



U.S. Department
of Transportation
Federal Highway
Administration

MAP-21 Sections 1316 & 1317

New Categorical Exclusions:

Operational Right of Way

23 CFR 771.117(c)(22)

Limited Federal Assistance

23 CFR 771.117(c)(23)



BACKGROUND

- October 1, 2012 – MAP-21 goes into effect
- February 28, 2013 – FHWA & FTA publish the NPRM in which proposed 2 new CEs for listing in their joint NEPA regulations
- January 13, 2014 – The Final Rule for the 2 CEs is published
- February 12, 2014 – The effective date for the 2 new CEs



THE NEW REGULATION

- Beginning 2/12/14, 23 CFR 771.117(c) is amended by the addition of 2 further actions to the list of Categorically Exclusions:
- 23 CFR 771.117(c)(22) – Projects within the existing operational right-of-way
- 23 CFR 771.117(c)(23) – Federally-funded projects (less than \$5 million or less than 15% of \$30 million total estimated cost)



THE NEW REGULATION (con't)

– Remember:

The new rule results in the addition of two new categories of “action” to 23 CFR 771.117(c)

The rule and MAP-21 do not alter the rest of the CE regulation - 23 CFR 771.117(a), (b), or (d)



23 CFR 771.117(c)(22)

- The new regulation reads:
Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. 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. (con't)



23 CFR 771.117(c)(22) (con't)

- This area include the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, etc.) and other areas maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, ...



23 CFR 771.117(c)(22) (con't)

- ... 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.



23 CFR 771.117(c)(22) (con't)

- 23 U.S.C 101 defines “project” as follows:

The term “project” means any undertaking eligible for assistance under this title.



23 CFR 771.117(c)(22) (con't)

“Existing Operational Right-of-Way”

- The regulation’s second sentence defines the meaning and extent of the phrase, through the use of terms
 - disturbed right-of-way
 - existing transportation facility
 - maintained for a transportation purpose



23 CFR 771.117(c)(22) (con't)

- In the context of the regulation,

“Disturbed” refers to the right-of-way occupied by an “existing transportation facility”

Therefore, a surface transportation facility must already exist in the right-of-way in question when a project is proposed for consideration for this CE



23 CFR 771.117(c)(22) (con't)

- “Existing Transportation Facility” refers to the presence of a surface transportation facility occupying the right-of-way within which the project proposed for this CE is to be located.
- Therefore, rights-of-way acquired and held for a future transportation facility are not suitable for this CE.



23 CFR 771.117(c)(22) (con't)

“Maintained for a transportation purpose”
refers to areas in the right-of-way not
traditionally considered a transportation facility
but are maintained to serve the existing
transportation facility
E.g. – clear zones, areas for the safety and
security of the facility (both given as examples in
the regulation).



23 CFR 771.117(c)(22) (con't)

In these examples, “Maintain” is not necessarily equivalent to regular maintenance actions as may be conducted elsewhere in the footprint of the existing operational right-of-way.

Areas outside of those necessary for existing transportation facilities – e.g., excess r-o-w, uneconomic remnants – are not covered by this CE.



23 CFR 771.117(c)(22) (con't)

Q: Can this CE be applied to a project requiring a temporary easement/temporary work located outside of the operational right of-way?

A: YES, but the final project must be entirely within the operational right-of-way.



23 CFR 771.117(c)(23)

The new regulation reads:

(23) Federally-funded project:

- (i) That receive less than \$5,000,000 of Federal funds; or
- (ii) With a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated cost



23 771.117(c)(23) (con't)

Is a project's amount of Federal funding an indicator of the significance of its environmental impacts?

- - This CE is still subject to the requirements of the CE regulation – basically, that there are no significant impacts associated with the action.
- - Other environmental laws still apply, which can result in this CE's inapplicability



23 CFR 771.117(c)(23) (con't)

- A project might include funds from a variety of Federal sources, but this CE is limited to FHWA /FTA joint NEPA procedures – the CE is only available for FHWA and FTA actions.
- A project meeting the funding limitations , and including another FHWA approval (not related to \$) can qualify for this CE
- Projects not receiving Federal funds, but requiring other forms of approval from FHWA (e.g., Interstate System access change approval), don't qualify for this CE but may qualify for some other type of CE.



23 CFR 771.117(c)(23) (con't)

Changes to “Total Estimated Costs”

A Re-evaluation of the CE will be triggered when:

- The amount of Federal funds in the project increase beyond the specified thresholds, and
- There is still an FHWA/FTA action to be taken when the changes in costs occur.



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*Wait,
There's More!*



Sec. 1323 Requirements

Sec. 1323(b) – Additional Report

“Not later than 2 years after the date of enactment of this Act, the Secretary shall submit ... a report on the types and justification for the additional categorical exclusions granted under the authority provided under sections 1316 & 1317.”



“Additional Report” (con’t)

“...Types and Justification for the additional CEs granted under the authority ...”

“Types” – the kinds of actions applied to this CE
Information about the action, e.g.: what it is, where it is, its extent/magnitude, whether other agencies’ approvals were required.

“Justification” - the reason the CE was used, e.g. instead of an action that could apply to the (d) list.



Follow-Up

Questions about the application of a project to either of these new CEs and/or the one-time report?

1. Talk with your contact at your state's FHWA Division Office
2. Contact FHWA HQs' Office of Project Development & Environmental Review:

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Questions?

