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VIA ELECTRONIC SUBMITTAL ([www.regulations.gov](http://www.regulations.gov))

U.S. Department of Transportation  
Dockets Management Facility  
Room W12-140  
1200 New Jersey Avenue SE.  
Washington, DC 20590

Re: Comments on Notice of Proposed Rulemaking for Programmatic Agreements and  
Additional Categorical Exclusions (Docket No. FHWA-2013-0049)

To the Federal Highway Administration and Federal Transit Administration:

The American Association of State Highway and Transportation Officials (AASHTO) welcomes the opportunity to submit these comments on the notice of proposed rulemaking (NPRM) issued by the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) on September 19, 2013. (78 Fed. Reg. 57587). The NPRM proposes changes to the regulations governing the use of categorical exclusions (CEs) for highway and transit projects.

AASHTO is a nonprofit, nonpartisan association representing the State transportation departments in the 50 states, the District of Columbia, and Puerto Rico. Its primary goal is to foster the development, operation, and maintenance of an integrated national transportation system. AASHTO members work closely with USDOT agencies to operate, maintain, and improve the nation's transportation system.

### ***Background***

Section 1318 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) directed USDOT to take several actions regarding the use of CEs for transportation projects:

- Section 1318(a) directed USDOT to survey the use of existing CEs for transportation projects since 2005, and publish the results of that survey. It also required USDOT to solicit requests for the designation of new CEs.
- Section 1318(b) directed USDOT to propose new CEs, based on the results of the survey, "to the extent that the categorical exclusions meet the criteria for a categorical exclusion under" existing Council on Environmental Quality (CEQ) and FHWA/FTA regulations.
- Section 1318(c) required USDOT to move three existing CEs from the "(d) list" to the "(c) list" in 23 C.F.R. Part 771, "to the extent to that such movement complies with the

criteria for a categorical exclusion” under existing CEQ regulations. This change would reduce the level of documentation needed when a CE is approved.

- Section 1318(d) directed USDOT to “seek opportunities to enter into programmatic agreements with the States that establish efficient administrative procedures for carrying out environmental and other required project reviews.” It also provided that programmatic agreements under this section may allow a State to make a CE determination on behalf of FHWA. This section did not call for a rulemaking.

### ***AASHTO Comments on the Proposed Regulations***

Section 1318 of MAP-21 was intended to expand the availability of CEs for highway and transit projects, while reducing the amount of documentation needed to apply those CEs. While aspects of the proposed regulations are consistent with that intent, others are not. As described below, we urge USDOT to adopt a final rule that more fully carries out the intent of the statute. Our comments focus on the three main aspects of the proposed rule: creating new CEs, shifting CEs from the (c) list to the (d) list, and codifying requirements for programmatic CE agreements.

#### **1. New Categorical Exclusions**

The NPRM proposes to expand the list of CEs in Part 771 by creating four new CEs for highway projects and five new CEs for transit projects. We welcome the proposal to create new CEs, but have a few concerns about the new CEs in the proposed rule. Our general concern is that the proposed rule includes only a handful of the new CEs proposed by transportation agencies in their survey responses. In addition to considering our recommendations below to expand the availability of CEs and reduce proposed documentation requirements, we encourage FHWA to continue to look for and consider additional appropriate CEs.

We also have several specific comments regarding the proposed new CEs:

##### **a) Proposed CE for Environmental Fieldwork Activities**

FHWA and FTA have proposed a new CE that would cover “localized geotechnical and other investigations to provide information for preliminary design and for environmental analyses and permitting, including archeological investigations and wetland surveys.” (78 Fed. Reg. 57601, 57602). This new CE would be included on the (c) list for both FHWA and FTA projects.

We agree that, *if* these types of activities are subject to NEPA review, they should be covered by a CE on the (c) list. However, NEPA review is required only for federal actions. It is important to clarify that fieldwork activities carried out with non-federal funds do not require NEPA review, because there is no federal action.

In addition, we are concerned that this CE could be construed to require separate determinations for each individual activity - e.g., for each wetland survey, archeological investigation, etc. We recommend clarifying that, when this type of CE is issued, a single determination can be made for all fieldwork activities on a single project. It is important to ensure that the creation of this new CE does not create a major increase in paperwork burdens on transportation agencies.

##### **b) New CEs Proposed by FTA but not FHWA**

The NPRM proposes two new CEs for transit projects, but does not propose the same CEs for highway projects. The two new CEs would apply to (1) “bridge removal and bridge removal related activities” and (2) “preventative maintenance ... to culverts and channels within and adjacent to transportation right-of-way” and certain related activities. (78 Fed. Reg. 57602).

In the NPRM, FHWA gives the following reasons for its decision not to propose these CEs:

- “The FHWA does not have sufficient experience with projects involving only bridge removal to warrant the creation of a new CE. Typically, for FHWA, a bridge removal action is associated with a bridge replacement project that is already listed as a CE.”
- “For preventive maintenance actions, FHWA found that the majority of actions that would be eligible as preventive maintenance under title 23 would qualify for other CEs in section 771.117 and therefore, no new FHWA CE was needed at this time.”

78 Fed. Reg. 57594.

We believe these two new CEs would be beneficial for highway projects, and that existing information supports adopting these CEs for highway projects as well as transit projects.

- It would be beneficial to provide a CE specifically for bridge removal because, while a bridge removal is typically associated with a bridge replacement, that is not always the case. FHWA should adopt this CE in order to provide coverage for bridge-removal projects in situations where the bridge-replacement CE does not apply.
- It would be beneficial to provide a CE specifically for preventative maintenance activities in culverts and channels because it would eliminate uncertainty about whether these types of activities are covered by other CEs. Also, if this CE were adopted for transit projects but not highway projects, it may create a perception that FHWA’s regulations do not allow a CE to be used for those activities. FHWA should adopt this CE in order to make clear that these activities are covered by a CE to the same extent for highway projects as for transit projects. Look at C list.

The FTA’s rulemaking record provides the necessary factual support for FHWA to adopt both of these CEs, because the impacts of these activities do not depend on whether they are being carried out as part of a highway project or a transit project. Therefore, an additional round of rulemaking is not required. We urge FHWA to adopt these two CEs for highway projects as part of its final rule in this rulemaking process.

c) CE Not Proposed for Early Right-of-Way Acquisitions

The NPRM notes that FHWA considered, but decided not to propose, a CE that would cover early right-of-way acquisitions that are authorized under Section 1302 of MAP-21, which amended 23 U.S.C. § 108(d). The NPRM explains that FHWA elected not to propose such a CE at this time, because FHWA has not completed procedures to implement Section 108(d). The NPRM also notes that “early acquisition projects using Federal funds that meet the statutory conditions in section 108(d) may be processed as a (d)-listed CE, so long as unusual circumstances do not exist ....” (78 Fed. Reg. 567590).

We welcome the acknowledgement that early right-of-way acquisitions under Section 108(d) can be approved as CEs, even though they are not specifically included in the (d) list. However, we urge FHWA to move expeditiously to adopt a CE that specifically covers early right-of-way acquisitions under Section 108(d), in order to clarify that these types of activities - like hardship and protective acquisitions - are covered by a CE. In addition, we recommend that this early acquisition CE be placed in the (c) list. The mere acquisition of property does not impact the environment.

Moreover, existing regulation (23 CFR 771.117(b)) provides that an “action which normally would be classified as a CE but could involve unusual circumstances” will require additional review to determine if CE classification is proper for the action. Congress changed 23 USC 108(d) to expedite property acquisition. The protection in existing regulations (771.117(b)), for the case of “unusual circumstances” is a sufficient safeguard to warrant inclusion of an early acquisition CE in the (c) list.

## **2. Moving Existing Categorical Exclusions from (d) List to (c) List.**

The NPRM proposes to move three existing CEs for highway projects from Section 771.117(d) to Section 771.117(c) - that is, from the (d) list to the (c) list - as directed in Section 1318. This shift should allow these CEs to be applied without the need for documentation to be prepared, beyond the project description itself. The NPRM, however, proposes to limit the availability of these CEs by establishing six “constraints” that need to be satisfied before these three CEs can be applied. Those six constraints would be listed in a new subsection (e). In addition, the NPRM would retain these CEs in their “unconstrained” form on the (d) list, as the new (d)(13), so that they remain available for projects that do not satisfy all of the constraints.

We recognize that the statute requires these CEs to be shifted only “to the extent to that such movement complies” with the criteria for CEs in the CEQ regulations. In addition, we welcome the proposal to retain these CEs on the (d) list in their “unconstrained” form, so there is no loss of existing flexibility. Nonetheless, as outlined below, we have concerns regarding the proposed approach for moving these CEs.

### **a) Availability of a Less Restrictive Approach**

First, we believe that a less restrictive approach is available for ensuring compliance with the criteria for CEs in the CEQ regulations. Our concern with the constraints, in addition to the increased documentation requirements and limited availability of the CEs, is that they reflect a one-size-fits-all approach: all States would be subject to the same list of constraints, regardless of the unique circumstances in each State. Instead of inserting the constraints into regulations, FHWA could issue guidance for determining whether additional documentation needs to be prepared to assess the potential for “unusual circumstances.” This approach would build on the existing requirement in 23 CFR 771.117(b), which requires “appropriate environmental studies to determine if the CE classification is proper” for any action that “could involve unusual circumstances.”

### **b) Documentation Requirements for Constraints**

Second, we are concerned about the documentation requirements that could arise if these new constraints are implemented. If States are expected to document the absence of each of these

conditions each time the CE is applied, the benefit of shifting these CEs to the (c) list will be diminished or lost altogether. We recommend clarifying that the absence of these constraints can normally be documented with a brief checklist. In addition, we recommend that the final rule itself explicitly recognize that the documentation requirements for a (c)-list CE are lower than the requirements for a (d)-list CE. For example, the final rule could incorporate into the regulations themselves the statement that is included in the preamble to the proposed rule: “The project description [for a (c)-list CE] typically contains all of the information necessary to determine if the action fits the description of the CE and that no unusual circumstances exist that would require further environmental studies.” (78 Fed. Reg. 57588).

We also note that some of the constraints involve subjective determinations - e.g., “more than a minor amount of right-of-way” and “major traffic disruptions or substantial environmental impacts.” We agree that it is appropriate to leave discretion to States and FHWA Division Offices to determine if these criteria are met, rather than establishing specific numerical thresholds in the regulation. (*See* 78 Fed. Reg. 57595). However, we recommend clarifying in the final rule itself that States and Division Offices can adopt specific thresholds for determining whether an action meets these criteria. Adopting specific thresholds, on a State-by-State basis, will help to simplify the process for determining that the criteria are met.

#### c) Flexibility

Third, we are concerned that some of the constraints are too strict, and therefore may preclude use of the CEs for projects with clearly minor impacts. If the constraints are retained, we recommend the following changes:

- Constraint # 5 would preclude use of the CEs for projects that involve “changes in access control.” We recommend revising this constraint to refer to changes in access control “that raise major concerns regarding environmental effects.” The final rule also should clarify that the States and Division Offices can adopt specific criteria for determining if this constraint is met.
- Constraint #6 would preclude the use of the CEs for projects that involve “floodplain encroachment other than functionally dependent uses.” We recommend revising this constraint to refer to projects with floodplain encroachment “that adversely affect the function of the floodplain.” The final rule also should clarify that the States and Division Offices can adopt specific criteria for determining if this constraint is met.

#### d) CE for 4R Projects

Finally, if the constraints are retained, we recommend splitting proposed CE (c)(26) into two separate provisions, one of which could be adopted without constraints because it would cover projects with clearly minor impacts.

Currently, this proposed CE would cover “Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing) if the action meets the conditions in paragraph (e) of this section.” Within the scope of this CE, the activities most likely to have the potential for significant impacts are those involving adding shoulders and adding auxiliary lanes. The other activities - commonly known as “4R” work - typically have no significant impacts.

If the constraints are retained, we suggest that FHWA consider splitting this CE into two parts: (1) a CE that covers only the 4R activities, without the constraints, and (2) a CE that covers projects that involve adding shoulders and adding auxiliary lanes, with the constraints. This approach would streamline the approval process for 4R activities that do not involve construction of wider shoulders or additional lanes.

### 3. Programmatic CEs.

The NPRM proposes to establish a new section in the regulations regarding programmatic CE (PCE) agreements with States. This new section recognizes FHWA's authority, under Section 1318(d) of MAP-21, to enter PCE agreements allowing a State to "make a NEPA CE certification or determination and approval on FHWA's behalf." This section also establishes several requirements that all PCE agreements must meet, and requires existing PCE agreements to be amended as necessary to conform to the new requirements. (78 Fed. Reg. 57602).

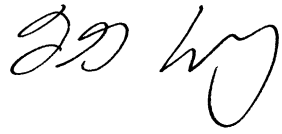
We welcome the statement in the NPRM recognizing that Section 1318 "allow[s] a State DOT to make determinations on FHWA's behalf, without the need for certification and FHWA's approval as required under 23 CFR 771.117" and that "this new opportunity would avoid the need for State DOT certification and FHWA review before the start of the project for those CEs identified in the agreement." (78 Fed. Reg. 57591). This interpretation is consistent with the intent of Section 1318 and will help to streamline the process for approving CEs.

While the broader authority is a positive development, we are concerned that the proposed regulations interpret it too narrowly. The NPRM states that FHWA interprets Section 1318(d)(3) as "limiting this expanded authority to actions listed in regulation ... and any other CE that is added through a process consistent with the requirements of 40 CFR 1508.4." (78 Fed. Reg. 57591). Section 1508.4 describes the process for a federal agency to adopt new CEs. We are concerned that this statement in the NPRM means that PCE agreements can only include CEs that are specifically listed in the existing regulations, or that are added to the regulations through a rulemaking. Such an approach would not be consistent with the statute: Section 1318(d)(3) provides that a PCE agreement may include CEs "*in addition to*" the CEs listed in the (c) list and (d) list in the regulations. The final rule should state that a PCE agreement can authorize a State to approve CEs that are not listed in FHWA's regulations, as long as those CEs are "consistent with" the criteria in the CEQ regulations.

In addition, we have concerns with the proposal to establish new requirements for all PCE agreements and to require all existing agreements to be amended for consistency with the new requirements. The statute included no such requirements. Imposing these requirements through rulemaking is inconsistent with the intent of the statute. To the extent that greater consistency is needed among PCE agreements, we recommend that FHWA release non-binding guidance, including a template agreement, rather than issue regulations. The advantage of a template is that it can be modified on a case-by-case basis, taking into account the circumstances of each State.

Thank you for the opportunity to submit comments. If you have questions or would like additional input, please contact Shannon Eggleston at (202) 624-3649.

Sincerely,

A handwritten signature in black ink, appearing to read "Bud Wright". The signature is written in a cursive style with a large, looped initial "B" and a long, sweeping tail.

Bud Wright Executive Director