



Federal Aviation Administration

Memorandum

Date: December 19, 2024

To: FAA Office of Airports Environmental Protection Specialists

From: Jean Wolfers-Lawrence, Environmental Branch Manager, Office of Airports, Airport Planning and Programming Directorate, Planning and Environmental Division (APP-420)

Copy: Krystyna Bednarczyk, Manager Airports and Environmental Law Division, Environmental Law Headquarters (AGC – 620)

Subject: Initial Instructions to Office of Airports Environmental Protection Specialists on Implementation of Section 788(a) of the 2024 FAA Reauthorization Act

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Purpose

Section 788 of the FAA Reauthorization Act of 2024, Pub. L. No. 118-63 (May 16, 2024) (section 788) creates two new presumptions that a categorical exclusion (CATEX) applies to certain types of airport projects. A CATEX refers to a category of actions that do not individually or cumulatively have a significant effect on the human environment and as such do not require preparation of an Environmental Assessment or Environmental Impact Statement under the National Environmental Policy Act (NEPA). A CATEX is not an exemption or waiver of NEPA review; it is a level of NEPA review.

The first presumption outlined in section 788(a) applies to projects that receive "limited Federal assistance." The law defines two types of projects that may meet this presumption:

(1) Projects expected to receive less than \$6 million in total Federal funding or PFC revenues, or

(2) Projects that have a total estimated cost of not more than \$35 million and the total amount of Federal funding (not including use of PFC revenue) comprises less than 15 percent of the total estimated project cost.

The second presumption (Section 788(b)) applies to public use airports that seek to rebuild airport infrastructure that is damaged or destroyed in a natural disaster. Instructions on the application of 788(b) are not included in this memorandum and will be provided at a later time.

The purpose of this memorandum is to provide Office of Airports (ARP) Environmental Protection Specialists (EPS) with instructions on the application of the presumed CATEX for projects that receive “limited Federal assistance.”

1. Background

1.1 Decision on the Availability for Immediate Application

Congress creates CATEXs in a variety of ways, with the statutory language controlling how that CATEX is implemented. In some cases, Congress provides CATEXs which the agency may apply immediately to comply with NEPA without additional action to implement the statute by the agency. In some cases, these statutorily created CATEXs also do not require an agency to conduct extraordinary circumstances review. In other cases, Congress sets out criteria that defines whether the statutorily created CATEX is applicable, leaves to agency discretion whether the criteria is met, and requires further action by the agency before the CATEX can be applied.

The House Transportation and Infrastructure Committee, in its section-by-section analysis, noted that subsection 788(a) is intended to create a categorical exclusion under FAA Order 1050.1F, *Environmental Impacts: Policies and Procedures* (FAA Order 1050.1), for airport projects similar to ones that already exist for Federal highway projects, and that subsection 788(c) clarifies that the categorical exclusion created by subsection (a) still requires the FAA to apply the standard extraordinary circumstances analysis set forth in FAA Order 1050.1^{1,2}.

¹ H.Rept.118-138, 118th Cong., pg. 311 (2024), <https://www.congress.gov/congressional-report/118th-congress/house-report/138/1>.

² Extraordinary circumstances are factors or circumstances in which a normally categorically excluded action may have a significant environmental impact that then requires further analysis in an EA or an EIS. For FAA proposed actions, extraordinary circumstances exist when the

The ARP Airport Planning and Programming Directorate (APP) has determined that ARP EPSs may apply the presumed limited Federal assistance CATEX upon distribution of this memorandum and before the CATEX is incorporated into FAA Order 1050.1.

APP will continue to work with the FAA's Office of Environment and Energy (AEE) to revise FAA Order 1050.1 to comply with the Fiscal Responsibility Act, the 2024 FAA Reauthorization Act, and other applicable regulations. The revised Order will incorporate the CATEX for projects with limited Federal assistance. When AEE issues FAA Order 1050.1G, ARP will rescind this memorandum.

1.2 Defining Federal Funds and Federal Funding Thresholds

Section 788(a)(1) refers to "limited Federal assistance," "Federal funds," and "charges collected under [49 U.S.C. § 40117]." To qualify for the CATEX, the proposed action must receive funding under either Title 49 of the U.S. Code or collect passenger facility charges pursuant to 49 U.S.C. § 40117. However, any Federal funding, regardless of source, would need to be accounted for in calculating whether the Federal funding threshold has been exceeded.

Section 788(a)(2) refers to projects that have a total estimated construction cost of not more than \$35 million and the Federal funds provided for the project comprise less than 15 percent. Section 788(a)(2) does not include reference to the use of PFCs, thus, if PFCs are to be used they should not be included when calculating the total Federal funds when considering the applicability of the limited Federal assistance CATEX pursuant to Section 788(a)(2)³.

Only projects that receive Federal financial assistance can be considered for application of this presumed CATEX.

proposed action involves any of the circumstances described in FAA Order 1050.1F Section 5-2(b) and may have a significant impact.

³ Section 788(a)(1) of the FAA Reauthorization Act of 2024 includes funds from charges collected under 49 U.S.C. § 40117, which establishes the Passenger Facility Charge (PFC) Program, when considering the \$6 million threshold for project funding. However, this citation is not included in Section 788(a)(2) which establishes the threshold of less than 15 percent of projects with a total estimated cost of not more than \$35 million.

1.3 Defining Total Project Cost

The total project cost is the expected cost to construct the project. This may be based on the airport's capital improvement plan, planning level estimates, or bids if available.

1.4 Changes in Circumstances and Re-evaluation

EPSs should consider whether the estimated project costs and the projected level of Federal funding are reasonably supported by the facts.

A change that occurs after the FAA's NEPA determination that raises the level of Federal funding or total project cost beyond the thresholds specified in the CATEX set forth in section 788(a) will trigger re-evaluation in accordance with Paragraph 9-2 of FAA Order 1050.1F and may require the FAA to prepare additional NEPA documentation.

2. Instructions on Applying the Presumed CATEX

EPSs should continue to utilize, where applicable, already established CATEXs as outlined in Section 5-6 of FAA Order 1050.1F for projects that would also likely qualify for the limited Federal assistance CATEX due to the risk of differences in interpretation and application of this new CATEX across Regional Offices (RO) and Airports District Offices (ADO) and to minimize risks associated with potential project segmentation.

2.1 Steps for Determining Applicability of the limited Federal assistance CATEX

The following steps shall be completed to determine whether the presumed limited Federal assistance CATEX is appropriate:

Step 1: Has the sponsor provided documentation to demonstrate that the proposed project has independent utility, does not restrict consideration of alternatives for other reasonably foreseeable transportation improvements, and is not part of a larger proposed action?⁴

⁴ For a categorical exclusion to apply to a proposed action, the proposed action must not be improperly segmented. See, e.g., NEPA requirements related to connected actions and segmentation set forth at 40 CFR 1501.3(b). In addition, if the proposed action requires consultation or coordination pursuant to a special purpose environmental law or an approval, authorization or other action by another Federal agency that trigger a different level of NEPA review than the one employed by the FAA, then those requirements should be satisfied before

If YES, proceed to Step 2.

If NO, request that the project be rescoped to demonstrate independent utility, or if the project cannot be rescoped to demonstrate independent utility ensure the full scope of the project is documented, before further consideration of the applicability of the limited Federal assistance CATEX. Record the analysis and conclusions in the administrative project file.

STEP 2: Does the proposed project fit within a CATEX set forth in FAA Order 1050.1F?

If YES, review for the presence of extraordinary circumstances. If no extraordinary circumstances exist, utilize the existing CATEX(s).

If NO, proceed to Step 3.

STEP 3: Will the proposed project receive Federal funds from any source (e.g., AIP, DOE grants, TIFIA loans, etc.) or use PFCs?

If YES, proceed to Step 4.

If NO, the limited Federal assistance CATEX does not apply. Begin preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS), as appropriate.

STEP 4: Will the proposed project receive Federal funds from a source other than FAA?

If YES: proceed to Step 5.

If NO: proceed to Step 7.

STEP 5: Is the estimated total cost to construct the project more than \$35 million?

If YES, the limited Federal assistance CATEX does not apply. Begin preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS), as appropriate.

the proposed action can proceed. In these circumstances, the applicable requirements must be satisfied regardless of the availability of the limited Federal assistance CATEX for the proposed action.

If NO, proceed to Step 6.

STEP 6: Will the proposed project receive Federal funds from all sources (not including PFC revenues) that total more than 15% of the estimated cost to construct the project?

If YES, the limited Federal assistance CATEX does not apply. Begin preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS), as appropriate.

If NO, review for the presence of extraordinary circumstances. If no extraordinary circumstances exist, the limited Federal assistance CATEX applies.

STEP 7: Will the proposed project receive more than \$6 million in Federal funds from FAA (e.g., AIP, ATP, AIG, etc.) or use more than \$6 million in PFCs?

If YES, the limited Federal assistance CATEX does not apply. Begin preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS), as appropriate.

If NO, review for the presence of extraordinary circumstances. If no extraordinary circumstances exist, the limited Federal assistance CATEX applies.

To ensure the legal sufficiency and defensibility of these determinations, EPSs should document the application of this CATEX and the extraordinary circumstances review for each proposed action in a memo to the administrative project file.

Figure 1 provides a visual summary of the steps.

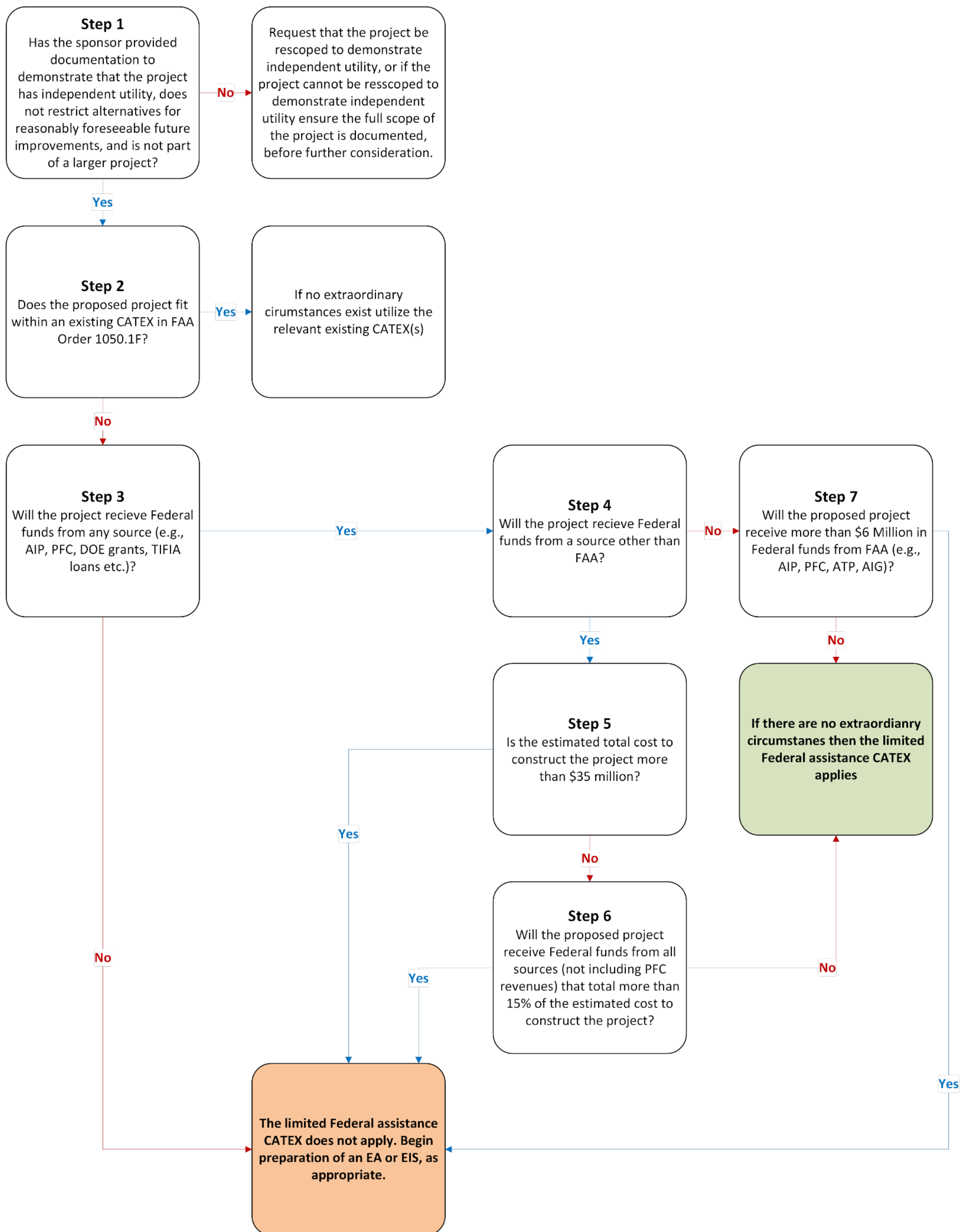


Figure 1: Steps for considering whether the limited Federal assistance CATEX can be applied.

3. Requests for Further Information or Guidance

If airport sponsors, consultants, or others request the application of a CATEX for an airport development project based on the project's limited Federal financial assistance, ARP EPSs should respond by indicating that until the FAA incorporates the section 788(a) CATEX into FAA Order 1050.1G, the FAA will first endeavor to apply CATEXs already established in Order 1050.1F and resort to an examination for applicability of the limited Federal assistance CATEX if there are no previously established CATEXs available. EPSs should also inform those inquiring that they should provide sufficient information regarding the anticipated project costs, supporting documentation that demonstrates how the estimated project cost was derived, and relevant information about project funding dedicated to delivering the proposed project for the FAA's review.

Until FAA Order 1050.1G is published ARP EPSs should coordinate with APP-420 on any projects where the above steps have been undertaken and the EPS concludes application of the limited Federal assistance CATEX is appropriate, prior to finalizing the CATEX documentation.

Please contact Andrew Brooks (andrew.brooks@faa.gov) if you have questions on this memorandum or section 788 and how it applies to airport development projects seeking to utilize Federal financial assistance.