

## Fact Sheet for New Categorical Exclusions (CEs) under 23 CFR 771.117(c), CEs Moved FROM the “d list” TO the “c list,” and Programmatic Agreements for CEs – Effective November 5, 2014

**Introduction:** On October 6, 2014, the Federal Highway Administration and the Federal Transit Administration (FTA) published a Final Rule in the *Federal Register* that amends 23 Code of Federal Regulations (CFR) 771.117 (and 771.118 for FTA) and takes effect November 5, 2014. The changes are as follows:

- Adds four new categorical exclusions (CEs) to the “c list.”
- Moves 771.117(d)(1) through (d)(3) to the “c list” as (c)(26), (c)(27), and (c)(28) and adds 6 new constraints to their use.
- Adds a new CE, (d)(13), to the “d list” to cover those situations in which the “moved” CEs do not qualify under the “c list” due to the new constraints.
- Adds a new section on programmatic agreements between FHWA and State DOTs.

These changes were required by Section 1318 of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21).

### General Considerations:

- 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 have 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. Additionally, the Categorical Exclusion checklist (CE checklist) documents the project's eligibility for a categorical exclusion. The checklist must be completed for each project and included in the project environmental file.
- As always, choose the CE best suited for the project.

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**Four New CEs:**

- **771.117(c)(24):** Localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.
- **771.117(c)(25):** Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. 1341; 1342) carried out to address water pollution or environmental degradation.
- **771.117(c)(29):** Purchase, construction, replacement, or rehabilitation of **ferry vessels** (including improvements to ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities which themselves are within a CE.
- **771.117(c)(30):** Rehabilitation or reconstruction of **existing ferry facilities** that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in the existing facility’s capacity. Example actions include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.

**CEs Moved from the “d List” to the “c List”**

- **771.117(c)(26):** Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes), if the action meets the constraints in paragraph (e) of this section. [Note: Previously 771.117(d)(1).]
- **771.117(c)(27):** Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints in paragraph (e) of this section. [Note: Previously 771.117(d)(2).]
- **771.117(c)(28):** Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings, if the actions meet the constraints in paragraph (e) of this section. [Note: Previously 771.117(d)(3).]

In moving these CEs from the “d list” to the “c list,” a number of constraints were added in order for a project to qualify for processing under 771.117(c). Specifically, actions described in the new (c)(26), (c)(27), and (c)(28) **MAY NOT** be processed as a CE if they involved ANY of the following (771.117(e)):

- (1) An acquisition of more than a minor amount of right-of-way<sup>1</sup> or that would result in any residential or nonresidential displacements;

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<sup>1</sup> The list of constraints is derived from a list originally established in FHWA’s 1989 Programmatic Categorical Exclusion (PCE) Memorandum. This list was refined over time and in most State DOT’s PCE agreements with FHWA, including California’s 2003 PCE agreement, which defined a minor amount of right-of-way not more than ten (10) acres. Therefore, 10 acres should generally be considered the maximum allowed under this CE. Additionally, each situation is unique and a “minor amount of right-of-way” will be defined by the context of the acquisition. Acquiring 10 acres from a 100-acre parcel would likely qualify as a minor amount of right-of-way. Acquiring 10 acres from a 12-acre parcel would likely NOT qualify as a minor amount of right-of-way.

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- (2) An action that needs a bridge permit from the U.S. Coast Guard, or an action that does not meet the terms and conditions of a U.S. Army Corps of Engineers nationwide or general permit under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899;
- (3) A finding of “adverse effect” to historic properties under the National Historic Preservation Act, the use of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (section 4(f)) except for actions resulting in *de minimis* impacts, or a finding of “may affect, likely to adversely affect” threatened or endangered species or critical habitat under the Endangered Species Act;
- (4) Construction of temporary access, or the closure of existing road, bridge, or ramps, that would result in major traffic disruptions;
- (5) Changes in access control;
- (6) A floodplain encroachment other than functionally dependent uses (e.g., bridges, wetlands) or actions that facilitate open space use (e.g., recreational trails, bicycle and pedestrian paths); or construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.

Detailed information regarding each of these constraints can be found in the [Final Rule](#).

If a project cannot be processed under (c)(26), (c)(27), or (c)(28), it may be processed under newly created (d)(13) which reads:

771.117(d)(13): Actions described in paragraphs (c)(26), (c)(27), and (c)(28) of this section that do not meet the constraints in paragraph (e) of this section.

Please note that if a NWP 23 from the U.S. Army Corps of Engineers is desired for the project, you will need to work closely with the project biologist. A pre-construction notification will be required under (c)(26), (c)(27), and (c)(28) until the “moved” CEs have been approved as “c list” CEs by the USACE. Further, the *new* CEs—(c)(24), (c)(25), (c)(29), and (c)(30)—will not qualify for a NWP 23 until the new CEs have been approved by USACE.

### **Programmatic Agreements**

The Final Rule also added the ability for FHWA and State DOTs to enter into programmatic agreements allowing State DOTs to make CE determinations on FHWA’s behalf. As Caltrans already makes such determinations under its 23 USC 326 (CE Assignment) and 23 USC 327 (NEPA Assignment) MOUs, Caltrans is not pursuing programmatic agreements at this time.