

Agency Use of and Approach to FHWA Approved Programmatic Agreements

Requested by:

American Association of State Highway
and Transportation Officials (AASHTO)

Standing Committee on the Environment

Prepared by:

Venner Consulting, Thomas F. King, TransTech Management
Parsons Brinckerhoff, and PB Consult

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Acronyms

AASHTO	American Association of State Highway and Transportation Officials
ACHP	Advisory Council on Historic Preservation
AIP	Airport Improvement Program
BLM	Bureau of Land Management
CE	Categorical Exclusion (from further NEPA documentation)
CEQ	Council on Environmental Quality
CFR	Code of Federal Register
CRIS	Cultural Resources Information System
CZMP	Coastal Zone Management Program
DOT	Department of Transportation
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act
FAA	Federal Aviation Administration
FEIS	Final Environmental Impact Statement
FEMA	Federal Emergency Management Agency
FHWA	Federal Highway Administration
FS	U.S.D.A. Forest Service
FTA	Federal Transit Administration
FWS	U.S. Fish and Wildlife Service
GIS	Geographic Information System
HRITGS	Historic Records and Information Turnkey Geographic Information System
MOA	Memorandum of Agreement
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NPDES	National Pollutant Discharge Elimination System
NPS	National Park Service
NOAA	National Oceanic and Atmospheric Administration
NRHP	National Register of Historic Places
NWP	Nationwide Permit

OAI	Ohio Archaeological Inventory
OHI	Ohio Historic Inventory
OHS	Ohio Historical Society
OSHPO	State Historic Preservation Office
ROD	Record of Decision
SBGP	State Block Grants Program
SCOE	Standing Committee on Environment
SHPO	State Historic Preservation Officers
THPO	Tribal Historic Preservation Officer
Corps	U.S. Army Corps of Engineers
USCG	U.S. Coast Guard
VTrans	Vermont Agency of Transportation, also VAOT

1. Introduction

Transportation infrastructure projects that include a federal action, such as funding or a regulatory permit, generally must follow stringent review procedures prescribed by the National Environmental Policy Act (NEPA) and designed to protect the nation's environmental quality. They are also frequently affected by other major federal environmental laws, including the Clean Water Act (CWA), the Endangered Species Act (ESA), the National Historic Preservation Act (NHPA), and the Clean Air Act. As many as 58 other federal laws and executive orders may affect projects on a case-by-case basis.¹

To streamline navigation through this complex regulatory environment, State departments of transportation (State DOTs) and the U.S. Department of Transportation's Federal Highway Administration (FHWA) often create "programmatic agreements." Such agreements establish streamlined processes for handling simple environmental requirements for commonly encountered project types. Typically, these agreements outline how the signatory agencies will ensure adherence to federal-level environmental consultation, documentation, and compliance requirements, in a given state or local environment. Programmatic agreements may lay out which parties will undertake the "legwork" of environmental analysis and review, what oversight or quality control will occur, and often, what legal authorities are maintained elsewhere. Some DOTs may have multiple programmatic agreements that address compliance with various regulatory requirements.

State DOTs most commonly establish programmatic agreements with FHWA. Projects covered by these programmatic agreements, however, may also involve actions by other federal agencies. Coordination with other federal agencies is vital to ensuring that the agreement remains effective and constructive. Nevertheless, other federal agencies may not always be aware of, or readily accept, the terms of such agreements, or understand the relationship of such agreements to their own actions and the environmental reviews they feel obliged to undertake.

This project examines whether FHWA and State DOTs' programmatic agreements may not always be accepted by other federal agencies, why this happens, and how such situations may be avoided.

1.1 Why Does Federal Agency Oversight For Transportation Projects Overlap?

Federal environmental laws generally apply whenever federal agencies undertake actions. An "action" might include funding part of the cost of a state's transportation project or issuing a permit to impact wetlands. As the chief sponsor of states' federal-aid transportation projects, the FHWA regularly has a primary oversight role in ensuring that federal environmental

¹ Federal Highway Administration (FHWA). 2003. Evaluating the Performance of Environmental Streamlining: Phase II. Washington, D.C.

requirements are met. If another federal agency must also take an action related to the project, such as approval of a CWA, Section 404 permit for wetland fill, they will also have responsibility for ensuring the projects is compliant with federal environmental laws

The problem statement for this research project identifies such an agency as a “third party agency,” relative to an FHWA-approved programmatic agreement that covers FHWA and DOT compliance with the federal law at issue. The federal resource agency is often referred to as a “participating agency” in these cases, and that term is employed in the remainder of this report. Participating agencies for transportation projects may include the U.S. Army Corps of Engineers (Corps), U.S. Fish and Wildlife Service (FWS), National Oceanic and Atmospheric Administration (NOAA), the U.S. Environmental Protection Agency (EPA), the National Park Service (NPS), and the U.S. Coast Guard (USCG). Coordination between a participating agency, or agencies, the State DOT, and FHWA on compliance requirements where the DOT and FHWA desire and expect transportation entities should have lead responsibility for environmental compliance can be very helpful in maximizing the effective transfer of such authority.

For example, the regulations implementing Section 106 of the NHPA, at 36 CFR § 800.2 (a)(1) allow for designation of a lead federal agency. “If more than one federal agency is involved in an undertaking, some or all the agencies may designate a lead federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under Section 106. Those federal agencies that do not designate a lead federal agency remain individually responsible for their compliance with this part “(800.2(a)(2)).” Even when designated as lead, FHWA bears the responsibility to show the public and participating agencies that the requirements have been met. Sometimes documentation or copies thereof are requested when FHWA or the DOT thinks this should not be necessary; however, such documentation may still prevent duplicative performance of studies or preparation of environmental documents.

1.2 CEQ and Federal Agency Provisions to Avoid Duplication of Effort

The Council on Environmental Quality (CEQ) and some federal agencies have issued guidance and regulations to encourage interagency cooperation and avoid duplication of effort. 40 CFR 1501.5 provides for identification of lead and cooperating agencies, by the lead federal agency. If agencies disagree about their status, the following factors (in order of descending importance) determine lead agency designation:

- Magnitude of agency’s involvement.
- Project approval/disapproval authority.
- Expertise concerning the action’s environmental effects.
- Duration of agency’s involvement.
- Sequence of agency’s involvement.

Many transportation agency staff interpret CEQ's regulations to provide implicit approval of FHWA's lead agency status in all NEPA matters regarding development of transportation projects.

In some cases, interagency programmatic agreements and/or internal environmental guidance address how agencies will work together and jointly accomplish federal environmental responsibilities. BLM, for example, explicitly directs staff to work within "existing administrative frameworks, including any existing programmatic agreements" when making NEPA class of action determinations. Other agencies have issued guidance on avoiding duplication of federal efforts in environmental compliance. For example, Corps guidance on interpreting Appendix C(2)(c) of 33 Part 325 and 36 CFR 800.2(2) advises the following relative to the Section 106 compliance process:

Districts should not be undertaking Section 106 compliance for other federal agencies with greater jurisdiction. Appendix C provides for the acceptance of work already undertaken by outside agencies. The Corps will generally accept the compliance of the lead federal agency. If state or other federal agencies have already undertaken compliance work that is acceptable to cover the Section 106 process, copies of compliance letters from the consulting agencies may be all that is necessary to document compliance. Section 106 compliance should not be duplicated by agencies.

Such guidance for federal agencies on shared responsibility as the research team was able to locate in research and discussions with resource agency staff and legal offices is identified in this report.

1.3 What Are Programmatic Agreements?

Compliance with federal environmental law, including NEPA, the ESA, or the NHPA, often requires federal agencies to make decisions or carry out consultations regarding projects that State DOTs develop. Over the years, systems have evolved with agencies' experience carrying out these responsibilities, including separating types of actions into those requiring more and less review, based on impacts. In some cases, such systems are built into the laws or regulations themselves. Programmatic agreements formalize understandings about how these environmental responsibilities will be carried out at a given level, often on a statewide basis.

Along with process streamlining, programmatic agreements (PAs) have presented a mechanism to save and focus staff time. Many State DOTs have added specialists trained to conduct and oversee studies and fulfill the responsibilities and outreach required for federal compliance. Programmatic agreements provide a framework for states to assume more of these formerly federal responsibilities, freeing staff to spend more time on projects that have greater impacts.

The programmatic agreement may also outline how a certain amount of analysis, decision-making, or consultative responsibilities will be performed on a larger than project (i.e. programmatic) basis. Programmatic agreements encourage efficient project delivery by reducing delays and creating greater certainty about how environmental reviews occur for specified types of actions. The process is streamlined, timing becomes more predictable, and

processes to ensure environmental quality are put in place. If, however, another federal agency with a permitting or other consultation action does not recognize a programmatic agreement and instead requires standard procedures to be followed, these benefits may be lost. In some cases, programmatic agreements have included provisions for “fall back” to standard procedures, which can help ensure that the large majority of projects may continue to be analyzed and handled according to streamlined procedures that distill experience from past project reviews.

Previous research suggests that programmatic agreements are most frequently developed in two major areas by DOTs and their partners:²

- **Historic Resources - Section 106 of the NHPA.** Many states and FHWA Divisions have developed programmatic agreements that help expedite project delivery by delegating certain FHWA responsibilities in the NHPA Section 106 review process to the State DOTs. The scope of these agreements ranges considerably, with some giving almost complete responsibility to the State DOT, even for projects with major impacts, and others giving states responsibility only for relatively routine projects with few or no potential impacts on historic places. Most of these agreements also involve the State Historic Preservation Officer (SHPO), and specify expedited means of coordination between the SHPO and State DOT.
- **NEPA Documentation – Categorical Exclusions.** Under NEPA and its regulations, transportation projects that typically do not individually or cumulatively have significant environmental effects are classed as categorical exclusions (CEs) and are exempt from detailed NEPA review. In a typical state, over 90 percent of all highway projects fall into the CE category. Programmatic agreements allow more efficient NEPA review of projects, especially those that qualify for Categorical Exclusions, by utilizing DOT staff to perform first level analysis and make project determinations. They have been widely used by State DOTs since FHWA’s 1989 guidance on the matter.

States’ CE or Section 106 programmatic agreements often share common themes, but are tailored to fit a state’s unique circumstances. Programmatic approaches for compliance with the Endangered Species Act and other major environmental laws have not yet been as widely or frequently used by DOTs.

1.4 Why Could Acceptance Conflicts Occur?

While FHWA-approved programmatic agreements with DOTs can streamline the environmental review process, other federal agencies may not always be aware of or readily accept the terms of such agreements, or understand the relationship of such agreements to their own actions and environmental reviews.

² NCHRP, 2002. Delegation of Federal Environmental Responsibilities for Highway Projects, NCHRP Project 20-07, 144

Programmatic agreements do not change a federal agency's basic legal responsibility to comply with federal environmental laws; federal oversight is retained, though potentially in a different form. In some cases, an agency may feel that it is not authorized to delegate certain oversight or decision making to the State DOT. In other cases, a resource agency may express concerns with decisions resulting from a programmatic process. The following types of acceptance problems may occur if a participating agency perceives that the programmatic does not ensure satisfactory completion of its legal responsibilities:

- A participating agency may request additional steps to satisfy federal responsibilities.
- A participating agency may not endorse application of a programmatic to a particular project or projects.
- A participating agency may reject an entire programmatic.
- A participating agency may not be aware of the provisions of an agreement to which it was not a signatory.

In each instance, delays can occur as decision-making or consultation responsibilities are returned to the federal level before a project proceeds. Ensuring that all affected federal agencies are comfortable with the development and application of programmatic agreements is a key step in successful application of this effective streamlining tool.

1.5 Research Objective

At the start of this research project, the extent and causes of acceptance problems with programmatic agreements was unknown, but considered potentially significant. In response, AASHTO's Standing Committee on Environment (SCOE), comprised of the state DOTs, sought guidance on the extent of this problem, its causes, and potential solutions that states can use to increase acceptance and use of programmatic agreements. The SCOE project panel's problem statement for this study states that: "The objective of this study is to document the reasons that FHWA-approved programmatic agreements are not recognized by other federal agencies, and to identify strategies for DOTs to achieve that recognition." This research effort sought to:

- Compile recent examples of conflicting federal agency acceptance of various types of commonly used programmatic agreements.
- Document the underlying causes of acceptance problems.
- Identify strategies that may lead to more consistent recognition of FHWA approved programmatic agreements among agencies and across regions.

1.6 Research Methodology

After consulting with the project panel, the research team decided to focus on review of the two most commonly encountered types of programmatic agreements that involve FHWA, which are Section 106 and CE programmatic agreements. Problems with Section 106 and CE programmatic agreements in particular were considered likely to have the greatest relevance to the state DOT community since they are widely used and can offer far-reaching benefits.

The research team adopted a four-part methodology to address the research objective for this study. It included 1) identifying the scope of programmatic acceptance conflicts via a survey, 2) understanding their causes and potential strategies for reducing or avoiding issues, via targeted interviews with FHWA, regulatory agency, and DOT staff, 3) examination of the regulatory underpinnings of issues raised, and 4) review of administrative solutions that may offer insight about improving problems identified in steps 1) and 2):

1. **FHWA Division Office Survey.** FHWA's division offices are located in every state. Every division office has at least one staff person assigned to cover environmental issues as their primary responsibility. FHWA's division-level environmental staff work closely with State DOTs and resource agencies and usually have day-to-day responsibility for environmental oversight of projects in their state. The project panel concurred that senior environmental staff in FHWA's divisions presented a logical starting-point for identifying problems encountered with FHWA-led programmatic agreements. The research team undertook a comprehensive survey of senior environmental contacts at the FHWA Division office in every state. Division office environmental staff were contacted by the research team in January 2005 via email and asked to respond to five questions intended to uncover problems with any programmatic agreements used by FHWA. A copy of the survey is included in Appendix A. If no response was provided by the FHWA contact, or if clarification of their email response was needed, the research team followed up with phone calls.
2. **Targeted Resource Agency Interviews.** As responses from FHWA Division staff were collected, the research team identified issues and problems that merited further investigation via phone calls with key State DOT, federal resource agency, and FHWA Division office staff. These calls were intended to gather detailed information about what problems occurred; the legal, administrative, and other basis for their occurrence; and how solutions, if any, were achieved. In cases where problems had been avoided and multi-agency support for agreements was achieved, proactive strategies were identified as well.
3. **Regulatory Research.** The research team researched the regulations involved with any of the issues raised to further understand the origins of the issues and potential solutions to comply with the regulations and satisfy the interests of the parties involved.
4. **Review of Federal Transit Administration (FTA) and Federal Aviation Administration (FAA) Agreements.** The research team simultaneously sought FTA and FAA agreements that might offer insight for FHWA and State DOTs in developing programmatic agreements. As per the project scope, emphasis was placed on review of FAA's pilot programmatic Environmental Assessment (EA) program. This review is included as Appendix F.

When a low incidence of acceptance conflicts with programmatic agreements was discovered, the research team:

1. **Redoubled efforts** to reach FHWA Division offices in each state.

2. **Inquired among State DOT Environmental Directors**, as represented on AASHTO's Standing Committee on the Environment, which represents all 50 states, the District of Columbia, and Puerto Rico to identify examples of acceptance problems that were not reported by FHWA staff.
3. **Obtained approval from the study panel to undertake a comparative study of selected states' programmatic agreements for CEs and Section 106**, that highlighted differences and similarities in the language of states' agreements that maximize the efficiency and effectiveness of such agreements.

1.7 Overview of Study Findings

All FHWA Division offices were contacted as part of the survey phase of this project. An overview of contacts and their summary responses is included in Appendix B.

Based on the information provided by FHWA Division staff, lack of acceptance of FHWA-led programmatic agreements by other participating federal agencies is rare. While some interagency process issues with satisfying Section 106 and CE determinations were identified and explored, FHWA Division offices did not report meaningful levels of project delay due to outright acceptance conflicts with the programmatic agreements themselves. As lack of findings spurred the research team to survey State DOT environmental managers and conduct in-depth discussion where issues emerged, several State DOT environmental managers and staff did identify problems they felt were substantial. A detailed review of those is included in Chapter 3 of this report.

Study highlights include the following:

- **Outstanding Survey Response Rate.** With persistence, the research team received an exceptionally high survey response rate of 100 percent. Many of the surveys were conducted via phone, which allowed the research team to ask additional probing questions where appropriate. A summary table of responses for each FHWA Division office, supplemented with state input, are included as Appendix B.
- **FHWA Survey Respondents Are Experienced.** All survey respondents described environmental issues as a primary job responsibility. Job titles for respondents were typically Environmental Coordinator, Environmental Engineer, or Environmental Manager. All respondents were familiar with the concepts of programmatic agreements and could identify such agreements. The average reported length of work experience at FHWA or in a related field was over nine years, suggesting that the survey results are based on respondents with sufficient experience to identify recent acceptance problems. Less experienced staff were often asked to check with others with more familiarity with the division's environmental program. In other cases, respondents indicated they had cast a wider net already.
- **Division Offices Report Almost No Acceptance Conflicts with Programmatic Agreements.** FHWA Division office respondents reported very few problems with acceptance by other federal agencies of programmatic agreements. In three instances, problems were reported for Section 106 agreements; however, investigation of these

instances suggested that problems were actually related to general challenges in compliance with Section 106 when multiple federal agencies are involved, rather than from acceptance of a programmatic agreement in particular.

The most commonly reported issues were differences of class of action determination among federal agencies; however, this occurred with and without FHWA-approved programmatic agreements and is only peripherally related to a programmatic CE agreement designed to delegate FHWA's environmental analysis work or authority to the State DOT. Though uncommon overall, this class of action determination issue was thought to be of sufficient interest to conduct follow up research with federal resource agencies and State DOTs. FHWA staff that identified the issue also noted that relatively simple solutions were used to resolve problems, e.g., reformatting a documented CE for use by the other federal agency as an EA, with very minor changes or even just a change of cover. DOTs reporting such problems described current disputes that were more intractable.

No problems were reported with ESA Section 7 agreements, CWA 404, or other types of agreements, with the exception of one case related to CZM (Coastal Zone Management). The latter involved a CZM Program letter delegating authority for consistency determinations. The research team was advised by the panel not to address Section 4(f), though state and FHWA Division staff did not voluntarily raise this issue in more open ended survey and interview questions either.

- **Study Clarification.** During the process of completing the agency interviews, the interagency acceptance conflict identified by the panel and described in the initial project problem statement was withdrawn by the state and FHWA Division office that had described the issue, and identified to be more related to orientation of new staff.
- **Low Incidence of the Expected Problem led to Focus of the Final Report on:**
 - **How Acceptance Problems Can Be Proactively Avoided.** Given that process issues were identified, particularly with Section 106, as part of the survey and in follow up interviews with other agencies, and that Divisions and states who experienced no problems still had experience to share on how to avoid such conflicts, the study's final report presents an initial exploration of how process and acceptance problems may be proactively avoided.
 - **Redirection of Remaining Funds/Effort to Examination of Sample Categorical Exclusion Programmatic Agreements and Section 106 Programmatic Agreements** to better understand the differences among them and how their efficiency and effectiveness might be extended, particularly in terms of acceptance by other agencies.
 - **Identification and Discussion of Related Issues.** In detailed discussions with some survey respondents, other issues emerged regarding relations among federal agencies participating in the Section 106 and CE determination processes that can cause delay. These include differing opinions and needs among federal agencies regarding appropriate class of action, and an issue where another federal regulatory agency had concerns about whether the Section 106 process was adequately

followed and others involving general coordination. The details of case examples uncovered in the interview process are presented in Section 3.

1.8 Report Structure

This report reviews general interagency coordination issues raised by a small number of FHWA Divisions and State DOTs related to categorical exclusions and the Section 106 process and how these issues can be resolved. The issues reviewed appear relevant to other DOTs, who could face such issues in the future. The remainder of the report includes the following sections:

- Overview of CE and Section 106 programmatic processes.
- Identification of Programmatic agreement and interagency coordination and process issues identified during interviews.
- Study of sets of identified CE and Section 106 programmatic agreements to identify similarities, differences, and ways to enhance or increase interagency acceptance.
- Appendices cover:
 - A: Initial FHWA Division Office Survey
 - B. FHWA Survey/Interview Responses and DOT Supplement
 - C: Overview of Larger NEPA CE and Section 106 Compliance
 - D: Sample 106 Programmatic Coordination Letters
 - E: How Selected Federal Agencies Define and Process Categorical Exclusions Under NEPA
 - F: Review of the Federal Aviation Administration's pilot EA programmatic

Note: The discussion of Section 106 and CE-related issues in the remainder of the report should not be considered comprehensive. The survey used to collect this information was originally intended to specifically uncover acceptance issues with programmatic agreements; many Division Offices chose only to indicate that they have no such conflicts. As further interviews and inquiry uncovered, such states may have experienced more general issues related to interagency coordination during NEPA review, ESA consultations, Section 404 permitting, and the Section 106 process but chose to answer the survey question specifically and not go into other problems or issues they had encountered. Thus, this survey should not be considered comprehensive or exhaustive with regard to issues that may occur in these processes, though issues raised are discussed in Section 3. Further work is likely needed to explore these issues in detail. An overview of NEPA CE and Section 106 compliance processes is included in Appendix C, for reference by the reader, as needed.

2. CE and Section 106 Programmatic Agreements

This section provides a brief overview of how State DOTs and FHWA have used programmatic agreements to streamline basic compliance processes required under federal law for designation

of categorical exclusion projects under NEPA and completion of Section 106 requirements under the NHPA.

2.1 CE Programmatic Agreements

FHWA's 1989 guidance memo on "Categorical Exclusion (CE) Documentation and Approval" recommends expediting approval of documented CEs listed under 23 CFR Part 771.117(d) using a programmatic model:

Additional actions which qualify as CEs under 23 CFR 771.117(d), that meet the criteria of 23 CFR 771.117(a) may be designated as CEs upon the submission of documentation which demonstrates that the specific conditions or criteria for those CEs are satisfied and that significant environmental impacts will not result.

The memo and programmatic model directly quote 23 CFR Part 771.117(d) "Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a)...may be designated as CEs" but drops, "only after Administration approval." Both paragraphs contain the 771.117(d) injunction that "(t)he applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result." Paragraph (d) goes on to list "examples of such actions (that) include but are not limited to..." those included in the (d) list. FHWA's March 30, 1989 memo states that:

To obtain FHWA approval for those projects that do not satisfy the stipulated conditions 3-6 in the programmatic, e.g., projects which use wetlands, Section 4(f) properties or more than minor amounts of right-of-ways, etc., the State would need to submit supporting information for each individual project which would clearly establish that there is little or no potential for significant impacts.

A number of approaches may be used by the Division Office and the State highway administration to document the CE classification. For example, the annual 105 program of projects or a periodic listing of projects which identifies those projects which are pre-approved and those which meet the terms of the programmatic could be submitted to the Division Office. Other CE classifications could be individually approved using a "batch" process, whereby a number of similar projects, e.g., bridge replacements, are reviewed, documented, and approved at one time.

Most DOTs have executed programmatic agreements that group projects for approval in this fashion; several of these are analyzed in Section 5. Although they vary widely in form, structure, and content, most FHWA-State DOT programmatic agreements for CEs share the following elements:

- **List of Action Types Eligible for Categorical Exclusion.** Almost all of the CE programmatic agreements used by states list action types that are eligible for exclusion from more extensive NEPA review – that is, categorically excluded action types. Most such lists are based directly or indirectly on those in 23 CFR § 771.117 paragraphs (c) and (d). Paragraph (c) describes actions that FHWA assumes to have little or no

potential for significant effects; these are primarily non construction-related activities, such as installing fencing or conducting planning studies. Some DOTs have described the (c) list as those subject to a “blanket CE.” Paragraph (d) provides an example list of other actions, many of them construction-related, that FHWA believes rarely have environmental impacts and invites State DOTs to propose for exclusion. Most lists set forth in states’ CE PAs go beyond the specific action types listed in the paragraphs (c) and (d), to some extent.

- **Screening Conditions or Criteria.** States’ programmatic agreements typically establish screening criteria to ensure that only projects eligible for programmatic processing will be handled in that fashion. FHWA’s 1989 guidance provides a model for criteria to use in identifying project types that have the potential for significant impacts – and thus that are ineligible for a CE. These criteria build on the conditions set forth in 23 CFR 771.117(b) — 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, as do many of the DOT-FHWA programmatic models developed over the following years.³ The criteria outlined in the 1989 memo include the following:

1. The action does not have any significant environmental impacts as described in 23 CFR 771.117(a).
2. The action does not involve unusual circumstances as described in 23 CFR 771.117(b).
3. The action does not involve the following:
 - a. The acquisition of more than minor amounts of temporary or permanent strips of right-of-way* for construction of such items as clear vision corners and grading. Such acquisitions will not require any commercial or residential displacements.
***Note:** Although a precise definition is not required, one State has defined a minor amount of right-of-way as not more than 10 percent of a parcel for parcels under 10 acres in size, 1 acre for parcels 10 to 100 acres in size and 1 percent of the parcel for parcels greater than 100 acres in size.
 - b. The use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. 303).
 - c. A determination of adverse effect by the State Historic Preservation Officer.

³ In their 1987 Technical Advisory, FHWA refers to the Section 771.117(b) list as those “unusual circumstances where further environmental studies will be necessary to determine the appropriateness of a CE classification. Unusual circumstances can arise on any project normally advanced with a CE; however, the type and depth of additional studies will vary with the type of CE and the facts and circumstances of each situation,” with the “level of consideration, analysis, and documentation should be commensurate with the action’s potential for significant impacts, controversy, or inconsistency with other agencies’ environmental requirements.” (T664008A section 1.B.)

- d. Any U.S. Coast Guard construction permits or any US Army Corps of Engineers Section 404 permits.
 - e. Any work in wetlands.
 - f. Any work encroaching on a regulatory floodway or any work affecting the base floodplain (100-year flood) elevations of a water course or lake.
 - g. Construction in, across or adjacent to a river designated as a component or proposed for inclusion in the National System of Wild and Scenic Rivers published by the US Department of the Interior/US Department of Agriculture.
 - h. Any changes in access control.
 - i. The use of a temporary road, detour or ramp closure unless the use of such facilities satisfy the following conditions:
 - i. Provisions are made for access by local traffic and so posted.
 - ii. Through-traffic dependent business will not be adversely affected.
 - iii. The detour or ramp closure, to the extent possible, will not interfere with any local special event or festival.
 - iv. The temporary road, detour or ramp closure does not substantially change the environmental consequences of the action.
 - v. There is no substantial controversy associated with the temporary road, detour, or ramp closure.
 - j. Any known hazardous materials sites or previous land uses with potential for hazardous materials remains within the right-of-way.
4. The action conforms to the Air Quality Implementation Plan which is approved or promulgated by the Environmental Protection Agency in air quality non-attainment areas.
 5. The action is consistent with the State's Coastal Zone Management Plan as determined by the appropriate State agency.
 6. The action occurs in an area where there are no federally listed endangered or threatened species or critical habitat.

CE PAs typically begin with this list and adapt it, abbreviate it or add to it. Projects meeting eligibility requirements may still be eligible for CE status, but they require documentation and must be individually approved by FHWA. FHWA's guidance memo clarifies that the above programmatic approach is an example, and that flexibility exists in how the various specific categories or criteria could be handled:

“To obtain FHWA approval for those projects that do not satisfy the stipulated conditions 3-6 in the programmatic, e.g., projects which use wetlands, Section 4(f) properties or more than minor amounts of right-of-ways, etc., the State would need to submit supporting information for each individual project which would clearly establish that there is little or no potential for significant impacts.”

- **Standardized Documentation.** States must be able to demonstrate to FHWA that projects are justifiably classified as CEs. Therefore, many states use a standardized project form or checklist to create a record of how projects were screened, using the specified criteria and conditions. Some PAs do not require such documentation for certain activity types, usually those specified in 23 CFR 771.117(c).

- **Reporting to FHWA.** PAs typically require reports to be provided to FHWA identifying projects processed under their terms.
- **Program Audits.** Finally, some PAs provide for program audits to allow FHWA and the state to review and improve the capabilities of the CE agreement.

According to NCHRP 20-7(129), in a typical state, over 90 percent of all highway projects that undergo NEPA review, or an average of about 290 projects per year, fall into the CE category. Recent programmatic agreements are more detailed in identifying actions that may be classified as categorical exclusions, and under what conditions, with the intent of allowing transportation agencies to focus more of their attention on Environmental Assessments (EAs) and Environmental Impact Statements (EISs) and the assessment and public involvement processes those entail. As DOTs' use of programmatic agreements has evolved, agreements have been expanded to include more project types. For example, Ohio DOT has a [CE programmatic](#) that provides programmatic CE approval for actions that involve wetlands impacts of five acres or less. FHWA has been reluctant, however, to grant programmatic approval for types of projects that require consultation or permits under other laws.

2.2 Section 106 Programmatic Agreements

Programmatic agreements for conducting Section 106 responsibilities are permitted under the Section 106 regulations. In response to passage of the NHPA in 1966, State DOTs began to develop the ability to address historic resources affected by transportation projects, and today:

- Most State DOTs employ one or more full-time staff historians, archaeologists, or other professionals in related disciplines.
- Many DOTs have substantial internal procedures for Section 106 review, including standards for identifying historic properties, contracting procedures, and provisions for public participation and working with interested parties.
- Many DOTs have fostered working relationships with staff in the SHPO and/or THPO offices in their states.

As a result, State DOTs are often prepared to participate in or lead the Section 106 process for transportation projects. Programmatic agreements and other memorandums of understanding between FHWA, the State DOT, and the SHPO and/or the Tribal Historic Preservation Officer (THPO), which draw on DOTs' Section 106-related capabilities, can help to expedite project delivery by transferring leadership for aspects of the Section 106 review process from FHWA to the DOT. Copies of programmatic agreements acquired by the research team are included as a separate document. In a number of cases, DOTs have hired their historians and archaeologists from the SHPO. SHPO representatives may also informally or formally contribute to the recruiting or hiring process for professionals in this field at a DOT.

2.2.1 What Responsibilities May be Delegated by a Section 106 Programmatic Agreement?

The scope of individual DOTs' programmatic agreements ranges considerably. Some programmatic agreements give almost complete responsibility for Section 106 to the state

DOT, even for projects with major impacts, and others give states responsibility only for documenting routine projects with limited potential for impacts on historic properties. Most commonly, programmatic agreements exclude certain classes of action from Section 106 review and/or allow the State DOT to represent FHWA in Section 106 consultations with the SHPO.

As the popularity of Section 106 programmatic agreements has grown, ACHP has amended [36 CFR §800](#) to permit expedited completion of routine programmatic agreements. DOTs and others can now use “prototype programmatic agreements” established by ACHP without individual approval from ACHP. 36 CFR §800.14(b) encourages use of programmatic agreements for large, complex projects or programs where:

- Effects on historic properties are similar and repetitive.
- Effects cannot be fully determined prior to approval of the project.
- Non-federal parties (such as State DOTs) are delegated major decision-making responsibilities.
- Effects result from routine maintenance.
- Circumstances warrant deviation from the normal Section 106 process.

2.2.2 Alternatives to Section 106 Programmatic Agreements

State DOTs may perceive that a programmatic agreement is required to create a more efficient review process for certain project types. This is not always the case; for example, a simple letter agreement can be used to exclude from full Section 106 consultation project types that have no realistic potential to affect historic resources. (See Appendix D for sample letters drafted by Dr. Tom King.)

2.2.3 VTrans Section 106 Programmatic Agreement

Vermont Agency of Transportation’s (VTrans) Section 106 programmatic agreement is one of the best known and most wide-ranging among DOTs. Under the programmatic, qualified VTrans historic preservation and archaeological staff complete all aspects of the Section 106 process internally. The programmatic agreement is the result of a lengthy collaborative effort among VTrans, Vermont Division of Historic Preservation (VDHP), and FHWA. An implementation manual sets out the qualifications for the VTrans review staff in addition to procedures for project reviews, provisions for soliciting and responding to public comment, standards for evaluating and documenting projects, an annual reporting process, and guidance on using standard mitigation measures and addressing emergency situations and unanticipated discoveries. The employment of qualified personnel and the process outlined by the agreement have helped enable VTrans to conduct historical and archaeological reviews without need for further oversight from the SHPO, in most cases.

3. Study and Interview Results

This section describes specific inter-agency coordination issues raised in the surveys and interviews with staff at FHWA Division staff, resource agencies, and State DOTs. In some cases, a programmatic agreement was involved, but in others no programmatic was involved .

3.1 USCG and Coastal Zone Management Act Consistency Determination

This case involved differences of opinion among agencies about how to satisfy documentation requirements for a Coastal Zone Management Act consistency determination, including transportation program conformity, in the context of an FHWA-approved programmatic agreement. In this case, FHWA had programmatically delegated the CZM consistency determination with the state's Coastal Management Plan to the DOT, and had written a letter to the state CZM oversight agency to that effect. In making its own consistency determination for a permit, the USCG did not feel able to accept the DOT's conforming (for air quality purposes) transportation program and the state CZM office would not issue conformity determinations on DOT plans. To resolve a one-time issue that dragged on for many months, the DOT ultimately ran a special conformity analysis for the USCG and involved FHWA in discussions and drafting a formal letter that the project came from a conforming plan, despite the existence of the aforementioned programmatic approach. No other examples related to CZM programs or conformity determinations were found in the course of this study, despite a number of specific inquiries with other states and USCG offices.

3.2 Section 106 Coordination Issues

This section describes four types of Section 106 interagency coordination issues that the research team encountered in its survey of FHWA Division office staff and in subsequent conversations with natural resource agency staff, Section 106 personnel at State DOTs, and process experts.

3.2.1 Agency is Not Included in Part of Section 106 Process That It Considers Important

If a participating agency is not included in the initial steps in the Section 106 process, they may be unable to raise legitimate concerns until late in the Section 106 process. An example was described to the research team in which the State DOT made a decision regarding Indian burial mounds in the right-of-way on a federal-aid transportation project that also affected 20 acres of wetlands and therefore required Corps approval of a Section 404 permit. The DOT did not include the Corps in the Section 106 process until a late stage. The Corps subsequently refused to support a proposed Memorandum of Agreement on how the project was addressing Section 106 requirements until further Section 106 consultation was undertaken with tribal representatives to address what the Corps perceived as deficiencies in the Section 106 process. In this particular case, the Corps representative indicated that having copied the agency on the initial reports identifying the archaeological sites could have helped prevent the problem and the delay that subsequently occurred in signing a project-specific MOA. Other cases could require greater involvement in the Section 106 process.

3.2.2 FHWA Not Designated as “Lead Agency” for Section 106

The Section 106 regulations at 36 CFR Part 800, §800.2 (a) allow for designation of a lead federal agency. “If more than one federal agency is involved in an undertaking, some or all the agencies may designate a lead federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under Section 106.” However, they go on to caution that “(t)hose federal agencies that do not designate a lead federal agency remain individually responsible for their compliance with this part.” Thus, if a participating federal agency does not designate FHWA as the lead agency for Section 106 compliance on transportation projects, that federal agency must carry out Section 106 review independently, or at least participate equally with FHWA in project review. While FHWA may recognize a state’s PA as the means of compliance in such a case, the other agency may not and may continue using a project-by-project approach. In two states, division environmental staff indicated they were having problems in the Section 106 process; one state had a programmatic Section 106 agreement and the other did not. In at least one case (and potentially both, the parties did not think this had occurred, but were unsure) the other federal agency involved had not designated FHWA as the lead agency.

One situation was described where a Corps District Office hesitated to sign a DOT-FHWA-SHPO Section 106 agreement that clarified FHWA-DOT’s lead agency role. In a number of other Section 106 PAs, the Corps was not involved in discussions or agreement development or was consulted sporadically or at the end of the process, and the parties still expressed that the Section 106 agreement and interagency relationships were functioning well. In still other cases, DOTs indicated there had been substantial coordination with other federal agencies throughout the Section 106 agreement development process, to ensure that the Section 106 process outlined therein would be satisfactory to all the agencies and tribes.

Corps guidance interpreting Appendix C(2)(c) of 33 Part 325 and 36 CFR 800.2(2) advises: “Districts should not be undertaking Section 106 compliance for other federal agencies with greater jurisdiction. Appendix C provides for the acceptance of work already undertaken by outside agencies. The Corps will generally accept the compliance of the lead federal agency. If state or other federal agencies have already undertaken compliance work that is acceptable to cover the Section 106 process, copies of compliance letters from the consulting agencies may be all that is necessary to document compliance. Section 106 compliance should not be duplicated by agencies.” How this advice is implemented at the level of a Corps District office and an FHWA Division is a matter that needs more attention.

3.2.3 Handling of Section 106 Compliance Criticized

Interagency conflicts or FHWA-DOT Section 106 process acceptance issues may emerge when another federal agency has questions or concerns about the adequacy of the process being employed on certain projects, particularly in terms of scope of analysis and legal sufficiency. One Corps District interviewed for this report expressed concerns regarding how the Section 106 process was being conducted by the DOT and its adequacy for meeting the Corps’ Section 106 review and consultation requirements, particularly where Corps’ permitting actions (wetland fill under CWA Section 404) were sufficiently large that a transportation project would not move forward “but for” the Corps permitting action. Elsewhere, such concerns have

been avoided through regular meetings among agencies, update and exchange of information through a cultural resources information system, and/or a detailed Section 106 process such as that developed by the Vermont Agency of Transportation. Confidence in staff abilities and the established process, good relations, and a high degree of trust between the agencies even prompted the Corps to request that VTrans staff handle the Corps' Section 106 responsibilities for a state project where there was no FHWA involvement.

3.2.4 New Personnel Orientation

Orientation of new personnel to agreed processes and procedures among federal agencies and among federal agencies and the DOT can take some time and affect whether programmatic agreements appear to be accepted by other agencies. For example, until new staff at a resource agency reached common understandings with FHWA and the DOT in one case, one Corps District office did not acknowledge DOT review and approval of an action, which fell under the FHWA-DOT-SHPO agreement allowing the DOT to make the call on such types of actions. As a result of the confusion, the SHPO would write back to the Corps that the project wasn't cleared because the SHPO did not have anything on the project in their files, a situation that occurred because the project was reviewed and "cleared" by the DOT per the programmatic agreement. Initially, the DOT handled the situation by copying the SHPO on all their Section 404 permit requests to the Corps, so that when the Corps wrote a letter to the SHPO, the SHPO was better able to respond on how Section 106 review had been performed for the project at hand. The DOT felt this "waste(d) a huge amount of time writing letters" even after FHWA-DOT indicated "up front, that the project has been reviewed and cleared by the DOT, for FHWA, per the programmatic agreement. Ultimately, sufficient orientation was performed with the Corps District on the programmatic process, and the need for this level of correspondence was reduced. The DOT has also made substantial investments in a shared database with the SHPO. New personnel orientation may be considered an aspect of the problem in another case involving a delay in one Corps District signing on to the DOT-FHWA-SHPO PA, despite lack of concern expressed by the new administration about the provisions therein.

3.2.5 Parts of Corps Section 106 Compliance Procedures Inconsistent with 36 CFR §800 Regulations

The Corps follows 33 CFR §325 Appendix C in addressing Section 106 responsibilities in its Clean Water Act Section 404 permitting activities. However, Appendix C differs from the Section 106 regulations themselves (36 CFR 800) on a number of key points, notably the geographic scope of agency responsibility for review of impacts and the manner in which historic properties subject to effect are identified. FHWA must follow 36 CFR 800, so the differences between these regulations and the Corps' Appendix C create the potential for confusion when an FHWA-assisted project requires a 404 permit. The Corps is exploring how CFR Part 325, Appendix C may be brought more in line with traditional Section 106 implementing regulations at 36 CFR Part 800.

3.3 NEPA Coordination Issues

Given the initial research focus on FHWA-approved programmatic agreements and interagency acceptance issues, and the existence of Categorical Exclusion (CE) PAs in many states, the NEPA interagency coordination issues uncovered by this study tended to relate to class of action determination. In particular, cases were identified in which actions that FHWA and the DOT had determined to be a CE were determined by another federal agency to require an EA.

3.3.1 Differing Agency Approaches to Categorical Exclusions

As generally defined by the Council on Environmental Quality (CEQ) in its regulations (40 CFR Sec 1500 et seq) for implementing the National Environmental Policy Act (NEPA), a categorical exclusion (CE) is a category of actions which does not individually or cumulatively have a significant effect on the human environment. Under CEQ's regulations, such classes of action do not require preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS). However, CEQ's regulations require agencies to publish in the Federal Register specific criteria for and identification of typical classes of action that can normally be considered CEs. 40 CFR 1507.3 calls for each agency to adopt its own procedures to supplement CEQ's NEPA regulations. Agency NEPA procedures must go through a public notice and promulgation process and a CEQ conformity review, in order for them to be legitimate.

(E)ach agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. . . . Each agency shall consult with the Council while developing its procedures and before publishing them in the Federal Register for comment...The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations.(40 CFR 1507.3(a)).

Case law has upheld this public notice process for establishing a Categorical Exclusion:

(T)here are certain procedural requirements for establishing categorical exclusions... Such agency procedures can only be adopted after 'an opportunity for public review...' 40 CFR § 1507.3(a). ... Defendant argues the categorical exclusions are not new, they have been published previously and public responses have been received.... I find that public comment is required prior to the establishment of a valid categorical exclusion, and that defendant has not provided sufficient evidence that public comment was received.... I find that it was not appropriate for defendant to rely upon the categorical exclusions ... due to this procedural inadequacy." *Felix Concolor vs. U.S. Forest Service*, (U.S. Dist. Or. LEXIS 9498, 1990). Also *Heartwood, Inc. v. U.S. Forest Service*, 73 F. Supp. 2d 962 (S.D. Ill. 1999), aff'd, 230 F.3d 947 (7th Cir. 2000).

Agency NEPA procedures must include specific criteria for and identification of those typical classes of action which normally require EISs and EAs, and those which normally do not

require either an EIS or an EA (categorical exclusions (Sec. 1508.4)(40 CFR 1507.3(b)(2)(iii)). While fostering agency involvement in, ownership over, and flexibility with regard to NEPA implementation, this also laid the groundwork for differing agency understandings of what may be considered categorically excluded under NEPA. Furthermore, as “typical” classes of action, the projects listed in such procedures should not be expected to be an all-inclusive list, but rather serve as representative examples of types of actions to which the criteria appropriately categorize as a CE.

One agency’s procedures may classify a type of action as a CE while another federal agency classifies the same type of action differently. While a CE is defined by CEQ at 40 CFR §1508.4, that definition is applied in different ways by different federal agencies. The procedures agencies have developed are tailored to the particular mission, statutory mandates, and responsibilities of each agency. Variation in categorical exclusions for similar classes of actions is possible because each agency takes into account “where and how it takes actions when it implements its missions and executes its responsibilities.”

Over time, each agency has developed its own tailored regulations and guidance that best fits the types of actions they commonly undertake; for example the Bureau of Land Management’s listing of CEs is different from the listing created by the USCG, and so on. A review of the agency-level regulations followed by the U.S. Forest Service, BLM, the U.S. Coast Guard, and the Corps of Engineers for complying with NEPA and CEQ’s 40 CFR Sec. 1500 regulations is included as Appendix D. For each agency’s regulations:

- Key references are described
- Specific categories of actions determined to be eligible for categorical exclusion by that agency are summarized,
- Criteria used by that agency for determining special circumstances where a CE is not appropriate are listed, and
- Any other relevant policies and procedures are noted.

For projects where more than one federal agency is involved in an action, CEQ’s regulations do not provide precise direction about which agency’s list should take precedence. Two agencies with different sets of regulations and guidance for interpreting NEPA and CEQ’s Sec 1500 regulations may disagree about whether a particular project should be processed as a CE. The extent of conflicts between agencies about appropriate NEPA documentation has not been measured, however, several anecdotal instances were identified where a project that FHWA and the DOT identified as a CE was not considered a CE under the regulations of other federal agencies. In these situations, preparation of an EA is usually required by the other agency, which may sometimes require additional time, effort, and resources in comparison to preparation of a CE.

In addition to differences in NEPA regulations among federal agencies, other guidance and policies have layered on additional interpretations and approaches, where implementation in the field may further extend the diversity of understandings and methods. CEQ encouraged agencies to publish explanatory guidance and continue to review, amend, and revise their policies and procedures: “Agencies shall continue to review their policies and procedures and

in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of (NEPA).” For example, FHWA’s 1989 guidance memo on Categorical Exclusion (CE) Documentation and Approval, further explains the agency’s 1987 procedures and allows states to add project types that may be considered as CEs as long as FHWA agrees and documentation is provided. Each State DOT-FHWA CE programmatic agreement (CE PA) lays out how this will be accomplished in the individual state where such an agreement is in place.

In the course of the research for this project and input from FHWA Divisions and State DOT environmental managers, differences in interagency acceptance of FHWA-DOT’s NEPA Categorical Exclusion determination and consequent level of documentation for a given project, with or without an overarching FHWA-approved CE programmatic agreement on the state level were identified in the following cases:

- **USDA Forest Service (FS).** Some cases were identified where:
 - A small or environmentally beneficial change from FHWA and the DOT’s perspective, such as an ecosystem enhancement project involving in-stream restoration work with FS ownership on one side, triggered FS need for an EA, which FS said would take nine months to complete.
 - Change in use of a parcel of land, such as for a roadside rest area conflicted with and involved changes to a Forest Plan.
 - A shoulder widening and safety improvement adjacent to forest land in an area of potential habitat for a threatened species triggered a FS request for an EA.
- **U.S. Army Corps of Engineers.** Two states indicated that the Corps sometimes rejects projects classified as CEs submitted by FHWA as part of the Nationwide Permit (NWP) 23, requiring case-by-case review and sometimes requiring them to be processed as EAs. A Corps regulatory guidance letter on the matter references the list of categorical exclusions FHWA published in 1987. Some Corps Districts have said that FHWA must initiate and the Corps must solicit comment on a revised list before further potential categorical exclusions can be considered for coverage under NWP 23.

In one state, even though the Corps has agreed to consider as CEs all projects that FHWA considers CEs, Corps review and agreement on CE categorization for certain projects requires a generic letter from FHWA identifying the individual project as a CE. This occurs only a few times a year, and the DOT had offered to implement this solution; however, a programmatic Categorical Exclusion agreement is in place between FHWA and the DOT delegating environmental review to the DOT on project types that include the subject cases, and the DOT would prefer to achieve a more efficient arrangement that would not require a project specific letter to the Corps in the future.

Also shared were examples of frequent DOT use of Corps EAs, where communities already had Corps permits for projects and in areas where the DOT came into work. In such cases, the DOT updated the Corps EA for FHWA, who in turn made sure that there was no Section 4(f) involvement.

- **U.S. Coast Guard.** In a couple of states, the need for a USCG permit has been considered to trigger the need for an EA or an individual letter of FHWA determination that a project is considered a CE by FHWA, even if a DOT-FHWA CE PA is in place. Examples included two bridge replacement projects, one approved by FHWA as a CE, but where the USCG required an EA or EIS, and another where the USCG would accept the CE, but not without an FHWA signature, therefore adding more time to the process for obtaining environmental approvals.
- **Bureau of Land Management.** For projects occurring on BLM land or involving BLM acquisition, in one state BLM regularly requires EAs where FHWA and the DOT have determined a CE to be appropriate. Examples included the following:
 - *Bridge Replacement Project.* This project required some right-of-way (ROW) controlled by the Bureau of Land Management. FHWA authorized environmental approval of the project as a documented categorical exclusion, with completion of a Biological Assessment and subsequent concurrence from the FWS, Section 106 clearance, a hazardous materials investigation, NPDES permit, and a Section 404 permit. BLM however, refused to accept this document and required preparation of an EA.
 - *Materials Site and Use.* Though an FHWA-DOT-BLM PA has been in effect in one state since 1991 (no expiration date), over the past year, BLM has begun to require EAs for materials sites and then another EA for the use of materials sites in areas that are 100 percent disturbed, according to the DOT.
 - *Project Land Transfer for ROW.* The DOT also just prepared an “optional EA”, required by BLM, after an EA and FONSI issued by FHWA, that entailed no new study but required rearrangement and publishing through BLM. Other BLM offices in the state continue to handle ROW and other requests according to procedures outlined in the MOA.
 - *Existing ROW Maintenance Project.* This project is located within existing State DOT ROW in an area of land controlled by BLM and involves bank stabilization alongside a river with Endangered Species Act-listed species. BLM requires preparation of an EA, where FHWA allows a CE.
 - *Snow Fence Construction Project.* This project requires construction of snow fencing along a stretch of Interstate highway to prevent drifting and blowing snow problems. The snow fence will be built on BLM land. FHWA requires a documented CE for this action, but BLM requires an EA and therefore the State DOT must prepare two separate environmental documents.
- A CE PA is not in effect between FHWA and the DOT in the last two cases above, nor is a DOT-BLM programmatic agreement. An adjacent state noted that a DOT-BLM memorandum of understanding (MOU) has helped avoid such conflicts.

DOTs also noted cases where interagency discussion of the class of action determination had led to mutually agreeable understandings that more than more than a CE was required; i.e. that an EA was appropriate. Another DOT, not noting a problem, stated,

It has been our experience that federal agencies do not automatically adopt environmental documents prepared for other federal agencies. Federal agencies routinely require close consultation during document preparation as a prerequisite to adopting a document prepared for FHWA. This consultation includes agreement that the type of document to be prepared for FHWA is acceptable for all purposes. We can anticipate requests for major revisions from other agencies if we don't provide an opportunity for input and oversight before requesting acceptance of the document. CEQ Regulation, 40 CFR Part 1500.6 required all federal agencies to revise their policies, procedures and regulations to ensure full compliance with the Act. This mandate led to the creation of multiple federal implementing regulations for NEPA. This means that FHWA regulations are simply one of many when it comes to identifying the appropriate type and document style to support decision making.

With only a couple of exceptions, the instances of interagency acceptance conflicts found in this report were described as rare and the overall interagency communication and class of action determination and acceptance process as smooth. Even in cases where one federal agency thought an EA was justified, such cases have been most frequently resolved by resubmitting a documented Categorical Exclusion as an EA with very minor changes.

3.4 Further Study of Categorical Exclusion Programmatic Agreements (CE PAs)

To gain a better understanding of State DOT/FHWA programmatic agreements on the application of categorical exclusions, project staff undertook a review of a sample of such agreements. Such agreements usually do three things:

- Increase State DOT responsibility and authority to decide whether a given action is a CE action, often called “delegation.”
- List the kinds of actions that will be regarded as CEs.
- Specify how actions thought to be CEs would be reviewed to identify any extraordinary circumstances that may require review through preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS).

Project staff undertook a comparative examination of categorical exclusion programmatic agreements (CE PAs) to identify commonalities and differences.

3.4.1 Background: FHWA's Procedures for NEPA and CE Implementation

One of the core requirements of NEPA is that agencies prepare “detailed statements” of the environmental impacts of any “major federal action significantly affecting the quality of the human environment.” One of the challenges facing CEQ when it set out to prepare regulations implementing NEPA was to distinguish between such actions and the plethora of other actions carried out by every agency on a daily basis that have little or no significant impact on the environment. One mechanism created by the CEQ regulations, at 40 CFR 1508.4, was the CE. Each agency was directed to develop a list of CEs specific to its own operations, and

promulgate this list in its own NEPA procedures, subject to CEQ approval. “Categorical exclusion” is defined at 40 CFR 1508.4 to mean:

a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency in implementation of these regulations (Sec. 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

CEQ goes on in this section of its regulations to require that:

Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

23 CFR 771 comprises FHWA’s NEPA procedures. 23 CFR §771.117 initially published in 1987 (52 FR 32660) sets forth FHWA’s CE list in three parts. 23 CFR §771.117 (a) defines CEs as actions which:

- Do not induce significant impacts to planned growth or land use for the area;
- Do not require the relocation of significant numbers of people;
- Do not have a significant impact on any natural, cultural, recreational, historic or other resource;
- Do not involve significant air, noise, or water quality impacts;
- Do not have significant impacts on travel patterns; or
- Do not otherwise, either individually or cumulatively, have any significant environmental impacts.

In response to the requirement that an agency’s use of CEs allow for “extraordinary circumstances,” at 23 CFR §771.117 (b) or “unusual circumstances” (T664008A 1.A&B) FHWA provides for a CE to be supported by small-scale environmental impact analyses to determine whether such circumstances may exist. The regulations give as examples of such circumstances the presence of 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 that might preclude a CE classification. Projects whose eligibility as CEs are supported by documented environmental analysis are sometimes referred to as “documented categorical exclusions” or DCEs.

A core group of transportation-related CE action types is listed in 23 CFR 771.117(c). This group includes:

- Planning and technical studies
- Utility installations along or across a transportation facility
- Bicycle and pedestrian facilities

- Highway safety initiatives
- Transfer of federal lands
- Installation of noise barriers
- Landscaping
- 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
- Emergency repairs
- Acquisition of scenic easements
- Improvements to existing rest areas and truck weigh stations
- Ridesharing activities
- Bus and rail car rehabilitation
- Alterations to facilities or vehicles to make them accessible for elderly and handicapped persons
- Program administration, technical assistance activities, and operating assistance to transit authorities
- Purchase of vehicles that can be accommodated by existing facilities
- Track and railbed maintenance and improvements within the existing right-of-way
- Purchase and installation of operating or maintenance equipment located within a transit facility
- Promulgation of rules, regulations, and directives

In its October 1987 Technical Advisory 6640.8A, FHWA described activities in the (c) list as those which “experience has shown never or almost never cause significant environmental impacts.” Part 1.A. of the advisory notes “[T]hese actions are automatically classified as CEs, and except where unusual circumstances are brought to FHWA’s attention, do not require approval or documentation by FHWA. However, other environmental laws may still apply... any necessary documentation should be discussed and developed cooperatively by the highway agency (HA) and the FHWA.”

At 23 CFR 771.117(d), FHWA invites applicants to propose additional actions that should be regarded as CEs on a case-by-case basis, supported by documentation demonstrating that they have no significant environmental impact. Examples of action types listed at 23 CFR 771.117(d) include:

- Highway modernization (resurfacing, restoration, rehabilitation, reconstruction)
- Highway safety or traffic operations improvement projects
- Bridge rehabilitation, reconstruction, or replacement
- Transportation corridor fringe parking facilities

- Construction of new truck weigh stations or rest areas
- Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way
- Approvals for changes in access control
- Construction of new bus storage and maintenance facilities
- Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities
- Construction of bus transfer facilities
- Construction of rail storage and maintenance facilities
- Acquisition of land for hardship or protective purposes; advance land acquisition loans under section 3(b) of the UMT Act.

Section 117(d) specifies that action types that may be categorically excluded “include, but are not limited to” the types on the above list. FHWA’s TA 6640.8A makes clear that this “second group is not limited to these 12 examples.” These actions have a “higher potential for impacts than the first group, but due to minor environmental impacts still meet the criteria for categorical exclusions.” Importantly for DOT Categorical Exclusion PAs, “Other actions with a similar scope of work may qualify as CEs.” Site location becomes a key factor and FHWA noted that “Some of these actions on certain sites may involve unusual circumstances or result in significant adverse environmental impacts.” (all from TA 6640.8A, section 1A).

FHWA then turned to the documentation issue, noting that minor actions from the list of examples “need only minimum documentation” and that for “more complex actions, additional information and possibly environmental studies will be needed... furnished to the FHWA on a case-by-case basis for concurrence in the CE determination.”

Because of the potential for impacts, these actions require some information to be provided by the (State DOT) so that the FHWA can determine if the CE classification is proper (23 CFR 771.117(d)). The level of information to be provided should be commensurate with the action’s potential for adverse environmental impacts. Where adverse environmental impacts are likely to occur, the level of analysis should be sufficient to define the extent of impacts, identify appropriate mitigation measures, and address known and foreseeable public and agency concerns. As a minimum, the information should include a description of the proposed action and, as appropriate, its immediate surrounding area, a discussion of any specific areas of environmental concern (e.g., Section 4(f), wetlands, relocations), and a list of other Federal actions required, if any, for the proposal. The documentation of the decision to advance an action in the second group as a CE can be accomplished by one of the following methods:

FHWA provided for additions to the (c) and (d) list through further documentation:

Any action which meets the CE criteria in 23 CFR 771.117(a) may be classified as a CE even though it does not appear on the list of examples in Section 771.117(d). The actions on the list should be used as a guide to identify other actions that may be processed as CEs. The documentation to be submitted to the FHWA must demonstrate that the CE criteria are satisfied and that the proposed

project will not result in significant environmental impacts. The classification decision should be documented as a part of the individual project submissions.

In summary, at section 117(c) FHWA listed the basic action types that – when the regulation was drafted – it viewed as relatively obvious CEs under 117(a). At section 117(d) it listed action types that appeared to be good candidates for CEs, but that involved enough uncertainty to warrant further consideration under 117(b). This consideration was to be provided through coordination between FHWA and State DOTs on projects as they came up.

23 CFR 771 goes on to specify at section 117(e) that “where a pattern emerges of granting CE status for a particular type of action;” in particular that “the Administration will initiate rulemaking proposing to add this type of action to the list of categorical exclusions in paragraph (c) or (d) of this section, as appropriate.” Over the years since the regulations were issued, thousands of actions falling into the types listed in sections (d) have been undertaken, and have passed through the environmental screening review provided for at section 117(b). This experience has not yet led FHWA to revise its CE list via rulemaking, though the agency attempted to do so in its 2000 Notice of Proposed Rulemaking on NEPA procedures.

FHWA’s 1989 memo distributed a “programmatic model” that was seen as a vehicle that a Division office could use to “more expeditiously and efficiently document and approve CEs which qualify for a CE determination under 23 CFR Part 771.117(d).”⁴ This memorandum suggested that Divisions enter into programmatic agreements with State DOTs, which would constitute FHWA “pre-approval” of section 117(d)-type CEs determined at the state level. It also mentioned “the preapproval inherent in 23 CFR 771.117(c),” suggesting that FHWA viewed section 117(c) CEs as “automatically” preapproved. The model attached to the memorandum was in the form of an agreement between a Division office and a State DOT, granting programmatic, advance, FHWA concurrence in section 117(d) CE determinations made by the state on actions “with no environmental impacts.” The state in turn certified that all conditions listed in the agreement would be satisfied. The conditions listed included those in 23 CFR 771.117(a) and (b), plus four others, listed in full in section 2.1 of this document, under Screening Criteria.

In response to the 1989 memorandum, many State DOTs have proposed, and FHWA Divisions have accepted, adjustments to and expansions on the core lists of CEs, drawing on the CE definition in 23 CFR 771.117(a) as “actions which meet the definition contained in 40 CFR 1508.4, *and, based on past experience with similar actions, do not involve significant environmental impacts.*” [emphasis added] (52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988). In the course of making such adjustments and expansions, Divisions and DOTs have often defined their respective roles and responsibilities in ongoing coordination, and often outlined procedures for the conduct of section 117(b) reviews. These are the usual subjects of the CE PAs analyzed in this report.

⁴ FHWA Memorandum: Categorical Exclusion (CE) Documentation and Approval. March 30, 1989. See <http://environment.fhwa.dot.gov/projdev/docuceda.htm>

3.4.2 Review of Categorical Exclusion PAs

We examined Programmatic Agreements dealing with Categorical Exclusions from thirteen states: Alaska, California, Colorado, Iowa, Kentucky, Maine, New Hampshire, New Jersey, Ohio, Pennsylvania, Texas, Utah, and Wyoming. Not all are actually referred to explicitly as Programmatic Agreements, and not all are in formal agreement format: some are simply exchanges of memoranda or letters, or memoranda sent from a State DOT to an FHWA Division for the Division Administrator to countersign and return. All, however, are designed to achieve one or more of the following objectives:

- Delegate the authority to identify a project as falling into a CE category.
- Outline agreed-upon CEs.
- Specify the conditions or criteria a project must meet in order to show that no “unusual circumstances” exist requiring a higher level of NEPA review.

Table 1 summarizes the character and content of the PAs reviewed. Table 2 compares the lists of exclusions contained in the various PAs that provided such lists (i.e. Iowa, Kentucky, Maine, New Hampshire, New Jersey, Ohio, Pennsylvania, Texas, Utah, Wyoming), and also compares them with the lists given in 23 CFR 771.117(c) and (d) and in the 1989 FHWA memorandum. Table 3 compares the conditions or criteria employed by those PAs that presented them, to screen possible CE actions for “unusual circumstances,” together with those provided at 23 CFR 771.117(b) and in the 1989 FHWA memorandum. It is important to note, however, that the various PAs define what appear to be more or less the same categories of action in different ways, and some lump categories together while others spilt them apart. The same observation applies to the screening conditions or criteria. Accordingly, Tables 2 and 3 should be taken only as broadly indicative of the content of the different PAs; slightly different interpretations of specific terms would result in somewhat different tables.

Table 1: Summary Content of PAs

Alaska

- Incorporate 117(c) & (d): Yes
- Adjustments/additions: Minor
- Based on 1989 model: Very similar
- Screening conditions/criteria: Yes, five evaluation criteria, one with 11 subcriteria
- Procedures for screening: Not specified

California

- Incorporate 117(c) & (d): Yes
- Adjustments/additions: Minor
- Based on 1989 model: Generally yes, elaborates
- Screening conditions/criteria: Yes, 14-point “do-not” list

- Procedures for screening: Yes, detailed.

Colorado

- Incorporate 117(c) & (d): 117(d) incorporated in part. Current agreement amends a prior one, which may have incorporated 117(c)
- Adjustments/additions: Yes, 18 additional/overlapping action types
- Based on 1989 model: No, but previous agreement may have done so
- Screening conditions/criteria: Yes, nine evaluation criteria
- Procedures for screening: Not specified in agreement reviewed

Iowa

- Incorporate 117(c) & (d): References but does not incorporate
- Adjustments/additions: Yes
 - 12 non-construction action types
 - Ten construction types
 - Two types involving change of use rights
 - Some overlap with 117(c) and (d), others do not
- Based on 1989 model: No, but current agreement amends earlier agreement, which may have been more like the model
- Screening conditions/criteria: Yes, in project summary worksheet
- Procedures for screening: Yes, summary plus detailed project summary worksheet

Kentucky

- Incorporate 117(c) & (d): Not explicitly
- Adjustments/additions: Yes., identifies 16 action types in one place and 24 in another as CEs. Divides CE action types into three levels:
 - Level 1: Little or no impact; may be determined by project and environmental staff
 - Level 2: Somewhat more potential for impact, CE must be determined by higher level officials
 - Level 3: Determination must be made by FHWA
- Based on 1989 model: No
- Screening conditions/criteria: Yes, for each level
- Procedures for screening: Yes, general

Maine

- Incorporate 117(c) & (d): Yes. 117(c) CEs are “self-certifying,” and apparently are not screened. 117(d) CEs are “programmatically” and must be screened

- Adjustments/additions: Yes, 31 additional (though sometimes overlapping) “programmatic” CE types, and allows for additional “individual” CEs subject to FHWA approval
- Based on 1989 model: No
- Screening conditions/criteria: Yes, 13-point checklist
- Procedures for screening: No

New Hampshire

- Incorporate 117(c) & (d): Yes, by reference
- Adjustments/additions: Yes
 - 30 action types that “never or almost never cause significant environmental impacts
 - Five types that “typically do not have significant environmental impacts
 - Four types that can be classed as CE only with FHWA approval
- Based on 1989 model: No
- Screening conditions/criteria: Four general screening factors from 117(b), ten more specific criteria that must be met
- Procedures for screening: Yes

New Jersey

- Incorporate 117(c) & (d): Yes, 30 CEs listed that can be “self-certified by NJDOT; most are from 117(c) and (d), while others appear derivative. Four CE types require approval by FHWA, all from 117(d)
- Adjustments/additions: Some adjustments; for example some modernization actions lumped in 117(d) are split between self-certified and programmatic categories
- Based on 1989 model: No, though some similar language
- Screening conditions/criteria: Yes, eight broad criteria
- Procedures for screening: Yes, general

Ohio

- Incorporate 117(c) & (d): Yes (see below)
- Adjustments/additions: Yes
 - 14 action types listed that require no documentation; most of these appear to be derived from 117(c), or implicitly embraced by 117(c) categories
 - 18 “Level 1” CEs are mostly derived from 117(c)
 - 17 “Level 2 & 3” CEs are mostly derived from 117(d)
 - “Level 4” appears to be open-ended
- Based on 1989 model: No
- Screening conditions/criteria: Yes, specific to levels

- Procedures for screening: Yes, Environmental Coordinator must certify Level 1 CEs; higher level ODOT officials must certify Level 2 & 3 CEs; Level 4 CEs must be coordinated with FHWA.

Pennsylvania

- Incorporate 117(c) & (d): Yes (see below)
- Adjustments/additions: Yes, adjustment/elaboration
 - 117(c) CEs are classed as “Level 1a.” FHWA “concur in advance” with PennDOT classification and satisfaction of conditions
 - 117(d) CEs are screened by PennDOT, and if conditions are met they are classified as “Level 1b” CEs
 - If conditions are not met, CEs are classified as “Level 2” CEs and FHWA must approve
- Based on 1989 model: No
- Screening conditions/criteria: Yes, ten conditions in addition to those in 117(b).
- Procedures for screening: Yes; commitment to documentation, different screens for different levels, quality management program

Texas

- Incorporate 117(c) & (d): Yes
 - 20 of 23 “Blanket” CEs are from 117(c)
 - 11 of 13 “Programmatic” CEs are from 117(d)
- Adjustments/additions: three “Blanket” and two “Programmatic” CEs are new, and four additional CEs require FHWA approval. Apparently additional “exceptions” may be agreed upon
- Based on 1989 model: No
- Screening conditions/criteria: Yes; list of ten conditions
- Procedures for screening: Yes, general

Utah

- Incorporate 117(c) & (d) lists: Yes (see below)
- Adjustments/additions: CEs divided into Level I, II, and III. Level I requires no documentation; Levels II and III require documentation
 - Ten CEs designated Level I, all from 117(c)
 - 23 CEs designated Level II, most but not all derived from 117(d); others de novo.
 - Five CEs reserved to FHWA as Level III, two derived from 117(d), other three de novo
- Based on 1989 model: No

- Screening conditions/criteria: Not in this document
- Procedures for screening: General; staff review of Level II documentation, periodic meetings with FHWA, commitments to application of high standards

Wyoming

- Incorporate 117(c) & (d): Yes
 - 7 action types derived from 117(c) are excluded;
 - 22 types derived from 117(d) are “programmatically” excluded
- Adjustments/additions: No, other than some rewording
- Based on 1989 model: No
- Screening conditions/criteria: Yes, 13 conditions, in addition to those in 117(b)
- Procedures for screening: General; findings must be documented, and contain obligatory statement

Table 2: Comparison of Approaches to Excluded Activities in the CE PAs with Such Lists Building on 117(d) Examples

Exclusion	117 (c)	117 (d) Examples	New Hampshire	Iowa	Kentucky	Maine	New Jersey	Texas	Wyoming	Ohio (Lv. 1)	Utah	Pennsylvania
No construction implications	X		X	X	X	X	X	X		X	X	X
Utilities in ROW	X		X		X	X	X	X		X	X	X
Bicycle/Pedestrian paths	X		X		X	X	X	X	X	X	X	X
In Highway Safety Plan	X		X			X	X	X	X		X	X
Land transfer w/no future involvement	X		X		X	X	X	X	X	X	X	X
Noise reduction	X		X			X	X	X		X		X
Landscaping	X		X	X		X	X	X	X			X
Fencing, signs, etc.	X		X	X	X	X	X	X	X	X	X	X
Emergency repairs	X		X	X	X	X	X	X	X	X	X	X
Acquire scenic easements	X		X	X	X	X	X	X		X	X	X
Payback determination	X		X			X	X	X			X	X
Rest stop/weigh station improvement	X		X	X		X	X	X	X	X	X	X
Ridesharing	X		X			X	X	X			X	X
Bus/rail car rehabilitation	X		X			X	X	X			X	X
Accessibility alterations	X		X			X	X	X			X	X
Program administration, etc.	X		X			X	X	X			X	X
Vehicle acquisition	X		X			X	X	X			X	X
Track/railbed maintenance	X		X	X	X	X	X	X			X	X
Operation/Maintenance. Equipment Acquisition	X		X	X		X	X	X			X	X

Exclusion	117 (c)	117 (d) Examples	New Hampshire	Iowa	Kentucky	Maine	New Jersey	Texas	Wyoming	Ohio (Lv. 1)	Utah	Pennsylvania
Rules, regulations, etc.	X		X			X	X	X			X	X
Resurfacing		X	X	X	X	X	X	X	X	X		X
Ramp meters, lighting		X	X			X	X	X	X	X	X	X
Bridge rehabilitation		X	X			X	X	X			X	X
Fringe parking		X				X	X	X	X		X	X
Disposal excess ROW		X	X		X	X	X	X		X	X	X
Change access control		X	X			X	X	X	X	X	X	X
Bus storage/maintenance facilities		X	X		X	X	X	X			X	X
Rehab existing bus/rail buildings		X	X			X	X	X			X	X
Bus transfer facilities construction		X	X			X	X	X			X	X
Rail storage/maintenance facilities		X	X			X	X	X		X	X	X
Hardship/protective buying		X	X	X		X	X			X	X	X
Bridge painting			X				X			X		
Recreational trails			X									
Transportation enhancement			X			X						
Congestion Mitigation/Air Quality			X									
Scenic byways reconstruction			X	X		X						
Entirely within ROW				X								
Guardrail replacement					X	X			X	X		
Traffic signal replacement					X					X		
Marking/painting pavement					X					X		

Exclusion	117 (c)	117 (d) Examples	New Hampshire	Iowa	Kentucky	Maine	New Jersey	Texas	Wyoming	Ohio (Lv. 1)	Utah	Pennsylvania
Herbicide spraying					X					X		
Mowing, trimming, etc. in ROW					X					X		
Turning lanes						X			X	X		
Flattening slopes						X						
Culverts, etc.						X			X	X		
Minor widening, etc.						X		X		X		
Bridge widening/maintenance						X			X	X		
Bridge approaches						X			X			
Adaptive use of buildings						X						
Adaptive use of railyards						X						
Railroad crossing improvement						X			X		X	
Railroad grade separation						X			X		X	
Railroad track circuitry						X						
Railroad crossing surface						X			X		X	
Railroad crossing sight distance						X			X			
Eliminate RR closures						X						
Rehabilitate ferries & locomotives						X						
Compensatory mitigation						X						
Clear zone safety actions						X			X			
Vacating excess property						X				X		
Screening unsightly areas						X			X			
General preventive maintenance						X				X		
Skid hazard treatment						X						
Upgrade median barrier						X			X			

Exclusion	117 (c)	117 (d) Examples	New Hampshire	Iowa	Kentucky	Maine	New Jersey	Texas	Wyoming	Ohio (Lv. 1)	Utah	Pennsylvania
Impact attenuators						X			X			
Traffic surveillance/control						X						
Motorist aid programs						X						
Highway information						X						
Computerized signalization						X						
New through lane								X			X	
ROW fence maintenance									X			
Road closure gates									X			
Snow control									X			
Runaway truck ramps									X		X	
2nd stage surfacing									X			
Maintenance facility improvement										X		
Beautification										X		
ROW use permits										X		
Modernization of highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (e.g., parking, weaving, turning, climbing).										X	X	
Wetland mitigation										X	X	
Tower lighting										X		

Table 3: Comparison Screening Criteria

Criterion	117(b)	1989 Memo	California	Alaska	Colorado	Iowa	New Hampshire	Kentucky (Lv. 1)	Maine	New Jersey	Texas	Wyoming	Ohio (Lv.1)	Pennsylvania
No significant environmental impact	X		X	X			X							
No significant environmental controversy	X		X				X		X				X	
No violation law/regulation/determination	X						X				X			X
No AE on historic properties	X	X	X	X	X	X	X		X	X	X	X	X	
No major R/W acquisition		X	X	X	X	X					X	X		
No Section 4(f) issues		X	X	X	X	X	X		X	X	X	X	X	X
No FEMA floodplain issues		X	X	X		X								
No construction Near Wild & Scenic River		X	X	X					X		X	X	X	X
No USCG permit		X	X	X							X		X	X
No significant Wetland/404 issues		X	X		X	X	X		X	X	X	X	X	X
No significant air quality impact		X	X		X	X	X	X	X	X		X		X
Consistent with CZMP		X	X								X			X
No hazardous sites/materials		X	X	X	X				X		X	X		X
No change in access control		X		X								X		
No detours, etc.		X												
No ESA issues		X	X		X	X		X	X	X	X	X	X	X
No agricultural land issues			X									X		
No road on new location				X										

Criterion	117(b)	1989 Memo	California	Alaska	Colorado	Iowa	New Hampshire	Kentucky (Lv. 1)	Maine	New Jersey	Texas	Wyoming	Ohio (Lv.1)	Pennsylvania
No displacement (residential/commercial)				X	X	X	X		X	X	X			
No new through lanes					X		X							
No adverse traffic patterns					X		X					X	X	
No impact community cohesiveness					X		X					X		
No/negligible water quality impact					X	X	X					X		
No/negligible noise impact					X	X	X		X	X		X		
No disturbance new land						X								
No buildings over 50 years old						X								
No high-risk regulated materials site						X								
No farm issues						X								
No Environmental Justice issues								X						
No unresolved opposition								X						
No Tribal cultural/religious issues								X						
No Sec. 6(f) issues								X	X	X				
No new interchanges								X						
No sole source aquifer									X	X				
No scenic byways									X					
No significant wildlife issues												X		
No significant visual impacts												X		
No protective buying/hardship acquisition														X
No "other" resource									X					

3.4.3 Summary: Diversity Among CE PAs

Although the PAs reviewed share purposes in common, they are diverse in terms of format and content.

- Some PAs are quite short and general, only a few pages long, with a limited list of CE action types, usually very generally described. Others are lengthy, with many attachments or subsidiary documents such as handbooks or guidelines to be used in “unusual circumstance” review.
- Some PAs adhere tightly to the categories listed in 23 CFR 771.117(c) and/or (d), while others rephrase or restructure these categories and/or go beyond them, identifying new categories or subcategories. Many of these new categories and subcategories are the same as or similar to those outlined in the 1989 FHWA memorandum and deal with more or less the same range of possible action types. Other categories and subcategories distill newer learning.
- Some PAs establish more or less detailed systems by which projects thought to fall into CE categories are screened against specified criteria or conditions to identify “unusual circumstances,” while others do this only generally.
- Some PAs use screening conditions or criteria derived verbatim or nearly so from 23 CFR 771.117(b); others use standards that are more distantly derivative or virtually independent of those given in FHWA’s regulation.
- Some PAs organize CEs into “levels” or other large categories, usually linked to “unusual circumstance” screening at different levels of intensity; others do not.
- Some PAs exclude some CE categories – usually those listed in 23 CFR 771.117(c) – from “unusual circumstance” screening altogether; others do not. This exclusion from screening may be derived from the 1989 FHWA guidance memorandum.

3.4.4 Observations and Questions for Future Research

This review provides the basis for general observations about CE programmatic agreements, and raises questions worthy of further consideration.

As noted above, there is a great deal of variability among the PAs reviewed, in terms of structure, content, and approach. This is to be expected and appropriate, since each reflects the needs of a particular state and its relationship with its own FHWA Division. However, this variability is unlikely to simplify coordination with other federal agencies. In a few cases, these agencies have issued national level guidance on how FHWA projects will be handled. In some cases this guidance falls short of addressing the range of coordination that is the norm between these agencies and the variety of issues involved. (An overview of the NEPA implementing regulations of four federal resource agencies where coordination issues have arisen is incorporated as Appendix E of this report.) Some DOTs have successfully minimized later coordination issues and conflicts with federal resource agencies by coordinating with these agencies in the CE PA development, review, or revision process. Nevertheless, with staff

turnover and other administrative changes, ongoing coordination and education to support past agreements may be needed.

23 CFR 771.117(e) contemplates that FHWA will from time to time adjust its list of CEs to include action types that experience has shown seldom if ever have significant effects on the environment. The experience acquired and distilled in the State DOT-FHWA CE PAs suggests that many of the action categories listed in subsection 117(d), and perhaps others included in particular PAs, may be appropriate for general adoption into the list of CEs given at 23 CFR 771.117(c). FHWA did propose expansion of the (c) list in 2000, but the Notice of Proposed Rulemaking was never carried forward to finalization.

Some PAs that do not adhere closely to the lists in 23 CFR 771.117(c) and (d) and the 1989 memorandum lump action types into a few large, rather loosely defined CEs, while others make many fine distinctions. Interviews with FHWA Divisions and State DOTs suggested that the fine distinctions provided clarification of situations where questions had arisen under the previous PA. This occurred in the case of TxDOT's CE agreement with FHWA; issues surrounding marginal cases were discussed among the agencies in the course of revisions and common understandings and an agreed process for such situations were recorded in the PA. However, it is not clear whether this approach has distinct advantages in all cases than using a few large, rather loosely defined CEs. The pros and cons of each approach could be investigated further.

The considerable variety in systems of screening for "unusual circumstances" raises questions about whether any particular system is superior to others, and about the conditions under which one or another system may be appropriate. This, too, is a question that may yield benefits for DOTs with further study.

Although few FHWA Division Offices and State DOTs reported problems in their coordination with other agencies based on how CEs are defined, the diversity of ways in which each agency understands and categorizes CEs provides fertile ground for such problems to arise. There is no necessary consistency between the way FHWA itself categorizes CEs and the way agencies like the Corps and USCG do so. This means that an action regarded as categorically excluded by FHWA will not necessarily be similarly regarded by BLM, the FS, the Corps, or USCG. The variability of FHWA-DOT CE PAs in use nationwide may work against development of national level understandings between the agencies to minimize the problems DOTs have reported; however, continued identification and elevation of common issues could enable focused agreements on specific areas of action. Also, DOTs may successfully avoid some differences of understanding and preference in class of action by up-front coordination with resource agencies in the process of CE PA revision or by development of side agreements with the resource agencies in question. While DOTs have reported the latter to be a very successful approach where employed, a case still arose in which a resource agency change of administration in one office chose an entirely different approach than outlined in the MOA, while the agreement remained in effect. Such a situation may leave the DOT in a quandary, especially where the agreement remains acceptable and streamlines the process in other districts of the same agency.

As national agencies often rotate staff through division/district/regional assignments, it is reasonable to expect that coordination and clarification with newer staff on state-level negotiated

approaches will continue to be necessary. The more PAs are negotiated that introduce variability into the CE systems used by FHWA and the State DOTs, the less likelihood there is of consistency with the systems employed by other agencies, and the greater likelihood there is of conflicts. Situations where other agencies do not easily share a State DOT's interpretation of what is and is not categorically excluded can easily arise. A certain amount of confusion may persist as many government employees still assume experience from other places or national level guidance prevails. DOTs and FHWA Divisions report that such differences can normally be resolved through discussion, though cases can be found where such discussions involved many meetings and difficulties lasted a year or more.

3.5 Further Study of Section 106 Programmatic Agreements

To broaden understanding of Section 106 PAs in use by State DOTs and FHWA Division offices, the research team undertook a study of all such PAs made available to us by states and Division offices.

3.5.1 Background: Programmatic Agreements under Section 106

The regulations of the Advisory Council on Historic Preservation (ACHP) implementing Section 106 of the National Historic Preservation Act prescribe a detailed, step-by-step process of project review (See 36 CFR 800). This process features:

- Early scoping
- Identification and evaluation of districts, sites, buildings, structures and objects that may be "historic properties" (i.e., meet the criteria of eligibility for the National Register of Historic Places)
- Determination of potential project effects on such properties
- Consultation to resolve effects that are adverse

The regulations require public involvement throughout the review process, and detailed consultation at several points with State and Tribal Historic Preservation Officers (SHPOs/THPOs), Indian tribes and Native Hawaiian groups, local governments, and other interested parties.

The Section 106 regulatory process was established with reference to large, new construction projects. For many smaller projects, projects involving multiple parties with overlapping or delegated responsibilities, and projects with marginal or routine effects on historic properties, the process can be overly complicated and time-consuming. Accordingly, at 36 CFR 800.14 the regulations allow agencies to adjust the process in various ways. The most commonly used vehicle for such adjustments is a Programmatic Agreement (PA) negotiated among the relevant federal and state agencies, the SHPO/THPO, and other interested parties, with ACHP oversight and sometimes direct participation. Many State DOTs and FHWA Divisions have negotiated or are negotiating Section 106 PAs having to do with maintenance and small-scale construction projects.

This section of the report compares various PAs that have been or are being negotiated dealing with State-managed transportation (generally highway) programs, identifying common elements and approaches, best practices, and ways to improve acceptance and legal sufficiency. Of particular interest to NCHRP 25-25(13), we also examine how other federal agencies, such as the Corps of Engineers, can be encouraged to accept such agreements as the bases for their own compliance with Section 106.

A number of the PAs analyzed here were also the subject of a study published by FHWA at <http://www.environment.fhwa.dot.gov/histpres/section1.htm>, which focused largely on how successful the PAs seemed to be to users as means of simplifying and reducing their workload. The current study is not aimed at demonstrating that PAs simplify Section 106 review; this has been well demonstrated. This review seeks to abstract a set of best practices that can facilitate the development of future PAs, avoid problems with acceptance and legal sufficiency, and facilitate use by other agencies.

Twelve (12) Section 106 PAs were examined and compared with one another and with the standards set forth in the Section 106 regulations. These included PAs prepared by State DOTs and consulting parties in California, Iowa, Kentucky, Maine, Maryland, Minnesota, New Hampshire, New Jersey, North Carolina, Ohio, Vermont, and Washington. Commonalities and differences were noted, giving special attention to consistency with the regulatory requirements, for maximal understanding and re-use by other federal agencies; likely effectiveness as streamlining mechanisms; possible impediments to acceptance by other agencies; and possible alternative approaches.

3.5.2 What Are the Programmatic Agreements Designed to Do?

Most of the PAs reviewed are designed to do two things:

- Delegate most Section 106 compliance responsibilities from FHWA to the State DOT
- Exempt some classes of action from review

Three of the PAs, however, focus on delegation and do not address exemptions.

Other issues addressed in some of the agreements include:

- Compliance with the Native American Graves Protection and Repatriation Act
- Curation of archaeological artifacts
- Delineating areas of potential effect
- Emergency operations
- Exempting certain property types from evaluation
- Innovative programs
- Keeping information confidential
- Management of historic bridges
- Phased compliance

- Philosophical commitment to physically avoiding archaeological sites
- Philosophical commitment to early planning
- Professional personnel standards
- Standard mitigation measures
- Standard treatment of archaeological sites
- Training
- Treatment of human remains
- Tribal consultation
- Unanticipated discoveries of historic properties
- Use of environmentally sensitive areas as a planning tool, and
- Use of the PA by other agencies

Clearly, however, the primary reasons for seeking to develop the PAs are to streamline review by 1) eliminating redundant review by both state and FHWA historic preservation experts and in most cases by 2) removing some project types from the review process altogether. The following subsections focus on these objectives and how to encourage other agencies to use the procedures the PAs prescribe when considering or reviewing State DOT projects.

Increased State Assumption of Responsibility for Reviews

The most common way the PAs reviewed provide for increased state assumption of responsibility for reviews, which has often been referred to as “delegation,” is to first provide an introductory (“Whereas”) clause explaining that the State DOT has qualified historic preservation personnel and systems for conducting review, and then to include two stipulations, the first requiring FHWA to ensure that the State DOT carries out the various “Agency Official” (i.e., federal agency) responsibilities specified in the Section 106 regulations, and the second committing the State DOT to carrying out these responsibilities. Other PAs seek to accomplish the same purpose by stipulating that the State DOT will act as FHWA’s agent in carrying out the requirements of the regulations. Others outline the various steps in the Section 106 process and specify that the State DOT will carry out each one, without saying explicitly that the DOT will do so as FHWA’s agent, sometimes going into some detail about how each responsibility will be exercised. Some employ two or even three of the above strategies.

In all cases, the PAs provide for the State DOT to act for FHWA in carrying out Section 106 review through initiation of the process, identification of historic properties, evaluation of such properties, and effect determination. All PAs that address the matter directly provide for FHWA to re-enter the process in the event an adverse effect is determined, in which case FHWA then carries the review process on to completion. Some provide for FHWA to assume this role only where standard mitigation measures agreed on by the parties cannot be employed. Some PAs provide for FHWA to serve in a dispute resolution role at other points in the process, and to interface with federal entities like the Keeper of the National Register of Historic Places. All that address tribal consultations reserve such consultation to FHWA, reflecting the government-

to-government relationship between the U.S. government and sovereign Indian tribal governments, though some specify ways the State DOT will participate in or facilitate such consultation.

Exempted Actions

Most of the PAs reviewed seek to exempt projects from review based on the statement that they have no “potential to cause effects on historic properties.” Some PAs (including some that also seek to exempt “no potential to cause effects” actions) exempt actions with “little” or “limited” such potential. Still others do not provide an explicit rationale for exemptions. Some specify that listed actions are exempted from Section 106 review altogether, while others say only that such actions are exempted from review by or coordination with the State Historic Preservation Officer (SHPO).

One PA (California’s) creates the category of “screened” actions, which are subjected to limited in-house review in lieu of the standard Section 106 review process, very much as categorically excluded actions are screened under NEPA (see discussion in previous section). Another (New Hampshire’s) uses a “checklist” to perform similar screening on certain kinds of projects, though it uses different terminology. Others appear to do essentially the same thing, but are not as explicit and detailed as California and New Hampshire are about how it is done.

Where a specific rationale for exemption is stated, it is to eliminate from standard Section 106 review small-scale, mostly routine projects with minimal potential for effect, including most maintenance work and a variable range of small-scale construction projects. The means selected to achieve this objective range widely, with some approaches likely to withstand greater scrutiny and encounter greater acceptability than others.

3.5.3 Analysis

Increased State Assumption of Responsibilities – “Delegation”

The heart of any delegation document is an assignment of responsibilities – specifying which functions will be carried out by the recipient of delegation and which are reserved by the delegating entity. If the delegation is to work smoothly, the delegation document must be clear about who is responsible for carrying out each function either delegated or not delegated, and how they are to be carried out. From this central requirement, several more specific requirements flow. The delegation document should:

- Specify precisely which responsibilities are delegated and which are retained. In this case, establish clearly which responsibilities, as set forth in the Section 106 regulations, will be carried out by the State DOT, and which ones will continue to be discharged by FHWA.
- Ensure that no responsibility fails to be assigned to one party or the other (or, perhaps, to some third party). In other words, nothing that FHWA is responsible for doing under the Section 106 regulations should be allowed to “fall through the cracks” between FHWA and the State DOT.

- Be unambiguous about any changes the parties are making in way each responsibility is discharged. For example, if the parties feel that the review of certain actions requires no planning for public involvement (a regulatory requirement under 36 CFR 800.3(e)), the agreement should very clearly document agreement that public involvement can be waived. In case of challenge, and simply to provide a complete administrative record, the rationale for any such change should also be explained, either in the PA itself or in supporting documents.

Some of the PAs reviewed for this report handled delegation elegantly by saying, in effect, that “FHWA will ensure that the State DOT carries out the responsibilities of the federal agency official set forth at 36 CFR 800.3(a), 3(b),...” and so on. The authors of most PAs seemed to feel that this was not enough – probably because they were not sure everyone implementing the agreements would be familiar with the regulatory citations – so the agreements go on to give more detail about each responsibility. This typically results in language that paraphrases the regulations.

While providing certain advantages, such paraphrasing does create opportunities for uncertainty and confusion to creep in. For example, 36 CFR 800.3(a) says that the Agency Official will, among other things, determine whether each undertaking (i.e., each project) is “a type of activity that has the potential to cause effects on historic properties.” If a PA assigns this responsibility to the State DOT, and then goes on to say that the State DOT will determine “whether the action has the potential to cause effects on historic properties,” it is possible to interpret the State DOT’s responsibility in either of at least two ways. Either the DOT is to determine whether a given project is an example of a *type* of activity that has the potential to affect historic properties, or it is to determine whether *this particular action* has such potential. The first interpretation embraces a broad range of actions and requires no information about a specific action other than its basic nature. The second interpretation is much narrower, and requires a good deal of information about the specific action. Will this specific action take place in an area where something of historic significance might be buried? It may be difficult if not impossible to decide which interpretation is correct, and this can lead to lengthy, costly disputes.

One PA solves this problem neatly by providing precise regulatory citations with brief descriptive tags; for example: “The State DOT will carry out the responsibilities of the federal agency official to *determine the scope of identification* under 36 CFR 800.4(a).” Such a point-by-point recitation may both minimize confusion and help guard against letting a responsibility “fall through the cracks,” because the authors of the PA identify each regulatory requirement and specify who will implement it.

Exempted Actions

Only two of the PAs explicitly use the lists of NEPA categorical exclusions at 23 CFR 771.117(c) and 117(d) as their starting points, although there is substantial overlap between those lists and the listed exemptions in the other PAs. Separate but overlapping lists may be a source of confusion, especially to new personnel. Such confusion might be proactively avoided by making the NEPA and Section 106 lists relate clearly to one another if possible.

As noted above, the rationale most commonly used in the PAs for exempting project types from Section 106 review is that they have “no potential to cause effects on historic properties.” This language is derived from the Section 106 regulations, which specify at 36 CFR 800.3(a) that the “Agency Official” is to determine whether a given undertaking is the type of action that has such potential. If the type of action does not have such potential, then under 36 CFR 800.3(a)(1), the Agency Official “has no further obligations under Section 106.” Since FHWA is the “Agency Official” in the case of the actions covered by FHWA-DOT-SHPO Section 106 PAs, to the extent the PAs exempt only “no potential for effect” projects, PAs are not needed for such; FHWA has the authority to exempt this kind of action unilaterally, without anyone else’s agreement. However, State DOTs assumption of this responsibility has created more rationale for PAs.

In the PAs reviewed, the lack of potential to affect historic properties is by far the most widely used justification for exemption. In a number of cases, having asserted that the PA is designed to exempt projects that have no potential for effect, the agreement goes on to list project types that many SHPO staff and specialists would commonly understand to have such potential, although such potential could be quite small. For example, installation and upgrade of signage is commonly listed as an exempt activity, but installing a sign can have visual effects on historic buildings, streetscapes, neighborhoods and landscapes. Taking such possibility into account, some of the PAs construct an exception to the exemption, saying that installation of signage is exempt *except* when it takes place in a historic district. This may create a conundrum, however, since historic properties are identified as a part of Section 106 review, and the PA exempts signage from precisely that review, those involved in a signage project may not have a way of knowing whether a historic district is present, and therefore whether the exception to the exemption applies. In striving to avoid such situations, DOTs could conceivably fall back to a more narrow range of exemptions, but this runs counter to the trend of trying to accomplish more with PAs in general. Another possible approach is to abandon “no potential for effect” as the criterion for exemption. While it may be unattractive to some historic preservation professionals because it amounts to acknowledging and accepting a degree of possible unmitigated adverse effects to historic properties, this option allows the authors of a PA greatly expanded latitude in carving out exemptions. The approach may increase the need to provide for public involvement in PA development and implementation though.

Several of the PAs leaned toward uncoupling exemption from “no potential for effect,” without explicitly doing so. Greater explicitness in this area could provide some advantages to DOTs and FHWA; there is nothing in law or regulation to keep an agency from concluding, in consultation with historic preservation authorities, that a given class of action, while it has *some* potential for effect on historic properties, has little enough such potential to justify a reduction in the complexity of historic preservation review. This approach may also maximize transparency and help the PA function as a public communication document as well.

Availability to the public is an issue that may well arise as these PAs are implemented in the future. At 36 CFR 800.14(b)(2)(ii), the Section 106 regulations require an agency developing a PA to “arrange for public participation appropriate to the subject matter and scope of the program” that is the PA’s subject, and to “its likely effects on historic properties.” This is to be done in accordance with subpart A of the regulations, where 36 CFR 800.1(d) requires that public views be sought and considered “in a manner that reflects the nature and complexity of

the undertaking and its effects on historic properties,” and that the public be provided with information on undertakings and effects. While the PA creation process may have included such public consultation, few PA documents record that the interested public was notified of or involved in their development. While few excluded project types may have residual potential for effect, in cases where ambiguity exists about just what kinds of projects are excluded or have an effect, problems could arise and concerned members of the public could have a strengthened case in challenging FHWA’s or a State DOT’s actions. In the signage example given above, for example, a property owner or local group in an older neighborhood that is not listed in the National Register or otherwise registered as a historic district being concerned about the visual impacts of new or improved signage, and challenging the exclusion of its installation under a PA. If this happened late in the project planning and implementation process – as it well might, since the property owner’s opportunities to raise the question beforehand would be limited by the project’s exclusion from Section 106 review – the property owner or group might resort to costly and time-consuming litigation. FHWA requires public involvement in NEPA review (23 CFR 771.111), but if a historic preservation issue were raised during NEPA review about a project type excluded from Section 106 review, this could lead to confusion.

Use by Other Agencies

Only some of the PAs reviewed directly address application of their terms to other agencies involved in environmental and historic preservation review, such as the Corps of Engineers. In a few cases, other agencies have been invited to sign the PA, and the PA’s terms very explicitly apply to all who sign. In others, there are provisions for other agencies to use the processes set forth in the PA at their discretion, sometimes simply by writing a letter to the SHPO and State DOT specifying that they intend to do so. Having other agencies sign a Section 106 PA is desirable as a means of reducing redundant reviews and generally simplifying the review process, though such involvement may slow down the process of developing the initial agreement, given legal review at multiple agencies. VTrans handled this issue by keeping the Corps apprised of drafting progress and holding open the potential for later sign-on.

Advantages of an ongoing cooperative approach include the lack of provisions for FHWA or any other federal agency to *require* another agency to tailor its own Section 106 review to the way the FHWA and the State DOT, for example, have agreed to do business. Without the signatures of other agencies on a PA, FHWA and DOTs may and often do establish simple ways for other agencies to interact with implementation of the PA by the signatories (FHWA, DOT, and SHPO). In some PAs, this takes the form of a “write a letter” stipulation, but whether any given agency can use such an approach depends on that agency’s own procedures for NEPA and Section 106 compliance, and for implementing its own regulatory responsibilities. In the case of the Corps of Engineers, for example, a Letter or Permission (LOP) issued under the authority of 33 CFR 325.2.e.1 might be the kind of instrument envisioned by the authors of PAs that allow other agencies to sign on by letter. Consultation with the District or other offices in each state can help ensure that whatever language is necessary is included, in the case of the Corps, to facilitate the issuance of LOPs.

Variability Among PAs

The PAs reviewed varied considerably, despite addressing more or less the same subjects; this may be expected, since no two State DOTs are identical in their histories, organizations, relations with SHPOs and other historic preservation authorities, project types, or historic properties. A “cookie-cutter” approach to PAs may not be desirable; however, base models can help DOTs develop approaches to the core purposes of delegation and exemption. Copies of the reviewed PAs are included in a related, attached document. Development of a generic model PA would be a logical next step in the research undertaken for this project.

4. Reducing Interagency Coordination Issues

This section provides a brief review of potential solutions for addressing the CE and Section 106 coordination issues identified in Section 4.0 of the report.

4.1 Recommendations for Improving CE Process Coordination

A selection of strategies for avoiding conflicts among agencies over class of action determinations for projects is described below.

4.1.1 Explicitly Define Types of Actions, Levels of Review, and Scenarios for Higher Levels of Consultation

The Texas FHWA Division and TxDOT’s 1990 Programmatic Agreement CE left certain areas open to interpretation, such as whether a project with an individual permit under Section 404 could still be processed as a CE under NEPA. To clarify the agreement, a cover letter was expanded to provide guidance in applying the agreement. The parties researched the levels of CEs used by other states and defined situations that could be encountered as clearly and narrowly as possible. The agencies discussed possible scenarios that would trigger a higher level of consultation, and spelled those out in a 1994 revision to the agreement and to an even further extent in the October 2004 revision of the agreement. TxDOT and FHWA are now comfortable that the new agreement will help avoid unnecessary levels of documentation in cases where confusion had arisen among the agencies in the past.

This issue was also addressed in the September 2003 NEPA Task Force Report To The Council On Environmental Quality: Modernizing NEPA Implementation:

agencies interviewed indicated some confusion about the level of analysis and documentation required to use an approved categorical exclusion, although CEQ consistently has stated that categorical exclusions should have minimal, if any, documentation developed at the time of the specific action application. Additionally, CEQ strongly discourages procedures that require additional paperwork to document that an activity has been categorically excluded. In their interview with the task force, CEQ stated that only documentation used to establish the categorical exclusion is required. However, some courts have found the need for some documentation at the time a specific categorical exclusion is used that explains that the proposed action fits the category relied upon in the agency’s NEPA procedures and that there are no

extraordinary circumstances in which such a normally excluded action may have a significant environmental effect. Many agencies interviewed stated that their own internal procedures require documentation of project-specific categorical exclusions partly due to concern about potential litigation. (Task Force Report Section 5.1)

Greater interagency awareness of these procedures and litigation concerns can help the parties involved identify and avoid problems before issues come to a head.

4.1.2 Work with Other Federal Agencies to Use FHWA's CEs as a Benchmark to Establish Their Own Categorical Exclusion

In the September 2003 *NEPA Task Force Report To The Council On Environmental Quality: Modernizing NEPA Implementation* some agencies also expressed an interest in using other agencies' existing categorical exclusions. The Task Force responded in section 5.1 that "CEQ categorical exclusion approvals are predicated on the agency's mission, assumptions, and past experiences; the agency must make its own determination that a particular category of actions does not have significant impacts. However, one agency might use another's experiences and documentation as a benchmark to establish their own categorical exclusion." In section 5.2.3 of the same report, the task force goes on to say that "[th]is benchmarking serves as a basis to establish their administrative record to support their no significant effects determination."

4.1.3 Consider Re-Presenting NEPA Documentation to Fit Needs of Non-Lead Agency

Though all federal agencies share CEQ guidance, each agency is guided by its own NEPA implementing regulations and ways of doing business. In the course of the research team's interviews, instances were uncovered with the Corps, BLM, and the U.S. Forest Service where those agencies felt an EA rather than a CE was required to meet their internal standards for NEPA compliance. In most of these cases, through the course of the DOT and FHWA discussions with the resource agency, the parties identified that a documented CE for FHWA and the DOT approximately equaled an EA in level of detail, allowing the documented CE information as an EA to assist the non-lead agency in meeting its requirements and standards.

4.1.4 Resolve Issue through National Level Memo or Agreement

Past instances were identified where the USCG required an EA or EIS for certain bridge replacement projects. This difficulty was addressed and resolved at the National level with the 12/17/2001 FHWA memo titled "USCG/FHWA Streamlining Procedures for Projects That Require a U.S. Coast Guard Permit. The USCG maintains only two such national level MOUs, one with the Corps and one with FHWA, and staff are guided by that memo for 144(h) exemptions on navigability concerns. USCG has also issued guidance, as part of the agency's Environmental Procedure Manual (Chapter 3) addressing how and the extent to which USCG may assume other agencies environmental documents. This manual obliges USCG staff to create their own CE and FONSI, though the document can still be prepared by the DOT/FHWA for USCG signature.

Chapter 3 specifies that "in bridge actions where a federal agency other than the USCG assumes the responsibility of lead agency, the case file must contain a document signed by an official of

the lead agency, stating both that the proposed action is categorically excluded from NEPA and the basis for that determination. *When the FHWA is the lead agency, Section IV, paragraph B.5. of the USCG/FHWA MOU requires FHWA give the Coast Guard information documenting its categorical exclusion finding.*” This documentation could potentially be a CE PA, but this provision appears to be able to be and to have been interpreted differently by different USCG personnel.

USCG’s Environmental Manual also specifies that “although categorically excluded actions do not require formal NEPA documentation, other than a CE Determination, they must still be investigated to ensure that impacts under other environmental laws do not elevate the action to an EA or EIS level. The results of this investigation must be documented in the Findings of Fact (FOF) accompanying all USCG case files, including those where the FHWA or any other agency is the lead agency.”

4.1.5 Reissue NEPA Procedures and Expand the 117(c) List

In response to the 1989 memorandum, many State DOTs have proposed, and FHWA Divisions have accepted, adjustments to and expansions on the core lists of CEs, drawing on the CE definition in 23 CFR 771.117(a) as “actions which meet the definition contained in 40 CFR 1508.4, *and, based on past experience with similar actions, do not involve significant environmental impacts.*” [emphasis added] (52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988). Though FHWA did try to update its 117(c) list in 2000 and the proposed rulemaking was not carried through to a final rulemaking, the CE PA updates of the last few years may provide the basis for new understandings and levels of agreement on just how the (c) and (d) list could be changed on a national basis. Re-promulgation would provide the opportunity for public comment and formal change and clarification regarding what all federal agencies could expect DOTs and FHWA to regard as a CE. In turn, this would provide other federal agencies that deal with FHWA to look at how their own regulations and guidance accord with this, and how any differences of opinion could be proactively addressed and avoided.

4.1.6 Develop a State-Level Memorandum of Understanding with Other Federal Agencies with Regard to Operating Procedures for Processing Federal-Aid Highway Rights of Way

In some cases, FHWA has worked with other federal agencies to refine their understandings regarding lead agencies and cooperating agencies, and how to keep the necessary information flowing between the two agencies. In one case, the agencies came to agreement on a single NEPA determination with the land management agency acting as a cooperating agency, but with the DOT funding liaison positions to help ensure consultation and the appropriate planning feedback between the two agencies. In another case, an MOU outlines formal operating procedures for processing federal aid rights of way and coordination with the land management agency, detailing how the DOT-FHWA environmental process fits with that of the land management agency. While this approach has been successful and seems to have much to recommend it, one State DOT did report an example of such an agreement with BLM continuing to work well with most offices in their state, but that one office has chosen an entirely different

approach in the last year and has required a number of EAs for minor actions, aside from the existence of the MOU.

According to the Department of the Interior Manual Section 2.3 A.(3) “Any action that is normally categorically excluded must be subjected to sufficient environmental review to determine whether it meets any of the unusual circumstances, in which case, further analysis and environmental documents must be prepared for the action. (However) *Bureaus are reminded and encouraged to work within existing administrative frameworks, including any existing programmatic agreements, when deciding how to apply Appendix 2 extraordinary circumstances.*” (Emphasis added. BLM’s Appendix 2 list is included in Appendix E of this document).

4.1.7 Consulting CEQ and Reconsidering the Appropriateness of a Categorical Exclusion

CEQ is available to provide assistance when consensus cannot be achieved among the agencies. When consulted as part of this research study, CEQ indicated that sometimes a short, focused, and concise EA is in order for the agency without a categorical exclusion. In other instances, the agencies may want to look at the evidence and see if continuing to require an EA is really justified when the environmental effects are not significant. Further, CEQ indicated that when agencies review the categorical exclusions they established many years ago they may find that missions, expected impacts, or even the environment have changed; consequently, in some cases, it may no longer be appropriate to categorically exclude types of actions that have been categorically excluded in the past.

4.1.8 Personal Touch

In addition to the approaches described for CE and 106 PAs, and more broadly applicable, some DOTs have described using a highly personal approach, with frequent personal contact and phone calls. As one DOT Environmental Director described, no letter goes out of his office to another agency to which agreement by the other agency has not already been secured. One DOT found that they could overcome the difficulties they were encountering with the Forest Service (agreement on CEs and not requiring EAs, needed studies, consistency with FS plans) by finding the appropriate specialists in the agency and consulting with them directly, up front and throughout the process, rather than expecting the resource agency to surmount their own internal walls. This way issues were identified in a timely fashion and could be addressed constructively. This office has maintained a policy of personal visits to agency offices for many years.

4.2 Recommendations for Improving Section 106 Process Coordination

The key to avoiding Section 106 interagency coordination issues with participating federal agencies is to ensure participating agencies have confidence that the Section 106 compliance process is conducted adequately. Clarity, accountability, awareness, and teamwork are the building blocks for creating confidence among participating agencies and avoiding acceptance conflicts.

4.2.1 Enhance Programmatic Agreement Clarity

PAs and the systems they create should be clear to all participating agencies. Simple steps for enhancing clarity include:

- **Ensure Language in Programmatic Agreements is Clear and Concise.** Easily understood agreements will help avoid unnecessary conflicts with other federal agency, enhancing transparency and acceptance.
- **Provide Adequate Direction and Support for Users.** Training and guidance for users of Section 106 programmatic agreements is important. Problems may occur for example, if a checklist is used that simply asks “Will the project impact a property listed in or eligible for the National Register of Historic Places,” if a user may be unaware of what “property,” “listed,” “eligible,” or “National Register” mean.
- **Develop Base Model for Use by DOTs.** Based on existing PAs and the analysis above, a logical follow on to this project might be development of model PA language on the national level, in consultation with the Advisory Council on Historic Preservation, providing opportunities for interested parties and federal agencies to participate, and address concerns the Council may have about PA content, structure, and implementation. Interested parties outside the federal/state establishment should also be given the opportunity to participate, and general public involvement should be provided for.

4.2.2 Ensure Lead Agency Acceptability and Accountability

Programmatic agreements that transfer decision-making and consultation responsibilities may make participating agencies wary about what might happen if issues or concerns arise. If participating agencies perceive they have paths for recourse in addressing any problems, they are less likely to raise issues with programmatic agreements. Simple actions include:

- **Negotiate with Key Participating Agencies to Designate a Lead Federal Agency.** 36 CFR §800 specifically allows designation of a “lead” federal agency to act on behalf of other participating agencies in complying with Section 106 requirements and avoid duplication of effort. A letter of designation can be used to designate the lead agency status and clarify the procedures that the lead agency will implement to fulfill other agency responsibilities as well as its own. If a lead federal agency is not designated, however, each agency remains individually responsible for its own compliance.⁵ In developing Section 106 PAs, State DOTs and FHWA Division offices could involve such key agencies as the Corps of Engineers and USCG, and seek to establish terms under which the State DOT, acting for FHWA, could serve as lead agency for Section 106 review on behalf of all the negotiating agencies. Vermont, Texas, Maine, and North Carolina provide different examples of levels of participating agency involvement. Vermont did not begin with the Corps as a signatory, but kept them informed throughout

⁵ 800.2(a)(2)

the process and held open the possibility of adding the Corps, if needed. Both North Carolina and Texas provided for Corps review of the developing PA and provided opportunities for the Corps to sign on.

- **Provide for Objections by Consulting Parties.** Parties to a Section 106 programmatic agreement may more readily agree to a streamlined process if an objection from any consulting party requires the normal Section 106 process to be followed, including full participation by the SHPO. Such a provision was incorporated into VTrans’s 106 agreement, assisting the avoidance of further interagency conflicts: “If, for any undertaking, formal written comment or formal written objection, so titled, is made within 30 days by FHWA, VTrans, SHPO, the Council, or any consulting party, to any findings made by either the Archaeology Officer or Historic Preservation Officer... the Archaeology Officer or Historic Preservation Officer shall consult, as appropriate, with SHPO, ACHP, FHWA, or VTrans. If, after consultation, agreement on federal undertakings cannot be reached regarding any such findings, any party may request the project be reviewed pursuant to the procedures identified in 36 CFR Part 800 et seq.”
- **Provide for Public Involvement.** While most of the action types covered by Section 106 PAs are probably of little or no interest to the public, the failure to provide for public involvement could lead to problems in those rare circumstances where people are interested in an action’s effects on historic properties. It may be helpful to develop more or less standardized ways to make sure that public interests are identified when screening actions addressed in a PA, including actions excluded from extensive review. Such methods might include ways for the interested public to trigger more detailed review of actions about which there are concerns.
- **Review and Update Section 106 Programmatic Agreements.** Review and update of programmatic agreements could involve other federal, state, and tribal agencies. VTrans’ programmatic agreement provides that evaluations of the programmatic and supporting manual shall take place annually, by March 1. VTrans prepares a detailed annual report to support this process, which is reviewed to the Vermont Advisory Council on Historic Preservation, the SHPO, and FHWA, and other interest groups.

4.2.3 Promote Awareness Among Participating Agencies about Section 106 Processes

Mechanisms should be in place that allow participating agencies to be kept adequately informed about Section 106 processes, particularly for projects where they have a substantial independent federal action, “but for” the transportation improvement could not move forward. Simple supporting steps may include:

- **Provide for review of documentation,** when requested by or as a matter of course for non-lead federal agencies, to give them coverage that Section 106 compliance is being carried out according to the regulations and according to the FHWA-approved programmatic agreement. In Vermont, prior to an annual evaluation, VTrans submits a report to FHWA and SHPO. This report includes summaries in table form identifying all undertakings and specifying project names, towns, and all findings.
- **Maintain a cultural resources information system.** Minnesota DOT provides the Corps St. Paul District with weekly updates of entries into the Cultural Resources

Information System (CRIS). The Corps is then responsible for viewing the system and updates thereto, and providing comments.

4.2.4 Extend and Enhance Stewardship in Innovative Ways

State DOTs and FHWA can help encourage coordination with participating agencies in the Section 106 process by extending and enhancing their environmental stewardship in innovative ways, including

- **Adopting innovative partnerships and initiatives.** To encourage cooperation and foster confidence among participating agencies, FHWA and DOTs can commit to developing more progressive or innovative programs. For example, they might agree to analyze, synthesize, and share past data; develop GIS-based models for predicting impacts; establish preservation priorities and management plans; sponsor special education and outreach programs; conduct statewide thematic, corridor, or other surveys of historic properties; encourage creative mitigation when and where appropriate; or develop policies to enhance permanent resource protection.
- **Improving SHPO and DOT Historic Resources Databases.** The majority of the DOT and SHPO staffs rarely use their cultural resource inventories or historic contexts to evaluate cultural resources. Rather, they rely on their own personal experiences and knowledge, and those of their cultural resource consultants. Few SHPOs and DOTs have entered their resource inventories in a database, and where databases do exist, most describe and locate resources regardless of whether they are listed in or eligible for listing in the National Register, making them of limited value for assessing significance in relation to the NHPA. Identifying exact needs and uses for the database is an important first step in such joint efforts. For example:
 - Ohio DOT (ODOT) formed a partnership with the Ohio Historical Society/State Historic Preservation Office (OHS/OSHPO) to develop a GIS system to document over 120,000 Ohio Historic Inventory (OHI) and Ohio Archaeological Inventory (OAI) features, such as individual properties and historic districts listed on the National Register of Historic Places in Ohio. The application enables staff to electronically plot archaeological and historic site locations and make early evaluations on the likelihood of potential impacts in a transportation project area. Through joint development of the GIS, the OSHPO obtained the resources they needed to thoroughly systematize knowledge of cultural resources the state and ODOT gained access to an extensive clearinghouse of cultural resource data to inform alignment choice, other planning, and the NEPA process in general. Related documentation may be found at the following web address: <http://www.dot.state.oh.us/techservsite/default.htm>
 - Rhode Island DOT (RIDOT), FHWA, and the Rhode Island Historical Preservation and Heritage Commission are working together to improve data storage and retrieval for cultural resource information. In 2004, RIDOT purchased computer workstations, server, scanner, and printer for the Historical Preservation and Heritage Commission, to help them utilize a GIS database for cultural and archaeological data and to make NEPA procedures more efficient. RIDOT and the Rhode Island Historical Preservation and Heritage Commission are in the process of developing and

implementing the Historic Records and Information Turnkey Geographic Information System (HRITGS), which will serve as the streamlining computer application.

5. Conclusions

5.1 Federal Agency Acceptance Conflicts Not Significant for DOT Programmatic Agreements

Programmatic agreements created by FHWA and State DOTs are not subject to significant acceptance conflicts among third party, or “participating” federal agencies, according to senior FHWA Division environmental staff. Over 90 percent of FHWA Division Offices and over 90 percent of State DOTs could not recall or identify instances where the Corps, the FWS, EPA, BLM, Forest Service, USCG or another participating agency would not recognize or otherwise accept an established programmatic agreement, though approximately 15 percent did identify a number of related issues, some where PAs were involved and some not. In general, acceptance issues that have occurred were either described as minor or resolved, and were usually connected to new personnel unfamiliar with the process.

5.2 Interagency Coordination Can Affect Environmental Reviews

The research conducted for this project suggests that states do sometimes experience broader interagency coordination issues that may cause project delays during compliance with environmental requirements such as Section 106 or CE documentation. Individual agencies often develop ad-hoc practices that help reduce or minimize these problems. A number of ways to maintain positive interagency relations and maximize the acceptability of programmatic agreements are identified throughout this report.

5.3 Programmatic Agreements on Categorical Exclusions Have Evolved

FHWA’s regulations at 23 CFR 771.117(c) and (d) provided initial lists of CEs, which were elaborated upon by FHWA’s 1989 memorandum encouraging the development of CE PAs. 23 CFR 771.117(a) defined CEs as “actions which meet the definition contained in 40 CFR 1508.4, *and, based on past experience with similar actions, do not involve significant environmental impacts.*” [emphasis added] (52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988). Over time, as experience increased, DOT-FHWA CE PAs have evolved. In the course of making adjustments and expansions, Divisions and DOTs have often defined their respective roles and responsibilities in ongoing coordination, and often outlined procedures for the conduct of section 117(b) reviews. The diversity of approaches and experience in each state, reflected in the evolution of CE PAs, together with the individual NEPA implementation guidance of each federal agency can provide a basis for misunderstandings and confusion. Despite this, the process appears to function smoothly between the agencies in the vast majority of cases and conflicts over class of action determination are rare.

5.4 Section 106 Programmatic Agreements as a Base Model

Section 106 PAs typically have a limited number of purposes – to delegate certain responsibilities to State DOTs and to exclude certain action types from detailed review. A variety of approaches have been adopted to achieve these purposes given FHWA and DOTs’ interest in extending the use, utility, and acceptance of such agreements, development of a base model, akin to FHWA’s 1989 guidance for CE PAs, may be appropriate to maximize the development, use, and acceptance of future agreements by all parties.

Appendix A FHWA Division Office Survey

Improving the Effectiveness of Programmatic Agreements FHWA Division Staff Survey

Background

Venner Consulting and TransTech Management are surveying FHWA Division Office environmental personnel as part of NCHRP project 25-25(13), a fast turnaround project sponsored by AASHTO's Standing Committee on Environment, to identify and understand instances where programmatic agreements are accepted by one agency but not by another, resulting in delay or other problems. As a hypothetical example of situations the project is intended to address, the Forest Service may not accept an FHWA-State DOT agreement on programmatic handling of part (c) Cat Ex projects, requiring projects to be forwarded to FHWA that would otherwise be handled by the State DOT.

Please take a moment to read the following questions. If you wish, you may respond to the survey via email to either jcrossett@transtechmanagement.com or marie.venner@vennerconsulting.com. If we have not heard from you, we will call you in the next two weeks to conduct the survey by phone. Please feel free to call Joe Crossett at 202-628-0440 or Marie Venner at 303-798-5333 with any questions.

Understanding the Issue

State DOTs often use programmatic agreements to improve the efficiency of their environmental compliance activities for transportation projects. Programmatic agreements contain language, often in the form of a Memorandum of Agreement (MOA) signed by participating agencies that details the circumstances under which a State DOT may perform another agency's responsibilities. (For example, many DOTs have developed programmatic agreements that transfer responsibility from FHWA to the State DOT for processing NEPA Categorical Exclusion projects.) By establishing advance rules for state and federal roles and advance approval of such roles, programmatic agreements can help eliminate unnecessary layers of bureaucracy and give DOTs greater control over the time required to demonstrate compliance with environmental regulations. In return for transferring responsibilities, DOTs agree to follow certain procedures that ensure environmental requirements are not in any way compromised. If, however, a programmatic agreement is not accepted by other agencies that have oversight responsibilities, its value in streamlining environmental reviews may be curtailed.

Questions

1. How long have you had responsibility within your Division for environmental coordination?
2. Please identify any programmatic agreements that the DOT in your state has established to improve the environmental compliance process and briefly describe their function, applicability, signatory agencies, and any other pertinent details.
3. For the programmatic agreements described above, are you aware of any instances where another federal agency with jurisdiction (e.g. permitting responsibilities) over projects covered by the programmatic has refused to accept some or all conditions agreed to in the programmatic (e.g. refusal to accept certain types of projects eligible for CE, Section 106, ESA section 7 or other programmatic agreements)? If so, please explain the problem encountered and the agency's rationale for non-acceptance, as you understand it.
4. If problems have occurred, in each instance, would you say that the lack of acceptance was significant, in terms of time and cost impacts, and was it easily resolved? Please describe how the problem was resolved and the impacts to FHWA, the DOT, or agency relationships.
5. If problems with acceptance of programmatic agreements have not occurred in your state, please describe any steps or measures your Division or State DOT has taken to successfully implement the agreement and avoid such acceptance conflicts?

Appendix B FHWA Division Office Responses

In some cases, FHWA Division Office input was supplemented with State DOT environmental office input to achieve a higher response rate and a more complete picture.

Division	Contact Name	Acceptance Conflicts (Y/N)
Alabama	Dennis Tates	No
Alaska	Bill Ballard – ADOT&PF	No, but the Corps has taken FHWA’s CE checklist and put a cover on it and made it an EA on occasion. DOT-FHWA also uses prior Corps EAs in some local areas.
Arkansas	Randall Looney	No
Arizona	Rick Duarte-AZDOT	No
California	Stephanie Stoemer	No
Colorado	Monica Pavlik	No, but previous FHWA staff reported class of action determination issue with FS on one project.
Connecticut	Amy Jackson-Grove	No
Delaware	Robert Kleinburd	No
D.C.	Mike Hicks	No
Florida	George Hadley	No
Georgia	David Grachen	No
Hawaii	Jodi Chew	No
Iowa	Mike LaPietra	No
Idaho	Brent Inghram Tim Cramer, Dennis Clark Idaho Dept.of Trans. (IDT)	No; however, DOT indicated class of action determination problems with USFS (with no FHWA-DOT CE PA in this case) and BLM, in the latter case requiring substantially more work, analysis, and delay.
Indiana	Robert Dirks	No, but USCG permits usually require an EA
Illinois	“JD” Stevenson	No
Kansas	Kurt Dunn	No
Kentucky	Anthony Goodman	No, but FHWA & state rescinded SHPO agreement
Louisiana	Robert Mahoney	No, but noted disagreement over CE class of action designation once with FS over a project type not specifically listed
Maine	Mark Hasselmann	No
Maryland	Dan Johnson	No
Massachusetts	Rick Marquis	No
Michigan	Abdelmoez Abdalla	No
Minnesota	Cheryl Martin	No
Mississippi	Cecil Vick	No, FS federal land transfer issues in distant past, smoothly operating now
Missouri	Peggy Casey	No
Montana	Carl James	No
Nebraska	EdwardKosola	No
Nevada	Ted Bendure Daryl James, NDOT	No, but DOT reports one BLM District Office now requires EAs in situations where existing MOA with BLM would not
New Hampshire	Bill O’Donnell	No
New Jersey	Jeanette Mar	No

Division	Contact Name	Acceptance Conflicts (Y/N)
New Mexico	Greg Heitmann	No
New York	Chris Woods	No
North Carolina	Rob Ayers	No
North Dakota	Mark Schrader	No
Ohio	Dave Snyder	X, minimal impact issue with USCG and need for project level signature. Larger 106 issue with Corps, which ODOT determined to be resolved and due to new staff.
Oklahoma	Elizabeth Romero	No
Oregon	Elton Chang	No
Pennsylvania	Karyn Vandervoort	No, but CE class of action differences with Corps led long discussion and ultimate reissue with mere "change of cover." SHPO differences in processing local Section 106 projects
Rhode Island	Michael Butler	No
South Carolina	Wayne Hall - SCDOT	X, CE class of action differences (FS), 106 agreement acceptance (Corps)
South Dakota	Ginger Massie	No
Tennessee	Leigh Ann Tribble	No
Texas	Tom Bruechert, FHWA Barbara Maley, FHWA Dianna Noble, TxDOT Duncan Stewart, TxDOT Nancy Kenmotsu, TxDOT	No, but DOT reports past issues with USCG need for conformity determination from FHWA when programmatically delegated to DOT for CZM purposes, Corps refusal to/delay in signing on to 106 PA, DOT-FHWA determined CE projects accepted by Corps as CEs, per PA still may require project-specific letter from FHWA to Corps.
Utah	Greg Punske	No
Vermont	Ken Sikora	No
Virginia	Kenneth Myers	No
Washington	Sharon Love	No
West Virginia	Joe Werning	No
Wisconsin	Jackie Lawton	No. No overarching Section 106 Programmatic, but problems with Corps delay/refusal to sign project-specific memorandum of agreement (MOA) with Section 106
Wyoming	Rodney Vaughn	No
		Average: Over 9 (nearly 10) years of experience

Appendix C Overview of NEPA CE & Section 106 Compliance Processes, and Potential Process Merger

This section provides a brief overview of the basic compliance processes required under federal law for designation of categorical exclusion projects under NEPA and completion of Section 106 requirements under the NHPA. Programmatic agreements can help expedite these processes.

NEPA CE Compliance

Under NEPA, any federal action requires documentation of potential environmental impacts. The Council on Environmental Quality (CEQ) regulations for implementing NEPA, however, acknowledge that some federal actions do not individually or cumulatively have a significant effect on the human environment. Such actions are called Categorical Exclusions (CEs) and they are exempted from NEPA documentation procedures.

Automatic Categorical Exclusions

Transportation-related actions that are automatically assumed not to require NEPA documentation are listed in 23 CFR 771.117(c). They are often called “automatic CEs” and they include any of the following:

- Planning and technical studies
- Utility installations along or across a transportation facility
- Bicycle and pedestrian facilities
- Highway safety initiatives
- Transfer of federal lands
- Installation of noise barriers
- Landscaping,
- 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
- Emergency repairs
- Acquisition of scenic easements
- Improvements to existing rest areas and truck weigh stations
- Ridesharing activities
- Bus and rail car rehabilitation
- Alterations to facilities or vehicles to make them accessible for elderly and handicapped persons

- Program administration, technical assistance activities, and operating assistance to transit authorities
- Purchase of vehicles that can be accommodated by existing facilities
- Track and railbed maintenance and improvements within the existing right-of-way
- Purchase and installation of operating or maintenance equipment located within a transit facility
- Promulgation of rules, regulations, and directives

Documented Categorical Exclusions

Some transportation-related actions may also qualify as CEs if they are shown to have no significant environmental impact. These actions are called “documented CEs” and they are listed in 23 CFR 771.117(d). Such actions require some NEPA documentation, but not an Environmental Assessment or a full-scale Environmental Impact Statement. Actions; they include:

- Highway modernization (resurfacing, restoration, rehabilitation, reconstruction)
- Highway safety or traffic operations improvement projects
- Bridge rehabilitation, reconstruction or replacement
- Transportation corridor fringe parking facilities
- Construction of new truck weigh stations or rest areas
- Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way
- Approvals for changes in access control
- Construction of new bus storage and maintenance facilities
- Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities
- Construction of bus transfer facilities
- Construction of rail storage and maintenance facilities
- Acquisition of land for hardship or protective purposes; advance land acquisition loans under section 3(b) of the UMT Act.

Section 106 Compliance

Under Section 106 of the NHPA, federal agencies are required to consider the effects of their actions (e.g. funding a transportation project or issuing a wetlands permit) on historic resources included in, or eligible for the National Register of Historic Places (NRHP).⁶ Section 106

⁶ Criteria for National Register of Historic Places eligibility include: 1) association with important events or patterns of events in history, prehistory, or culture, 2) association with important people in the past, 3) Possession of

regulations (36 CFR §800) issued by the Advisory Council on Historic Preservation (ACHP) require a four-step consultation process to review effects of proposed federal actions on historic resources:

1. Initiate Section 106 Process. Establish contact with the State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation Officer (THPO) and other consulting parties as appropriate, and develop a public participation plan. Regulations indicate that consultations should be appropriate to the scale of the undertaking and scope of federal involvement and that they should be conducted in a manner appropriate to agency planning processes and the nature of the undertaking.

2. Identify Historic Properties. Determine the geographic scope of the project and conduct a review to identify any historic properties within the project area and their significance. Recent amendments to 36 CFR §800 confirm that eligibility determinations may be made by the designated agency official, after consultation with the SHPO/THPO. No particular level of

distinctive characteristics of a class, school of architecture, etc., and 4) known or likely to contain data important in history or prehistory.

documentation is required to consider a property eligible. In some cases, making the assumption a property is eligible can streamline the process by enabling the consulting parties to move forward. The importance of the property may be explored as part of outreach to interested parties.

3. Assess Adverse Effects. If necessary, conduct a study to determine whether “no historic properties affected,” “no adverse effects to historic properties,” or “adverse effects to historic properties” will occur as a result of the project.

4. Resolve Adverse Effects. If necessary, develop a MOA with parties involved on ways to avoid, minimize, or mitigate adverse effects.

Section 106 regulations require that federal agencies undertaking an action must ensure an agency official with jurisdiction over an undertaking takes legal and financial responsibility for Section 106 compliance. The agency official may be a state, local, or tribal government official who has been given responsibility for compliance with Section 106 in accordance with federal law. The regulations emphasize, however, that if a Section 106 document is prepared by a non-federal official, the federal agency remains legally responsible for all required findings and determinations.

Satisfying the Section 106 Process in Conjunction with NEPA

NEPA establishes, as a national policy, use of all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.(NEPA Sec. 101(a))

In relation to the historic and cultural aspects of the environment, NEPA’s policy includes language charging the government to “use all practicable means ... to the end that the Nation may... assure for all Americans ... esthetically and culturally pleasing surroundings; and preserve important historic, cultural, and natural aspects of our national heritage.”(NEPA Sec. 101(b))

NEPA’s primary mechanism to accomplish this is the requirement that agencies consider the effects of their actions on the “human environment.” The courts have consistently found that while NEPA does not elevate environmental protection over all other aspects of public policy, it does require a “hard look” at environmental impacts and at alternatives. NEPA does not require a particular result, such as the least environmentally damaging alternative; it sets out a process for taking that “hard look” at what an action may do to the environment, and what can be done about it. In taking such a “hard look,” NEPA promotes systematic, interdisciplinary analysis of environmental issues. “Interdisciplinary” studies and analyses are often confused with those that are merely “multidisciplinary.” In contrast to mere compilation of results produced by multiple specialists, in an interdisciplinary study, the specialists work together as a team, bringing the expertise of each to bear on everyone’s problems and issues, informing the discussion across issue areas creating an analysis that is more than the sum of its parts.

NEPA Regulations

Compliance with Section 106 does not guarantee that all impacts on all cultural resource types have been addressed in NEPA analysis. Section 106 does not deal with impacts on all types of cultural resources, or all cultural aspects of the environment; it deals with impacts on properties included in or eligible for the National Register of Historic Places. Other authorities, such as the American Indian Religious Freedom Act and [Executive Order 12898](#), may require consideration of other cultural resource types, and NEPA itself provides for considering all aspects of the cultural environment.

According to NEPA regulations, in considering whether an action may “significantly affect the quality of the human environment,” an agency must consider, among other things: unique characteristics of the geographic area such as proximity to historic or cultural resources (40 CFR 1508.27(b)(3)) and the degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places (40 CFR 1508.27(b)(8)). Other cultural impacts — for example, on an Indian tribe’s religious practices, or on the use of resources for cultural purposes by a minority group or low-income community — are also considered under NEPA.

NEPA regulations require that, to the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the other laws and regulations. (40 CFR 1502.25(a)).

Using NEPA for Section 106 Review

36 CFR Section 800.8(c) of the NHPA Section 106 regulations allows “use of the NEPA process for Section 106 purposes.” Under this subsection, an agency can use the NEPA process and the documents it produces “to comply with Section 106 in lieu of the procedures set forth in Sections 800.3 through 800.6.” To use this provision, however, the agency and its NEPA work must meet the following tests.

- The agency must notify the SHPO/THPO and ACHP that it intends to substitute.
- The agency has to identify consulting parties -- such as Indian tribes and Native Hawaiian groups, local governments, preservation organizations, and so forth -- in a manner consistent with Section 800.3(f).
- The agency has to identify historic properties and assess effects on them in a manner consistent with Sec. 800.4 through 800.5, but the scope and timing of identification and effect determination may be “phased to reflect the Agency Official’s consideration of project alternatives in the NEPA process” and the effort the agency expends must be “commensurate with the assessment of other environmental factors.”
- The agency must consult about the action’s effects with the SHPO/THPO, tribes, Native Hawaiian groups, and other consulting parties during NEPA scoping, analysis, and documentation, and it must involve the public in accordance with the agency’s NEPA procedures.

- The agency must develop alternatives and mitigation measures in consultation with the other stakeholders, and describe these measures in its EA or DEIS.

Early coordination. Agencies should consider their Section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an action is a “major federal action significantly affecting the quality of the human environment,” and therefore requires preparation of an ... (EIS) under NEPA, should include consideration of the undertaking’s likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA. (36 CFR 800.8(a)(1))

Review by SHPO. To provide a safeguard against abuse of the flexibility allowed, subsection 800.8(c)(2) requires that the EA or EIS be reviewed by the SHPO/THPO and other consulting parties. Any of these may object “prior to or within the time allowed for public comment.” In the event of such an objection, the agency must refer the matter to the ACHP, which has 30 days to review the objection and decide whether it agrees with it. If it does, then consultation continues to resolve the objection, or the agency requests final ACHP comment. If the ACHP does not agree with the objection, or fails to respond within 30 days, the agency can complete its NEPA review and make its decision without further Section 106 review. (The Section 106 regulations do not specify how to handle the lack of a public review period, if this is the case.)

Review of Projects Categorically Excluded under NEPA. In EIS situations where cooperating agencies and an interdisciplinary team are involved throughout the process, all agencies have the opportunity to see that their compliance responsibilities are being met. The Section 106 regulations at 36 CFR 800.8(b) make a point of requiring agencies to consider whether projects categorically excluded under NEPA still require review under Section 106 to see whether “unusual circumstances” exist requiring further review. Whether such circumstances are found to exist based on historic property impacts will depend on the severity of the impacts and what the agency’s NEPA procedures say, but even if no further review is required under NEPA, Section 106 review must be completed.

“If a project, activity, or program is categorically excluded from NEPA review under an agency’s NEPA procedures, the Agency Official shall determine if it still qualifies as an undertaking requiring review under Section 106 pursuant to Sec. 800.3(a). If so, the Agency Official shall proceed with Section 106 review in accordance with the procedures in this subpart.” (36 CFR 800.8(b)). This requirement emphasizes that Section 106 and NEPA are separate authorities.

Integrating 106 and NEPA for EAs and EISs. The following recommendations can be made for integrating 106 with various classes of action for NEPA review of EAs and EISs:

- During preparation of any EA, conduct Section 106 review in order both to comply with Section 106 itself and in order to determine whether historic resources will be adversely affected, and if so, whether measures can be implemented to reduce adverse effects to a less than significant level. The results of the review should be reported in the FONSI if

one is issued, with an explanation of how Section 106 review has resulted in avoiding significant adverse effect.

- Section 106 review should be conducted during preparation of any EIS. Scoping, identification, and assessment of effects should be done during the analysis leading to the draft EIS, and the results should be presented in the DEIS. Consultation to resolve adverse effects should be coordinated with public comment on the DEIS, with the results reported in the FEIS. Any Memorandum of Agreement (MOA) developed under Section 106, or the final comments of the ACHP, should be addressed in the ROD. Unless there is some compelling reason to do otherwise, the Section 106 MOA should be fully executed before the ROD is issued, and the ROD should provide for implementation of the MOA's terms.

The Section 106 process and the NEPA EIS process merge as follows:

Section 106 (36 CFR 800)	NEPA (40 CFR 1500) EIS Process
Initiate Sec 106 Process.	File Notice of Intent in the Federal Register.
Identify and consult with interested parties (SHPO/THPO, CLGs, Tribes) local governments and the public.	Initiate Scoping Process. Invite cooperating agencies. Scope with agencies and the public regarding purpose and need range of alternatives, issues and information needs.
Identify historic properties. Determine the area of potential effects. Identify existing sites and studies, conduct inventories, make determinations of eligibility.	Conduct studies to cover the issues, fill information gaps. Analyze impacts of the proposed alternatives
Assess adverse effects	
— Draft EIS —	
Resolution of adverse effects Consult with parties to reach agreement Prepare MOA	Hold Public Hearing Respond to agency and public comments Analyze comments to determine next steps Prepare Final EIS
Sign Memorandum of Agreement	Sign Record of Decision

The exact sequencing of the steps of the Section 106 process with the steps of EIS or EA preparation vary, but 106 is completed before the Final EIS, if one is prepared. FHWA's policy, reflected in regulations under 771.105 (policy) and 771.133 (compliance with other regulations), is to complete the Section 106 as well as other applicable laws prior to issuing the FONSI or FEIS. While some flexibility exists, good practice is to do the bulk of the 106 work during DEIS preparation, report determinations in the DEIS, let comments on the DEIS inform any further 106 consultations, then report final results of 106 (e.g. a Memorandum of Agreement) in the FEIS, embodying the stipulations of the MOA by reference in the ROD. Where only an EA is prepared, or the action is categorically excluded, more flexibility is available.

The development of a memorandum of agreement (MOA) to address adverse effects under Section 106 for a DOT project suggests that the project may use historic property. Thus, the procedural requirements of Section 4(f) may dictate the completion schedule of the MOA and the ROD rather than the requirements of either NEPA or Section 106. While not all adverse effects equate to a Section 4(f) use, use of historic property triggers the Section 4(f) evaluation requirements. Preliminary coordination that leads to an unsigned MOA should be accomplished prior to the circulation of a draft Section 4(f) evaluation. Following public and agency review of the DEIS and draft Section 4(f) evaluation, the MOA is signed and included in the final Section 4(f) evaluation. The lead agency approves the FEIS and the final Section 4(f) evaluation. The ROD is signed after the appropriate waiting period and contains a summary of the basis for the Section 4(f) approval. Early coordination helps ensure that a critical party is not surprised by the MOA, and refuses to sign at the last moment.

Measures to Mitigate Adverse Effects and a Binding Commitment to Carry Those Out.

Based on the consultation and review described above, subsection 800.8(c)(4) requires the agency to specify in its FONSI or ROD the measures it will take to mitigate adverse effects on historic properties. The agency must also “ensure that the approval of the undertaking is conditioned accordingly,” and make “a binding commitment” to do so. Section 800.8(c)(4) goes on to say that “where the NEPA process results in a FONSI, the Agency Official must adopt such a binding commitment through a Memorandum of Agreement drafted in accordance with Sec. 800.6(c). In 2001, [Section 800.8\(c\)\(4\)](#) was rewritten to more clearly state the actions a federal agency must take in making a binding commitment in NEPA documents to carry out measures to avoid, minimize or mitigate adverse effects, in order to have the NEPA process comply with Section 106 requirements.

Appendix D Sample Section 106 Programmatic Agreement Letters

Letter from FHWA to Head of Tribal Government Requesting Authorization for DOT to Consult Directly with Tribe or THPO, and FHWA's Behalf

Dear (Chairman/President) _____

The Federal Highway Administration (FHWA) is seeking ways to simplify its government-to-government consultation with Indian tribes regarding transportation projects in (State), specifically with respect to potential impacts on historic properties under Section 106 of the National Historic Preservation Act.

Such projects are invariably planned and carried out by the (State) Department of Transportation (DOT). Since you have established your (Name of Office or Department performing THPO function) as your Tribal Historic Preservation Officer (THPO), we believe it would be most efficient for us to authorize the DOT to consult directly with your THPO on our behalf regarding all such projects that do not actually affect the fee or trust lands of your tribe. Of course, FHWA will always be available to consult with you on a government-to-government basis upon your request, and will continue to so consult in this manner with respect to projects affecting the fee or trust land of your tribe.

If this arrangement is acceptable to you and your tribal government, I hope you will so advise me by letter. If you would like to meet about this matter, or discuss it on the telephone, I would be happy to do so at your convenience. Please contact me at (phone number) to discuss it or arrange a meeting.

Sincerely

cc: THPO (Note: THPO should already have been consulted about this, to avoid surprise)

Letter from State DOT to THPO Identifying Project Types for Which Consultation Will Not Be Routinely Undertaken

Dear (THPO)

This is to confirm the outcome of our meeting of (date), at which we identified certain types of transportation project in (State) that are so unlikely to affect historic properties of interest to your tribe that there is no need for us to consult with you under Section 106 of the National Historic Preservation Act. The project types we identified are listed in the attachment to this letter (Attachment A: “Project Types on Which Section 106 Consultation With the _____ Tribe Will Not Be Routinely Undertaken”).

If you agree, when we consider initiating the Section 106 review process on a project falling into one of the identified categories under 36 CFR 800.3(e) and (f), we will not routinely contact you and request your participation. We will, however, notify you of any such project that will affect the fee or trust lands of your tribe, and of any project that our internal review suggests may be of interest to you. As you requested in our meeting, we will also advise you of any project that is planned to be conducted in the month of _____ within any of the areas identified on the attached map (Attachment B: “Areas of Special Cultural Importance to the _____ Tribe”), and seek your assistance in ensuring that such projects do not adversely affect your tribe’s cultural interests. We will also consult with you about any project at your request.

We propose to review the effectiveness of this arrangement with you on an annual basis, and make adjustments to the arrangement as needed.

If you agree with this approach, please sign the concurrence line below and return a copy of this letter to you for our files. If you would like to discuss this matter further, please contact me at (phone number).

Sincerely

Letter from FHWA to SHPO on Project Types on Which Section 106 Consultation With the SHPO Will Not Be Routinely Undertaken

Dear (SHPO)

This is to confirm the outcome of our meeting of (date). As you will recall, that meeting was aimed at clarifying what the (State) Department of Transportation (DOT) will do when it initiates review of certain routine project types on our behalf under 36 CFR 800.3, and on what your office, the DOT, and we agree constitutes a “reasonable and good faith effort” to identify historic properties with respect to such project types under 36 CFR 800.4. The authority for this agreement is found at 36 CFR 800.3(g).

The project types we collectively identified are listed in the attachment to this letter (Attachment A: “Project Types on Which Section 106 Consultation With the _____ State Historic Preservation Officer Will Not Be Routinely Undertaken”). They are all types of project that have very limited potential for adverse effect on historic properties, and whose mild potential for such effects can, we agreed, be handled by the (State) DOT without your advice and assistance.

We agreed that with respect to the property types listed in Attachment A, we will regard our responsibility to consult with you under 36 CFR 800.3(c) to be fulfilled by the programmatic consultation whose results are documented in this letter, and by the annual consultation proposed below, except in circumstances where the (State) DOT’s internal review and our compliance with the National Environmental Policy Act (NEPA) suggest to us or the (State) DOT that further consultation with your office is appropriate, whereupon the (State) DOT will undertake such consultation in accordance with 36 CFR 800.3(c).

We also agreed under 36 CFR 800.3(e) that with respect to the project types listed in Attachment A, there is no need for public involvement in individual project review beyond that routinely carried out by the (State) DOT as part of its planning and NEPA compliance processes, except that in interacting with the public and with local governments about such projects, the (State) DOT will routinely distribute the handout attached (Attachment B: “If You Have Concerns About Impacts on Historic Places”), which advises the public about how to make any historic preservation concerns known to the (State) DOT, FHWA, and your office. Should any such concerns be raised, or should the (State) DOT otherwise think it necessary, the (State) DOT will provide for further public involvement, in consultation with your office.

We also addressed the requirement of 36 CFR 800.4(b)(1) that a “reasonable and good faith effort” be made to identify historic properties subject to effect by a project. We agreed that with respect to the project types listed in Attachment A, the (State) DOT’s routine planning and NEPA compliance processes comprise such a reasonable and good faith effort in the vast preponderance of cases, and that no field survey to identify archaeological sites or other historic properties will ordinarily be carried out. We also agreed, however, that the (State) DOT will consult with your office in any case in which they are uncertain about the need for such a survey, and in any case in which a local government, an Indian tribe, or some other interested party requests such a survey. The (State) DOT pledged that such a survey will be carried out if your office advises that it is needed.

Finally, we agreed to review the effectiveness of this arrangement on an annual basis, and make adjustments as needed.

As we discussed, we are contacting all Tribal Historic Preservation Officers (THPOs) and Indian Tribes with interests in your State to seek similar arrangements. Nothing in this letter affects our obligations with respect to such tribes and THPOs.

If you agree with this approach, please sign the concurrence line below and return a copy of this letter to you for our files. If you would like to discuss this matter further, please contact me at (phone number).

Appendix E NEPA Categorical Exclusion Regulations for BLM, FS, USCG, and the Corps

This appendix reviews the agency-level regulations followed by: the Forest Service, Bureau of Land Management, U.S. Coast Guard, and the Corps of Engineers for complying with NEPA and CEQ's 40 CFR Sec. 1500 regulations. For each agency's regulations:

- Key references are described.
- Specific categories of actions determined to be eligible for categorical exclusion by that agency are summarized.
- Criteria used by that agency for determining special circumstances where a CE is not appropriate are listed.
- Any other relevant policies and procedures are noted.

Forest Service NEPA-Related Regulations

The “*Forest Service Directive System*” (<http://www.fs.fed.us/im/directives/>) consists of the Forest Service Manual and Handbooks, which codify the agency's policy, practice, and procedure. The system serves as the primary basis for the internal management and control of all programs and the primary source of administrative direction to Forest Service employees.

Forest Service Manual. The Forest Service Manual (FSM) describes all legal authorities, objectives, policies, responsibilities, instructions, and guidance needed on a continuing basis by Forest Service line officers and primary staff to plan and execute assigned programs and activities.

The FSM is divided into eight major sections called series; each series section includes several titles that address major topics within that series. The FSM's Organization and Management series includes a Planning title, which features a chapter on Environmental Policy and Procedures. This chapter sets forth Forest Service management objectives, policy, and responsibilities for meeting the requirements of the National Environmental Policy Act (NEPA). The FSM identifies three key authorities for its environmental policy and procedures:

- The National Environmental Policy Act of 1969 (NEPA),
- Council on Environmental Quality Regulations (40 CFR 1500-1508),
- U.S. Department of Agriculture NEPA Regulations

Forest Service Handbooks. The Forest Service Handbooks (FSH) are the principal source of specialized guidance and instruction for carrying out the direction issued in the FSM. Specialists and technicians are the primary audience of Handbook direction. The organizing structure of the FSH is similar to that of the FSM. The FSH *Planning* title includes a Handbook on *Environmental Policy and Procedures*. This Handbook includes six chapters.

Forest Service-Sanctioned Categorical Exclusions

FHS guidance indicates that an EIS is required for any proposals to take major federal actions that may significantly affect the quality of the human environment. The third chapter of the Forest Service's Handbook on *Environmental Policy and Procedures* describes circumstances under which a proposed action may be categorically excluded from further analysis and documentation in an environmental impact statement (EIS) or environmental assessment (EA). Actions in the following categories may be categorically excluded unless scoping indicates extraordinary circumstances, in some instances, however a case file and decision memo must be prepared to document the CE:

CE with Case File and Decision Memo Not Required

- Policy development, planning and implementation which relate to routine activities, such as personnel, organizational changes, or similar administrative functions.
- Activities which deal solely with the funding of programs, such as program budget proposals, disbursements, and transfer or reprogramming of funds.
- Inventories, research activities, and studies, such as resource inventories and routine data collection when such actions are clearly limited in context and intensity.
- Educational and informational programs and activities.
- Civil and criminal law enforcement and investigative activities.
- Activities which are advisory and consultative to other agencies and public and private entities, such as legal counseling and representation.
- Activities related to trade representation and market development activities abroad.
- Orders issued pursuant to 36 CFR Part 261 - Prohibitions to provide short-term resource protection or to protect public health and safety. (E.g., Closing an area during a period of extreme fire danger.)
- Rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.
- Repair and maintenance of administrative sites. (E.g., Mowing lawns at a District office.)
- Repair and maintenance of roads, trails, and landline boundaries. (E.g., Resurfacing a road to its original condition.)
- Repair and maintenance of recreation sites and facilities. (E.g., Repaving a parking lot.)
- Acquisition of land or interest in land.
- Sale or exchange of land or interest in land and resources where resulting land uses remain essentially the same.
- Exchange of administrative sites involving other than National Forest System lands.
- Approval, modification, or continuation of minor, short-term (one year or less) special uses of National Forest System lands.

- Issuance of a new permit for up to the maximum tenure allowable under the National Forest Ski Area Permit Act of 1986 (16 U.S.C. 497b) for an existing ski area when such issuance is a purely ministerial action to account for administrative changes, such as a change in ownership of ski area improvements, expiration of the current permit, or a change in the statutory authority applicable to the current permit.
- Amendment to or replacement of an existing special use authorization that involves only administrative changes and does not involve changes in the authorized facilities or increases in the scope or intensity of authorized activities, or extensions to the term of authorization, when the applicant or holder is in full compliance with the terms and conditions of the special use authorization.

CE with Case File and Decision Memo Required

- Construction and reconstruction of trails.
- Additional construction or reconstruction of existing telephone or utility lines in a designated corridor.
- Approval, modification, or continuation of minor special uses of National Forest System lands that require less than five contiguous acres of land. (E.g., Approving the construction of a meteorological sampling site.)
- Regeneration of an area to native tree species.
- Timber stand and/or wildlife habitat improvement activities.
- Modification or maintenance of stream or lake aquatic habitat improvement structures.
- Short-term (one year or less) mineral, energy, or geophysical investigations.
- Implementation or modification of minor management practices to improve allotment condition or animal distribution when an Allotment Management Plan is not yet in place.
- Hazardous fuels reduction activities using prescribed fire, not to exceed 4,500 acres.
- Post-fire rehabilitation activities, not to exceed 4,200 acres.
- Harvest of live trees not to exceed 70 acres, requiring no more than ½ mile of temporary road construction.
- Salvage of dead and/or dying trees not to exceed 250 acres, requiring no more than ½ mile of temporary road construction.
- Commercial and non-commercial sanitation harvest of trees to control insects or disease not to exceed 250 acres, requiring no more than ½ mile of temporary road construction.
- Issuance of a new special use authorization for a new term to replace an existing or expired special use authorization when the only changes are administrative.

Criteria for Determining Extraordinary Circumstances

Resource conditions that should be considered in determining whether extraordinary circumstances related to the proposed action warrant further analysis and documentation in an EA or an EIS are:

- Federally listed threatened or endangered species or designated critical habitat, species proposed for federal listing or proposed critical habitat, or Forest Service sensitive species.
- Flood plains, wetlands, or municipal watersheds.
- Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas.
- Inventoried roadless areas.
- Research natural areas.
- American Indians and Alaska Native religious or cultural sites.
- Archaeological sites, or historic properties or areas.

The mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion. It is the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.

Special Emphasis on Environmental Scoping

The first chapter (*Environmental Analysis*) of the Forest Service's Handbook on *Environmental Policy and Procedures* emphasizes that where National Forest System lands are involved, the Forest Service shall play a strong role in the preparation of any environmental documents, either as Lead Agency or as a Cooperating Agency.

Although the Council on Environmental Quality (CEQ) regulations require scoping only for environmental impact statement (EIS) preparation, the Forest Service has broadened the concept to apply to all proposed actions. In the Handbook, scoping is described as including refining the proposed action, determining the responsible official and lead and cooperating agencies, identifying preliminary issues, and identifying interested and affected persons. The results of scoping are used to identify public involvement methods, refine issues, select an interdisciplinary team, establish analysis criteria, and explore possible alternatives and their probable environmental effects. Because the nature and complexity of a proposed action determine the scope and intensity of the required analysis, no single technique is required or prescribed.

Bureau of Land Management NEPA-Related Regulations

Departmental Manual. The BLM follows the Department of Interior's Departmental Manual (http://elips.doi.gov/app_dm/index.cfm?fuseaction=home), which describes all official policies, procedures, programs, and functions of the bureaus and offices of the Department of the Interior. The Manual includes a series on Environmental Quality Programs, and Part 516 of this series addresses NEPA. The Manual states that approval of applications to the BLM for right-of-way for major highways require preparation of an EIS.

BLM-Sanctioned Categorical Exclusions

The Departmental Manual includes a list of proposed actions that may be considered as Categorical Exclusions unless extraordinary circumstances exist:

- Personnel actions and investigations and personnel services contracts.
- Internal organizational changes and facility and office reductions and closings.
- Routine financial transactions.
- Departmental legal activities.
- Nondestructive data collection, inventory (including field, aerial, and satellite surveying and mapping), study, research, and monitoring activities.
- Routine and continuing government business, including such things as supervision, administration, operations, maintenance, renovations, and replacement activities having limited context and intensity.
- Management, formulation, allocation, transfer, and reprogramming of the Department's budget at all levels.
- Legislative proposals of an administrative or technical nature.
- Policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.
- Activities which are educational, informational, advisory, or consultative to other agencies, public and private entities, visitors, individuals, or the general public.
- Hazardous fuels reduction activities using prescribed fire not to exceed 4,500 acres.
- Post-fire rehabilitation activities not to exceed 4,200 acres.

The BLM's Chapter of the Departmental Manual provides an expanded listing of Categorical Exclusion activities, which includes the following (http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3621):

Fish and Wildlife

- Modification of existing fences to provide improved wildlife ingress and egress.
- Minor modification of water developments to improve or facilitate wildlife use.
- Construction of perches, nesting platforms, islands and similar structures for wildlife use.
- Temporary emergency feeding of wildlife during periods of extreme adverse weather conditions.
- Routine augmentations such as fish stocking, providing no new species are introduced.
- Relocation of nuisance or depredating wildlife, providing the relocation does not introduce new species into the ecosystem.
- Installation of devices on existing facilities to protect animal life.

Fluid Minerals

- Issuance of future interest leases under the Mineral Leasing Act of Acquired Lands where the subject lands are already in production.

- Approval of mineral lease adjustments and transfers, including assignments and subleases.
- Approval of minor modifications or minor variances from activities described in approved development/production plans (e.g., the approved plan identifies no new surface disturbance outside the area already identified to be disturbed).
- Approval of unitization agreements, communitization agreements, drainage agreements, underground gas storage agreements, compensatory royalty agreements, or development contracts.
- Approval of suspensions of operations, *force majeure* suspensions, and suspensions of operations and production.
- Approval of royalty determinations such as royalty rate reductions.

Forestry

- Land cultivation and silvicultural activities (excluding herbicides) in forest tree nurseries, seed orchards, and progeny test sites.
- Sale and removal of individual trees or small groups of trees which are dead, diseased, injured, or which constitute a safety hazard, and where access for the removal requires no more than maintenance to existing roads.
- Seeding or reforestation of timber sales or burn areas where no chaining is done, no pesticides are used, and there is no conversion of timber type or conversion of nonforest to forest land.
- Precommercial thinning and brush control using small mechanical devices.
- Disposal of small amounts of miscellaneous vegetation products outside established harvest areas.

Rangeland Management

- Approval of transfers of grazing preference.
- Placement and use of temporary (not to exceed one month) portable corrals and water troughs, providing no new road construction is needed.
- Temporary emergency feeding of livestock or wild horses and burros during periods of extreme adverse weather conditions.
- Removal of wild horses or burros from private lands at the request of the landowner.
- Processing (transporting, sorting, providing veterinary care to, vaccinating, testing for communicable diseases, training, gelding, marketing, maintaining, feeding, and trimming of hooves of) excess wild horses and burros.
- Approval of the adoption of healthy, excess wild horses and burros.
- Actions required to ensure compliance with the terms of Private Maintenance and Care Agreements.
- Issuance of title to adopted wild horses and burros.

- Destroying old, sick, and lame wild horses and burros as an act of mercy.

Realty

- Withdrawal extensions or modifications which only establish a new time period and entail no changes in segregative effect or use.
- Withdrawal revocations, terminations, extensions, or modifications and classification terminations or modifications which do not result in lands being opened or closed to the general land laws or to the mining or mineral leasing laws.
- Withdrawal revocations, terminations, extensions, or modifications; classification terminations or modifications; or opening actions where the land would be opened only to discretionary land laws and where subsequent discretionary actions (prior to implementation) are in conformance with and are covered by a Resource Management Plan/EIS (or plan amendment and EA or EIS).
- Administrative conveyances from the Federal Aviation Administration (FAA) to the State of Alaska to accommodate airports on lands appropriated by the FAA prior to the enactment of the Alaska Statehood Act.
- Actions taken in conveying mineral interest where there are no known mineral values in the land, under Section 209(b) of the Federal Land Policy and Management Act of 1976 (FLPMA).
- Resolution of class one color-of-title cases.
- Issuance of recordable disclaimers of interest under Section 315 of FLPMA.
- Corrections of patents and other conveyance documents under section 316 of FLPMA and other applicable statutes.
- Renewals and assignments of leases, permits or rights-of-way where no additional rights are conveyed beyond those granted by the original authorizations.
- Transfer or conversion of leases, permits, or rights-of-way from one agency to another (e.g., conversion of Forest Service permits to a BLM Title V Right-of-way).
- Conversion of existing right-of-way grants to Title V grants or existing leases to FLPMA section 302(b) leases where no new facilities or other changes are needed.
- Grants of right-of-way wholly within the boundaries of other compatibly developed rights-of-way.
- Amendments to existing rights-of-way such as the upgrading of existing facilities which entail no additional disturbances outside the rights-of-way boundary.
- Grants of rights-of-way for an overhead line (no pole or tower on BLM land) crossing over a corner of public land.
- Transfer of land or interest in land to or from other bureaus or federal agencies where current management will continue and future changes in management will be subject to the NEPA process.

- Acquisition of easements for an existing road or issuance of leases, permits, or rights-of-way for the use of existing facilities, improvements, or sites for the same or similar purposes.
- Grant of a short rights-of-way for utility service or terminal access roads to an individual residence, outbuilding, or water well.
- Temporary placement of a pipeline above ground.
- Issuance of short-term (3 years or less) rights-of-way or land use authorizations for such uses as storage sites, apiary sites, and construction sites where the proposal includes rehabilitation to restore the land to its natural or original condition.
- One-time issuance of short-term (3 years or less) rights-of-way or land use authorizations which authorize trespass action where no new use or construction is allowed, and where the proposal includes rehabilitation to restore the land to its natural or original condition.

Solid Minerals

- Issuance of future interest leases under the Mineral Leasing Act for Acquired Lands where the subject lands are already in production.
- Approval of mineral lease readjustments, renewals and transfers including assignments and subleases.
- Approval of suspensions of operations, *force majeure* suspensions, and suspensions of operations and production.
- Approval of royalty determinations such as royalty rate reduction and operations reporting procedures.
- Determination and designation of logical mining units (LMUs).
- Findings of completeness furnished to the Office of Surface Mining Reclamation and Enforcement for Resource Recovery and Protection Plans.
- Approval of minor modifications to or minor variances from activities described in an approved exploration plan for leasable, salable and locatable minerals. (e.g., the approved plan identifies no new surface disturbance outside the areas already identified to be disturbed.)
- Approval of minor modifications to or minor variances from activities described in an approved underground or surface mine plan for leasable minerals. (e.g., change in mining sequence or timing.)
- Digging of exploratory trenches for mineral materials, except in riparian areas.
- Disposal of mineral materials such as sand, stone, gravel, pumice, pumicite, cinders, and clay, in amounts not exceeding 50,000 cubic yards or disturbing more than 5 acres, except in riparian areas.

Transportation Signs

- Placing existing roads in any transportation plan when no new construction or upgrading is needed.

- Installation of routine signs, markers, culverts, ditches, waterbars, gates, or cattleguards on/or adjacent to existing roads.
- Temporary closure of roads.
- Placement of recreational, special designation or information signs, visitor registers, kiosks and portable sanitation devices.

Other

- Maintaining plans in accordance with 43 CFR 1610.5-4.
- Acquisition of existing water developments (e.g., wells and springs) on public land.
- Conducting preliminary hazardous materials assessments and site investigations, site characterization studies and environmental monitoring.
- Use of small sites for temporary field work camps where the sites will be restored to their natural or original condition within the same work season.
- Issuance of special recreation permits to individuals or organized groups for search and rescue training, orienteering or similar activities and for dog trials, endurance horse races or similar minor events.
- A single trip in a one month period to data collection or observation sites.
- Construction of snow fences for safety purposes or to accumulate snow for small water facilities.
- Installation of minor devices to protect human life (e.g., grates across mines).
- Construction of small protective enclosures including those to protect reservoirs and springs and those to protect small study areas.
- Removal of structures and materials of nonhistorical value, such as abandoned automobiles, fences, and buildings, including those built in trespass and reclamation of the site when little or no surface disturbance is involved.
- Actions where BLM has concurrence or coapproval with another DOI agency and the action is categorically excluded for that DOI agency.
- Rendering formal classification of lands as to their mineral character and waterpower and water storage values.

Criteria for Determining Extraordinary Circumstances

Under selected extraordinary circumstances for individual actions, BLM specifies that a CE may not apply, these include:

- Have significant impacts on public health or safety.
- Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (Executive Order 11990); floodplains (Executive Order

11988); national monuments; migratory birds; and other ecologically significant or critical areas.

- Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources.
- Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.
- Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.
- Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.
- Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by either the bureau or office.
- Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species, or have significant impacts on designated Critical Habitat for these species.
- Violate a federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment.
- Have a disproportionately high and adverse effect on low income or minority populations (Executive Order 12898).
- Limit access to and ceremonial use of Indian sacred sites on federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (Executive Order 13007).
- Contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species (Federal Noxious Weed Control Act and Executive Order 13112).

DOI Review of Other Agencies' Documents

DOI/BLM's regulations include a section on handling the review of other agencies' environmental documents. It is focused on EA and EIS documents and indicates that the Department considers it a priority to provide competent and timely review comments on EISs and other environmental or project review documents prepared by other federal agencies for their major actions which significantly affect the quality of the human environment.

The Department of the Interior Manual 516 2.3A (3) requires the review of the following "extraordinary circumstances" (516 DM 2 Appendix 2) to determine if an otherwise categorically excluded action would require additional analysis and environmental documentation.

- Have significant impacts on public health or safety.

- Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (Executive Order 11990); floodplains (Executive Order 11988); national monuments; migratory birds; and other ecologically significant or critical areas.
- Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA Section 102(2)(E)].
- Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.
- Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.
- Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.
- Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by either the bureau or office.
- Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species, or have significant impacts on designated Critical Habitat for these species.
- Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment.
- Have a disproportionately high and adverse effect on low income or minority populations (Executive Order 12898).
- Limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (Executive Order 13007).
- Contribute to the introduction of invasive species.

However, the section also states: Bureaus are reminded and encouraged to work within existing administrative frameworks, including any existing programmatic agreements, when deciding how to apply any of the (following)...extraordinary circumstances” (Department of the Interior Manual 516 2.3A (3))

U.S. Coast Guard NEPA-Related Regulations

Environmental Policies Manual. The USCG’s NEPA-related policies are documented in *Commandant Instruction M16475.1D*. (http://www.uscg.mil/systems/gse/11_29_00_NEPA.pdf) This Manual establishes policy and prescribes responsibilities and procedures for USCG implementation of NEPA, 40 CFR Sec 1500 et seq, and other related laws and regulations. In addition to describing categories of actions that may be classed as categorical exclusions, the Manual describes project types for which EAs or EISs are usually completed.

Projects for which environmental assessments are normally completed include, but are not limited to:

- Dredging projects that increase water depth over the previously dredged or natural depths, and/or requiring new spoil designations except where prior negotiations with the Corps of Engineers indicate no EIS or EA is required for the purposes of permit authorization.
- Changes in mission, base closures, relocations, consolidations, and deployments which will have long term population increases or decreases in affected areas.
- Proposed utilization of tidelands and freshwater wetlands.
- Exercises conducted at the request of a state(s) (such as ship sinkings for artificial reefs) wherein environmental impact might be expected.
- Any activity proposed in a designated or recommended “critical” habitat of an endangered species, except where prior negotiations with the Fish and Wildlife Service/National Marine Fisheries Service indicate no EA is required for the purposes of continued operations and compliance with the Endangered Species Act.
- Construction or any other action affecting an EPA designated aquifer or recharge zone (as specified by Section 1424(e) of the Safe Drinking Water Act, 42 U.S.C. 201, et seq.).
- New or revised regulations, directives or policy guidance concerning activities that are likely to have significant environmental effects.

Projects for which an EIS is normally completed include:

- Actions assessed and found to have significant environmental effects.
- Actions having significant environmental effects on the global commons as described in section 2-3 of E.O. 12114 dated 5 January 1979. This is applicable to major federal actions outside the United States, its territories and possessions.
- Large dredging projects.
- Establishment of major new installations.
- Major land acquisitions that will result in changed use of the property.
- Actions which generate significant controversy because of effects on the human Environment.
- Deepwater Port permit applications.
- Actions having a significant effect on:
 - Property protected under section 4(f) of the DOT Act;
 - Wetlands or floodplains;
 - Endangered species; and
 - Significant archaeological, cultural or historical resources.

U.S. Coast Guard-Sanctioned Categorical Exclusions

The USCG's environmental policy Manual identifies a list of actions that may usually be considered categorical exclusions, and for which further analysis and NEPA documentation requirements are not required unless extraordinary circumstances exist.

Bridge-related Actions. The USCG's Bridge Administration Manual (BAM) (COMDTINST M16590.5C) provides additional detail on how bridge actions should be handled where a federal agency other than the USCG assumes the responsibility of lead agency.

Lead Agency Signature Requirement. The BAM specifies that the project case file must contain a document signed by an official of the lead agency, stating both that the proposed action is categorically excluded from NEPA and the basis for that determination. When the FHWA is the lead agency, Section IV, paragraph B.5. of the USCG/FHWA MOU requires them to give the USCG information documenting its categorical exclusion finding.

Findings of Fact Documentation. The BAM also indicates that although categorically excluded actions do not require formal NEPA documentation, other than a CE Determination, they must still be investigated to ensure that impacts under other environmental laws do not elevate the action to an EA or EIS level. The results of this investigation shall be documented in the Findings of Fact (FOF) accompanying all case files, including those where the FHWA or any other agency is the lead agency.

The BAN indicates that when another federal agency, as lead agency, classifies a project as categorically excluded, and the USCG agrees, the responsible USCG official must still prepare a USCG CE Determination to support the USCG bridge action. Categorical Exclusion Determinations of another federal agency cannot be adopted; however, they should be attached to the back of the USCG CE Determination. The USCG determination documents that the project meets USCG CE criteria. The lead agency's CE supports the fact that the overall project does not significantly impact the human environment.

USCG-approved CEs include the following actions, note that in some instances, completion of an environmental checklist may be required as part of the CE:

- Routine personnel, fiscal, and administrative activities, actions, procedures, and policies which clearly do not have any environmental impacts.
- Routine procurement activities and actions for goods and services
- Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an existing approved disposal site. (Checklist required).
- Routine repair, renovation, and maintenance actions on aircraft and vessels.
- Routine repair and maintenance of buildings, roads, airfields, grounds, equipment, and other facilities which do not result in a change in functional use, or an impact on a historically significant element or setting.

- Minor renovations and additions to buildings, roads, airfields, grounds, equipment, and other facilities which do not result in a change in functional use, a historically significant element, or historically significant setting. (Checklist required.)
- Routine repair and maintenance to waterfront facilities, including mooring piles, fixed floating piers, existing piers, and unburied power cables.
- Minor renovations and additions to waterfront facilities, including mooring piles, fixed floating piers, existing piers, and unburied power cables, which do not require special, site-specific regulatory permits. (Checklist required.)
- Routine grounds maintenance and activities at units and facilities. Examples include localized pest management actions and actions to maintain improved grounds (such as landscaping, lawn care and minor erosion control measures) that are conducted in accordance with applicable federal, state, and local directives.
- Installation of devices to protect human or animal life, such as raptor electrocution prevention devices, fencing to restrict wildlife movement on to airfields, and fencing and grating to prevent accidental entry to hazardous areas. (Checklist required.)
- New construction on heavily developed portions of USCG property, when construction, use, and operation will comply with regulatory requirements and constraints. (Checklist required.)
- Decisions to decommission equipment or temporarily discontinue use of facilities or equipment. (Checklist required for vessels and aircraft.)
- Demolition or disposal actions that involve buildings or structures when conducted in accordance with regulations applying to removal of asbestos, PCB's, and other hazardous materials, or disposal actions mandated by Congress. (Checklist required.)
- Outleasing of historic lighthouse properties as outlined in the Programmatic Memorandum of Agreement between the USCG, Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers. (Checklist required.)
- Transfer of real property from the USCG to the General Services Administration, Department of the Interior, and other federal departments and agencies, or as mandated by Congress; and the granting of leases, permits, and easements where there is no substantial change in use of the property. (Checklist required.)
- Renewals and minor amendments of existing real estate licenses or grants for use of government-owned real property where prior environmental review has determined that no significant environmental effects would occur.
- New grants or renewal of existing grants of license, easement or similar arrangements for the use of existing rights-of-way or incidental easements complementing the use of existing rights-of-way for use by vehicles; for such existing rights-of-way as electrical, telephone, and other transmission and communication lines; water, wastewater, storm water, and irrigation pipelines, pumping stations, and facilities; and for similar utility and transportation uses. (Checklist required.)

- Defense preparedness training and exercises conducted on other than USCG property, where the lead agency or department is not USCG or DOT and the lead agency or department has completed its NEPA analysis and documentation requirements.
- Defense preparedness training and exercises conducted on USCG property that do not involve undeveloped property or increased noise levels over adjacent property and that involve a limited number of personnel, such as exercises involving primarily electronic simulation or command post personnel.
- Simulated exercises, including tactical and logistical exercises that involve small numbers of personnel.
- Training of an administrative or classroom nature.
- Operations to carry out maritime safety, maritime law enforcement, search and rescue, domestic ice breaking, and oil or hazardous substance removal programs.
- Actions performed as a part of USCG operations and the Aids to Navigation Program to carry out statutory authority in the area of establishment of floating and minor fixed aids to navigation, except electronic sound signals.
- Routine movement of personnel and equipment, and the routine movement, handling, and distribution of non-hazardous and hazardous materials and wastes in accordance with applicable regulations.
- USCG participation in disaster relief efforts under the guidance or leadership of another federal agency that has taken responsibility for NEPA compliance.
- Data gathering, information gathering, and studies that involve no physical change to the environment. Examples include topographic surveys, bird counts, wetland mapping, and other inventories.
- Natural and cultural resource management and research activities that are in accordance with inter-agency agreements and which are designed to improve or upgrade the USCG's ability to manage those resources.
- Contracts for activities conducted at established laboratories and facilities, to include contractor-operated laboratories and facilities, on USCG-owned property where all airborne emissions, waterborne effluents, external radiation levels, outdoor noise, and solid and bulk waste disposal practices are in compliance with existing applicable federal, state, and local laws and regulations. (Checklist required.)
- Approval of recreational activities (such as a USCG unit picnic) which do not involve significant physical alteration of the environment, increased disturbance by humans of sensitive natural habitats, or disturbance of historic properties, and which do not occur in, or adjacent to, areas inhabited by threatened or endangered species. (Checklist required unless the activity will take place at a location developed or created for that type of activity.)
- Review of documents, such as studies, reports, and analyses, prepared for legislative proposals that did not originate in DOT and that relate to matters that are not the primary responsibility of the USCG.

- Planning and technical studies which do not contain recommendations for authorization or funding for future construction, but may recommend further study. This includes engineering efforts or environmental studies undertaken to define the elements of a proposal or alternatives sufficiently so that the environmental effects may be assessed and does not exclude consideration of environmental matters in the studies.
- Bridge Administration Program actions which can be described as one of the following:
 - (a) Modification or replacement of an existing bridge on essentially the same alignment or location. Excluded are bridges with historic significance or bridges providing access to undeveloped barrier islands and beaches.
 - (b) Construction of pipeline bridges for transporting potable water.
 - (c) Construction of pedestrian, bicycle, or equestrian bridges and stream gauging cableways used to transport people.
 - (d) Temporary replacement of a bridge immediately after a natural disaster or a catastrophic failure for reasons of public safety, health, or welfare.
 - (e) Promulgation of operating regulations or procedures for drawbridges.
 - (f) Identification of advance approval waterways under 33 CFR 115.70.
 - (g) Any Bridge Program action which is classified as a CE by another Department of Transportation agency acting as lead agency for such an action.
- Preparation of guidance documents that implement, without substantive change, the applicable Commandant Instruction or other federal agency regulations, procedures, manuals, and other guidance documents.
- Promulgation of the following regulations: (Note: When relying upon a CE in promulgating regulations, an environmental analysis checklist and an attached CED (Enclosure (6)) must be filed in the rulemaking docket before publication of a Notice of Proposed Rulemaking (NPRM), or an Interim or Final Rule not preceded by an NPRM unless specifically indicated.)
 - (a) Regulations which are editorial or procedural, such as those updating addresses or establishing application procedures.
 - (b) Regulations concerning internal agency functions or organization or personnel administration, such as funding, establishing Captain of the Port boundaries, or delegating authority.
 - (c) Regulations concerning the training, qualifying, licensing, and disciplining of maritime personnel.
 - (d) Regulations concerning manning, documentation, admeasurement, inspection, and equipping of vessels.

- (e) Regulations concerning equipment approval and carriage requirements.
- (f) Regulations establishing, disestablishing, or changing the size of Special Anchorage Areas or anchorage grounds. (Checklist and CED not required for actions that disestablish or reduce the size of the Area or grounds).
- (g) Regulations establishing, disestablishing, or changing Regulated Navigation Areas and security or safety zones. (Checklist and CED not required for actions that disestablish or reduce the size of the area or zone. For temporary areas and zones that are established to deal with emergency situations and that are less than one week in duration, the checklist and CED are not required. For temporary areas and zones that are established to deal with emergency situations and that are one week or longer in duration, the checklist and CED will be prepared and submitted after issuance or publication.)
- (h) Special local regulations issued in conjunction with a regatta or marine parade; provided that, if a permit is required, the environmental analysis conducted for the permit included an analysis of the impact of the regulations. (Checklist and CED not required)
- (i) Regulations in aid of navigation, such as those concerning rules of the road, International Regulations for the Prevention of Collisions at Sea (COLREGS), bridge-to-bridge communications, vessel traffic services, and marking of navigation systems.
 - Approvals of regatta and marine parade event permits for the following events:
 - (a) Events that are not located in, proximate to, or above an area designated environmentally sensitive by an environmental agency of the federal, state, or local government. For example, environmentally sensitive areas may include such areas as critical habitats or migration routes for endangered or threatened species or important fish or shellfish nursery areas.
 - (b) Events that are located in, proximate to, or above an area designated as environmentally sensitive by an environmental agency of the federal state, or local government and for which the USCG determines, based on consultation with the Governmental agency, that the event will not significantly affect the environmentally sensitive area. (Checklist and CED required.
 - (c) The USCG's manual indicates that additional CEs should be suggested when it becomes clear, through the preparation of EAs, that FONSI result after numerous analyses of similar types of actions.

Criteria for Determining Extraordinary Circumstances

According to the USCGs' Manual, some actions that normally would be categorically excluded could require additional environmental review under extraordinary circumstances, particularly whether the action is likely to involve one or more of the following:

- Public health or safety.
- A site that includes or is near a unique characteristic of the geographic area, such as a historic or cultural resource, park land, prime farmland, wetland, wild and scenic river, ecologically critical area, or property requiring special consideration under 49 U.S.C.

303(c). [Section 303(c) of Title 49 U.S.C. is commonly referred to as section 4(f) of the Department of Transportation (DOT) Act which includes any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site].

- The quality of the human environment that is likely to be highly controversial in terms of scientific validity or public opinion.
- An effect on the human environment that is highly uncertain or involves unique or unknown risks.
- Future precedent setting actions with significant effects or a decision in principle about a future consideration.
- An individually insignificant, but cumulatively significant, impact when considered along with other past, present, and reasonably foreseeable future actions.
- A district, site, highway, structure, or object that is listed in or eligible for listing in the National Register of Historic Places, or the loss or destruction of a significant scientific, cultural, or historical resource.
- Species or habitats protected by the Endangered Species Act.
- A potential or threatened violation of a federal, state, or local law or requirement imposed for the protection of the environment.
- An impact that may be both beneficial and adverse. A significant impact may exist even if it is believed that, on balance, the effect will be beneficial.

The simple existence of any of the situations as described above is not necessarily a reason to prepare an EA or EIS. The determination that a CE is inappropriate and more environmental analysis is needed, or that an EA or EIS is needed, must be based on the potential significance of the proposed action's effects on the environment. The proposed action must be evaluated in its context (whether local, state, regional, tribal, national, or international) and in its intensity by considering the level of possible effects as listed above.

Normally USCG gets a copy of their CE documentation along with the permit application. Cases where the DOT is asked to send a copy of the CE documentation might be considered as requesting FHWA signature. FHWA generally provides reason a project is a CE on a project basis and then USCG almost always agrees.

The USCG has established the following policy on adoption of other agencies' NEPA Class of Action Determinations.

U.S. Coast Guard Policy on Adoption of Other Agencies' NEPA Class of Action Determinations

Many bridge actions requiring USCG processing are based on environmental documentation that has been prepared by another federal agency, understanding that CEQ regulations at 40 CFR 1506.3 encourage agencies to adopt the environmental documentation of other federal agencies, whenever possible, to reduce the cost and processing time of federal actions.

Adoption can become complex because substantial differences often exist in internal agency NEPA implementing procedures. What one agency considers a Categorical Exclusion (CE), another may define as a major federal action.

Chapter 3 of USCG's Environmental Manual dictates that Findings of No Significant Impact (FONSI) and CE's cannot be adopted, whereas the USCG can adopt Environmental Assessments (EAs) and Environmental Impact Statements (EISs). In dealing with another agency's environmental document, BAP policy is to ensure agreement with the lead agency, wherever possible. Therefore, the USCG's choice of an environmental document must be at least at the same level or higher than the lead agency's document. For example, the USCG cannot prepare a CE Determination when the lead agency has prepared a FONSI. However, the USCG only adopts those portions of the environmental documentation applicable to the bridge(s).

COMDTINST M16475.1 (series) lists those bridge actions that are categorically excluded. If a bridge action is categorically excluded, then preparing an EA or an EIS is not required, unless it is subject to the restrictions of Chapter 2.B.2.b. of COMDTINST M16475.1 (series). Importantly, in bridge actions where a federal agency other than the USCG assumes the responsibility of lead agency, the case file must contain a document signed by an official of the lead agency, stating both that the proposed action is categorically excluded from NEPA and the basis for that determination. *When the FHWA is the lead agency, Section IV, paragraph B.5. of the USCG/FHWA MOU requires FHWA give the Coast Guard information documenting its categorical exclusion finding.* USCG's guidance specifies that although categorically excluded actions do not require formal NEPA documentation, other than a CE Determination, they must still be investigated to ensure that impacts under other environmental laws do not elevate the action to an EA or EIS level. The results of this investigation must be documented in the Findings of Fact (FOF) accompanying all USCG case files, including those where the FHWA or any other agency is the lead agency. When the USCG, as lead federal agency, determines that a bridge action meets the definition of a CE, then the responsible USCG official must prepare a CE Determination for the USCG to support that decision.

U.S. Army Corps of Engineers

The U.S. Army Corps of Engineers has two sets of environmental policy regulations for interpreting NEPA and CEQ's 40 CFR Sec. 1500 et seq:

- **Civil Works Program.** The Corps Civil Works program is guided by publication *ER 200-2-2 Environmental Quality - Procedures for Implementing NEPA* (www.usace.army.mil/inet/usace-docs/eng-regs/er200-2-2/). Last updated in 1988, this document includes a list of CE actions that includes:
 - Activities at completed Corps projects which carry out the authorized project purposes. Examples include routine operation and maintenance actions, general administration, equipment purchases, custodial actions, erosion control, painting, repair, rehabilitation, replacement of existing structures and facilities such as buildings, roads, levees, groins and utilities, and installation of new buildings utilities, or roadways in developed areas.
 - Minor maintenance dredging using existing disposal sites.

- Planning and technical studies which do not contain recommendations for authorization or funding for construction, but may recommend further study. This does not exclude consideration of environmental matters in the studies.
- All Operations and Maintenance grants, general plans, agreements, etc. necessary to carry out land use, development and other measures proposed in project authorization documents, project design memoranda, master plans, or reflected in the project NEPA documents.
- Real estate grants for use of excess or surplus real property.
- Real estate grants for Government-owned housing.
- Exchanges of excess real property and interests therein for property required for project purposes.
- Real estate grants for rights-of-way which involve only minor disturbances to earth, air, or water:
 - Minor access roads, streets and boat ramps.
 - Minor utility distribution and collection lines, including irrigation.
 - Removal of sand, gravel, rock, and other material from existing borrow areas.
 - Oil and gas seismic and gravity meter survey for exploration purposes.
 - Real estate grants of consent to use Government-owned easement areas.
 - Real estate grants for archaeological and historical investigations compatible with the Corps Historic Preservation Act responsibilities.
 - Renewal and minor amendments of existing real estate grants evidencing authority to use Government-owned real property.
 - Reporting excess real property to the General Services Administration for disposal.
 - Boundary line agreements and disposal of lands or release of deed restrictions to cure encroachments.
 - Disposal of excess easement interest to the underlying fee owner.
 - Disposal of existing buildings and improvements for off-site removal.
 - Sale of existing cottage site areas.
 - Return of public domain lands to the Department of the Interior.
 - Transfer and grants of lands to other federal agencies.

The regulation also provides a general caution that the Corps should be alert for extraordinary circumstances which may dictate the need to prepare an EA or an EIS.

Section 404 Permitting Program. The Corps wetlands permitting program is guided by 33 CFR 330, which was updated in 2002. The Office of the Chief of Engineers must make a CE finding or be furnished notice of the agency's or department's application for the categorical exclusion and concur with that determination. Prior to approval of any agency's categorical exclusions for

Nationwide Permit (NWP) 23 purposes, the Corps is committed to soliciting comments through notice in the Federal Register, which the Corps did in conjunction with FHWA's 1987 issuance of the "c" and "d" list for 23 CFR 771.117. The Corps published Regulatory Guidance Letter 87-10 on "Use of Nationwide Permit 23 for New Federal Highway Administration Categorical Exclusions" concurring with stipulations:

- Each activity occurring under paragraph (c)(3), (c)(7), (c)(9) and (c)(12) as well as all activities under all (d) paragraphs must be verified on a case by case basis by the district engineer or his regulatory staff. That is, the FHWA or local transportation agency to be funded by the FHWA should contact the appropriate Corps District to review the project proposal with the regulatory staff to ensure that the proposed activities would have only minimal adverse individual and cumulative impacts on the aquatic environment. If the district engineer thinks that concerns for the aquatic environment warrant further review, he should seek assertion of the division engineer's discretionary authority to require an individual permit. The district engineer will coordinate with state and federal resource agencies, if appropriate, when making his determination that concerns for the aquatic environment warrant further review. Development of local procedures to streamline such coordination is encouraged.
- The District Office will respond within 20 days as to whether he will seek assertion of the division engineer's discretionary authority within 20 calendar days. If the district engineer does not provide a response during this time, the activity qualifies for a nationwide permit, and the agency can begin construction.

NWPs are a type of general permit designed to regulate certain activities that have minimal adverse impacts and generally comply with the related laws in 33 CFR 320.3. While an individual review of each activity authorized by a NWP is normally performed, potential adverse impacts and compliance with the laws in 33 CFR 320.3 are controlled by the terms and conditions of each NWP, additional provisions, and the review process that is undertaken prior to the issuance of NWPs.

Specific general conditions of all NWPs provide for a case-by- case review of activities that may adversely affect endangered species or historic properties. Certain NWPs also have a notification requirement that will trigger a case-by-case review of particular activities. Another condition prohibits use of NWPs for activities that are located in wild and scenic rivers. In some cases, activities authorized by a NWP may require other federal, state or local authorizations. In such cases, a provision of the NWPs specifies that the NWP does not obviate the need to obtain other authorizations required by law. [33 CFR 330.4(b)] NWPs that authorize an activity within, or affecting land or water uses within a state that has a federally approved coastal zone management program must also be certified as being consistent with the state's program.

An additional safeguard is a provision that allows the Chief of Engineers, division engineers and/or district engineers to: assert discretionary authority and require an individual permit for a specific action; modify NWPs for specific activities by requiring special conditions on a case-by-case basis; add special conditions on a regional basis for certain NWPs; or take action to suspend or revoke a NWP. [33 CFR 330.4(e) and 330.5]

In the Corps' Preliminary Decision Document on NWP 23, the agency indicated that "the analysis contained in this document and coordination that will be undertaken prior to the issuance of all NWPs will fulfill the requirements of the National Environmental Policy Act, the Fish and Wildlife Coordination Act and other acts promulgated to protect the quality of the environment."

The 404(b)(1) compliance criteria for general permits is contained in 40 CFR 230.7. Prohibitions are outlined at 230.10(b), including:

- No toxic discharges will be authorized by this NWP. Section 404 general condition no. 3 specifically states that the material discharged must be free from toxic pollutants in toxic amounts.
- No adverse impact on endangered species will be authorized by this NWP. Refer to general condition no. 11 and to 33 CFR 330.4(f) for information and procedures.

Appendix F FAA and FTA Programmatic Agreements

The scope of work for this research project identified Federal Aviation Administration (FAA) and Federal Transit Administration (FTA) agreements as potential models for resolving programmatic acceptance conflicts among FHWA, State DOTs, and participating agencies. The research team found, however, that acceptance conflicts for FHWA and DOTs' programmatic agreements are rarely encountered. As a result, the need to review FAA and FTA agreements was reduced. The research team found from a cursory review that FTA's use of programmatic agreements is considerably less than FHWA's usage, and that FAA's unique Airport Improvement Block Grants program is not directly relevant to the situations that FHWA and State DOTs face. This appendix provides a brief overview of the FAA agreement.

FAA Airport Improvement State Block Grants

The Airport Improvement Program (AIP) is the main federal funding source for non-primary public use airport capital improvements. Funding under the AIP is administered via grants, overseen by the Federal Aviation Administration (FAA), that provide 90 percent federal match. Typical AIP-funded projects include land acquisition; site preparation; construction, alteration, and repair of runways, taxiways, aprons, and roads within airport boundaries; installation of airport lighting and navigational aids.

Ordinarily, the FAA selects and oversees individual AIP projects, including environmental documentation and analysis, through its network of regional offices; however, nine states (Missouri, Illinois, North Carolina, New Jersey, Michigan, Wisconsin, Pennsylvania, Tennessee, and Texas) receive AIP funding in the form of a state block grants program (SBGP) through a pilot effort that was begun in 1989. Under the AIP block grant program, states are delegated all FAA's compliance responsibilities related to project selection, planning, real estate acquisition, design, and construction via a Memorandum of Agreement. Delegation of these functions expedites the project funding and implementation process by reducing day-to-day federal oversight and gives states greater freedom to determine which projects are selected.

Actions that FAA would normally take under the Airport Improvement Program (AIP) become state actions under the SBGP. As a result, no federal action under NEPA occurs after FAA distributes the block of AIP funds to participating States because after distributing those funds, FAA has no control or responsibility over their use. FAA, in consultation with CEQ, however, determined that it is good environmental policy to require the SBGP states to consider the environmental consequences due to implementing individual projects funded under the SBGP. As a result, SBGP participants contractually agree to comply with environmental review requirements and procedures that FAA would have fulfilled if it were issuing individual project grants. SBGP participants with environmental laws similar to NEPA follow state laws and states

not having environmental laws similar to NEPA must comply with NEPA and other federal laws and Executive Orders when approving AIP amendments and funding for SBGP projects.⁷ A few AIP block grant states, such as Wisconsin, that have state-level NEPA-equivalent laws are also delegated FAA's responsibility for preparing EAs and they have full authority to act on FAA's behalf during the range of consultations with federal and state resource agencies. In other AIP block grant states, such as Illinois, that do not have a NEPA-equivalent state law, FAA retains final sign-off on EAs. In all block grant states, EISs must be prepared in coordination with FAA.

⁷ FAA Airports Environmental Guidance and Policy, Dec. 2004, DRAFT 5050.4B, Chapter 2: General NEPA Requirements and Responsibilities and Chapter 5: Special Provisions.