

Fact Sheet for Categorical Exclusions for Projects within an Existing Operational Right-of-Way and Projects Receiving Limited Federal Funding – Revised February 7, 2019

On January 13, 2014, the Federal Highway Administration and the Federal Transit Administration published a Final rule in the *Federal Register* which amends 23 Code of Federal Regulations (CFR) 771.117 to add two new categorical exclusions (CEs) to the “c” list. These new CEs are effective February 12, 2014. The first new CE is for projects which take place entirely within the existing operational right-of-way, and the second new CE is for projects receiving limited federal funding. The new CEs were required by Sections 1316 and 1317 of the Moving Ahead for Project in the 21st Century Act (MAP-21).

- As with all CEs, consideration must be given to the following:
 - Compliance with NEPA requirements related to connected actions and segmentation (i.e. the project must have independent utility, connect logical termini when applicable and not restrict further consideration of alternatives for other reasonably foreseeable transportation improvements). (FHWA Final Rule, “Background,” *Federal Register* Vol. 79, No. 8, January 13, 2014.)
 - Compliance with all other federal and state statutes and regulations such as the Clean Water Act, Section 4(f), Section 106, FESA, CESA, CEQA, etc.
 - 23 CFR 771.117(a) which defines categorical exclusions as actions that:
 - 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 resources;
 - 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 had any significant environmental impacts.
 - 23 CFR 771.117(b) which defines unusual circumstances as:
 - significant environmental impacts;
 - substantial controversy on environmental grounds;
 - significant impacts on properties protected by Section 4(f) or Section 106;
 - or inconsistencies with any federal, state, or local law, requirement, or administrative determination relating to the environmental aspects of the action.
- As noted in Chapters 30 and 34 of the SER, a project description that describes the need, purpose, location, limits, right-of-way requirements, and activities involved has been a longstanding requirement on the Categorical Exemption/Categorical Exclusion (CE/CE) form. The project description will be critical for these new two types of CEs because some congestion relief projects could meet the criteria for a CE. In these cases, additional technical studies would be required, including an air quality conformity determination.
- As always, choose the CE best suited for the project. Due to the many limitations placed on these CEs (explained below), these CEs should only be used if the project does not qualify for another CE under 23 CFR 771.117 (c) or (d) or Appendix A of the CE Assignment MOU.

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Projects within an Existing Operational Right-of-Way - 23 CFR 771.117(c)(22)

- “Existing operational right-of-way refers to right-of-way that has been *disturbed for an existing transportation facility* or is maintained for a transportation purpose. This area includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways¹, mitigation areas, etc.) and other areas maintained for transportation purposes such as clear zone, traffic control signage, landscaping, and rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities. Portions of the right-of-way that have not been disturbed or that are not maintained for transportation purposes are not in the existing operational right-of-way.”
- Existing operational right-of-way also does not include areas outside those areas necessary for existing transportation facilities such as uneconomic remnants, excess right-of-way that is secured by a fence to prevent trespassing, *or that are acquired and held for a future transportation project*. A transportation facility must already exist at the time of the review of the proposed project being considered for the CE. This precludes the acquisition of right-of-way and the subsequent use of this CE to build within that right-of-way.
- Accurate right-of-way requirements are critical when utilizing this CE, because if new right-of-way is required at the time a re-evaluation is done (start of final design and completion of PS&E), then the CE will no longer apply. The project will either have to meet the criteria for a different CE, or an environmental document will have to be prepared.

Projects Receiving Limited Federal Funding - 23 CFR 771.117(c)(23)

- Projects receiving limited federal funding are:
 - **Federally-funded** (in whole or in part) projects:
 1. That receive less than \$ 5,500,515.05 (effective February 6, 2019) of Federal funds; or
 2. With a total estimated cost of not more than \$ 33,003,090.30 (effective February 6, 2019) and Federal funds comprising less than 15 percent of the total estimated project cost (all phases are included in the estimated project cost).
- There must be federal transportation funds AND an FHWA or FTA approval for the project to qualify.
- Accurate cost estimates are critical when utilizing this CE, because if the limits in effect at the time of a re-evaluation² are exceeded, then the CE will no longer apply. The project will either have to meet the criteria for a different CE, or an environmental document will have to be prepared. A re-evaluation would also be triggered if there is an increase in the amount of federal funds for the project beyond the established thresholds and there is still an FHWA and/or FTA action that needs to be taken when these changes occur. For example, if FHWA approvals or grants are needed during construction, another re-evaluation would be triggered.

¹ “Fixed Guideway” means a public transportation facility using and occupying a separate right-of-way for the exclusive use of public transportation such as rail, a fixed catenary system (light rail, trolley, etc.) passenger ferry system, or for a bus rapid transit system.

² A re-evaluation is done at the start of final design, acquisition of “a substantial portion” of the needed right-of-way, and completion of PS&E.