordance with Project Level Air Quality [PLAQ] Screening).

xii. Is identified subsequent to the execution of this agreement by FHWA via written notification to ITD.

V. DOCUMENTATION OF ITD PCE APPROVALS

A. ITD shall maintain a project record for PCE approvals it makes on FHWA's behalf. This record should include at a minimum:

1. The date work commenced on the CE and the date of ITD’s approval, along with the name and title of the approving official.

2. Any checklists, forms, templates, or other documents and exhibits that summarize the consideration of project effects and unusual circumstances.

3. A summary of public involvement complying with the requirements of FHWA-approved public involvement policy.

4. Stakeholder communication, correspondence, consultation, or public meeting documentation that supports project and environmental decisions.
5. All re-evaluations, which will be performed as a minimum before requesting FHWA approval of funds for right-of-way or construction.

In the re-evaluations, ITD will either:
   i. Confirm that there have been no changes in the project design, conditions affecting the site, or additional requirements, and the original PCE approval remains valid; or
   ii. Document what changes have occurred, provide supplemental evaluations as necessary, and determine if the PCE approval is still valid in light of those changes.

6. ITD shall place the PCE approval and supporting documents in ProjectWise (or suitable successor system). The date of approval of each PCE shall be entered in the Office of Transportation Systems (OTIS) record for the project. Access to ProjectWise and OTIS will be provided to FHWA and FHWA may review contents of these files at its discretion.

7. All electronic or paper project records maintained by ITD shall be provided to FHWA upon request. ITD 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 years after project closeout.

VI. NEPA APPROVAL AUTHORITY AND RE-EVALUATIONS

A. ITD's PCE approvals may only be made by a qualified ITD Headquarters Environmental Section Manager or his/her qualified designees on the ITD Headquarters Environmental staff.

B. FHWA will use ITD's reporting in Financial Management Information System (FMIS) and Office of Transportation Investment System (OTIS), and the supporting documentation in ProjectWise to determine whether to approve right-of-way or construction phases for projects that meet the conditions of this Agreement.

C. Prior to requesting authorization of funding for right-of-way or construction ITD shall re-evaluate its determinations and approvals for projects, consult with FHWA, and as necessary, prepare additional documentation to ensure that determinations are still valid. Re-evaluations will be performed in accordance with procedures agreed upon by ITD and FHWA.

VII. QUALITY CONTROL/QUALITY ASSURANCE, MONITORING & PERFORMANCE

A. ITD is responsible for:
   1. Maintaining adequate organizational and staff capability and expertise 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.
      b) Devoting adequate financial and staff resources for processing and approving of projects under this Agreement.
2. Providing for quality assurance and quality control of consultant-produced documents. ITD may procure through consultant services environmental and other technical expertise needed for compliance with this Agreement.

3. Ensuring that the ITD individuals who prepare and/or approve PCE documentation will, at a minimum:

   a) Be knowledgeable with and follow the appropriate subsections 23 CFR 771 through 774, and FHWA and ITD procedures for environmental analysis and NEPA compliance, including having completed the FHWA-NHI-142052 course, “Introduction to NEPA and Transportation Decision-making”.

   b) Have adequate experience addressing NEPA compliance for transportation projects or until such time, have their work reviewed by staff having the necessary experience.

B. Quality Control and Quality Assurance Procedures

1. Within six months of the execution date of this Agreement, ITD, in coordination with FHWA, will develop QA/QC procedures that ensure ITD PCE documentation meets all legal requirements, and that ITD provides appropriate QA/QC oversight of PCEs.

C. Performance Monitoring and Reporting.

1. FHWA and ITD will cooperate in monitoring performance under this Agreement and work to assure quality performance.

2. ITD agrees to develop, carry out and report on regular quality control and quality assurance activities to ensure that its PCE approvals are made in accordance with applicable law and this Agreement.

3. ITD agrees to annually monitor its processes related to PCE approvals and re-evaluations on at least an annual basis.
   a. Review any non-compliance or deficiencies in outcomes.
   b. Identify any gaps in or corrections needed to practices, procedures, standards and policies.
   c. Review previous year’s recommendations and implementations and assess level of success.

4. By November 1 each year, ITD will submit to FHWA, an annual report summarizing
   a. Approvals made under this Agreement.
   b. Recommendations for program improvement.
   c. A description of actions taken by ITD as part of its quality control and quality assurance efforts.
   d. Changes to Procedures, Policies and Standards.
VIII. FHWA OVERSIGHT AND MONITORING

A. The FHWA is responsible for, and will fulfill its oversight and monitoring responsibilities by:

1. Overseeing the implementation of this Agreement in accordance with the provisions herein.

2. Providing timely advice and technical assistance on PCEs to ITD as requested.

3. Providing timely responses or confirmation to emails or other requests from ITD to fulfill both ITD’s and FHWA’s roles regarding CE actions as described in this Agreement.

4. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of ITD, as well as ITD’s performance of its PCE processing functions. Performance considerations include, without limitation, the quality and consistency of ITD’s PCE approvals, project environmental documentation, CE submissions to FHWA for approval, adequacy and capability of ITD staff and consultants, and the effectiveness, quality and consistency of ITD’s administration of its internal PCE approvals.

5. FHWA will conduct program reviews as part of its oversight activities during the term of this Agreement. If there are any findings that require action, ITD shall prepare and implement a corrective action plan to address findings identified in the FHWA review. ITD shall draft the corrective action plan within 45 calendar days of FHWA finalizing its review. The results of that review and corrective actions taken by ITD shall be considered at the time this Agreement is considered for renewal.

6. FHWA will review the corrective actions taken by ITD in regard to its processes relating to project CE determinations and supporting environmental analysis and documentation. The results of that review will be considered at the time this Agreement is considered for renewal.

7. FHWA, at its discretion, may undertake other monitoring or oversight actions including audits, with respect to ITD’s performance under this Agreement. FHWA may require ITD to perform other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with applicable Federal laws and regulations.

B. If FHWA does not approve the project authorization for right-of-way or construction due to concerns with NEPA compliance, then FHWA will immediately inform ITD of the reasons for its decision not to approve these phases.
 IX. AMENDMENTS

If the parties agree to amend this Agreement, then FHWA and ITD 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, upon signature by all parties, terminates and replaces the existing Programmatic Agreement executed August 8, 2007 between the Federal Highway Administration and the Idaho Transportation Department Regarding NEPA Categorical Exclusion Determinations for Minor Projects.

B. This Agreement shall have a term of five years, effective on the date of the last signature. ITD shall post and maintain an executed copy of this Agreement on its website, available to the public.

C. This Agreement is renewable for additional five-year terms if ITD requests renewal and FHWA determines that ITD 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 six months prior to the end of each five-year term, ITD and FHWA will meet to discuss the results under the Agreement and consider amendments to this Agreement. This meeting may be combined with a meeting to discuss performance under the monitoring provisions of this Agreement.

E. Either party may terminate this Agreement at any time by giving at least 30 days written notice to the other party.

F. Upon the expiration or termination of this Agreement, ITD will no longer be authorized 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.

Division Administrator
FHWA Idaho Division

Date

Director
Idaho Transportation Department

Date