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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 Categorical Exclusions for Projects within Existing Right-of-Way and Projects with Limited Federal Assistance (Docket No. FHWA-2012-0007)

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) pursuant to Section 1316 and 1317 of the Moving Ahead for the 21st Century Act (MAP-21). The NPRM was published in the Federal Register on February 28, 2013. (78 Fed. Reg. 13609).

AASHTO is a nonprofit, nonpartisan association representing the State transportation departments in the 50 states, the District of Columbia, and Puerto Rico. It represents all five transportation modes: air, highways, public transportation, rail, and water. AASHTO's primary goal is to foster the development, operation, and maintenance of an integrated national transportation system. Our members work closely with USDOT to achieve this goal.

### *Overview*

Sections 1316 and 1317 of MAP-21 require FHWA and FTA to establish new categorical exclusions (CEs) for two categories of projects: (1) projects within the existing operational right-of-way and (2) projects that receive limited federal financial assistance. These sections describe, in detail, the types of actions that must be included in the new CEs. They also require the new CEs to be included in 23 CFR 771.117(c).

These sections of MAP-21 were enacted as part of a broad package of measures to accelerate the delivery of transportation projects. In enacting these measures, Congress declared that "it is in the national interest to expedite the delivery of surface transportation projects by substantially reducing the average length of the environmental review process." 23 USC 101(b)(4). The goal

of accelerating project delivery provides the over-arching policy direction for implementation of MAP-21. This policy direction must inform the interpretation of the provisions that require the creation of new CEs: the new CEs must provide *new flexibility*, expanding the universe of projects that can be approved CEs.

We appreciate the timeliness with which FHWA and FTA are progressing implementation of the MAP 21 Project Delivery provisions and are encouraged by the positive direction of the implementation activities undertaken thus far. However, we are concerned that these proposed regulations include constraints not required by the statute that would limit the potential applicability of these new CEs.

### ***Section 1316: CEs for Projects in Existing ROW***

Section 1316 of MAP-21 directs FHWA and FTA to “designate any project (as defined in section 101(a) of title 23, United States Code) within an existing operational right-of-way as an action categorically excluded” from the requirements to prepare an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act (NEPA). The statute requires this new CE to be included in 23 CFR § 771.117(c).

We have two concerns with the scope of the CE as defined in the proposed rule: (1) it would narrow the scope of the CE; and (2) it would impose documentation requirements that are inconsistent with inclusion of this CE in the “(c)” list in 23 CFR § 771.117.

*Scope of CE.* The NPRM adopts a definition of “operational right-of-way” that is considerably narrower than the definition of this term in the statute:

- The statute defines “operational right-of-way” to mean “all real property interests *acquired for* the construction, operation, or mitigation of a project ... including the locations of the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway.” (emphasis added)
- The NPRM would define this term to include only “portions of the right-of-way that have been disturbed for an existing transportation facility or are regularly maintained for transportation purposes” and to exclude lands “that are not currently being used or not regularly maintained for transportation purposes.” The NPRM explains that this definition is intended to include only lands “*acquired, needed, and used*” for transportation purposes. (emphasis added)

The definition in the NPRM is narrower than the statute because it would exclude lands that were “acquired for” transportation use but are not currently being used for that purpose - e.g., lands acquired for future expansion of the facility - and because it may also exclude lands that have been acquired and are in use as mitigation sites. The intent of Congress was to apply the CE to all lands “acquired for” the construction, operation, and mitigation of a transportation facility, regardless of whether the lands are “disturbed” or “regularly maintained,” and regardless of whether the lands are currently “needed and used” for transportation purposes. In addition, the proposed language may have the unintended consequence of discouraging natural methods of managing roadside vegetation, because State and local governments would conclude that the

entire right-of-way must be “disturbed” or “regularly maintained” in order to ensure applicability of this CE. As such, the final rule should define the CE to cover “*all real property interests acquired for the construction, operation, or mitigation of a project.*”

*Documentation Requirements.* The NPRM includes documentation requirements that would apply to all actions covered by this CE. Section 1316 requires this new CE to be included in 23 CFR 771.117(c), which includes activities that are presumed to “meet the criteria for CEs in the CEQ regulations” without the need for documentation. Yet the NPRM states that:

For all actions processed under these proposed CEs, the project record would need to demonstrate that it fits within the conditions specified in the proposed CE language and that no unusual circumstances exist that require environmental studies to determine whether the CE classification is proper or further NEPA analysis and documentation is required.

This language is, in effect, requiring the preparation of documentation for “all actions” covered by this CE. This requirement would treat this CE as if it were included 23 CFR 771.117(d), which requires the applicant to “submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result.” Requiring this additional documentation is not consistent with the statutory direction to place this new CE in the “(c)” list rather than the “(d)” list in 23 CFR 771.117.

Because Congress required that this CE be included on the “(c)” list, the CE should be available without the need to prepare documentation specifically for the purpose of proving the absence of unusual circumstances. Other regulatory requirements - e.g., protecting wetlands, endangered species, and historic sites - would continue to apply, ensuring that unusual circumstances applicable to these resources are identified and addressed.

### ***Section 1317: CE for Projects with Limited Federal Assistance***

Section 1317 of MAP-21 directs FHWA and FTA to establish a new CE that applies to “any project” that (1) “receives less than \$5,000,000 of Federal funds” or (2) has “a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated project cost.” The statute requires this new CE to be included in 23 CFR 771.117(c).

We have two concerns with the scope of the CE as defined in the proposed rule: (1) it would limit application of the CE to projects for which funding is the only FHWA and/or FTA approval; and (2) it may impose documentation requirements that are inconsistent with inclusion of this CE in the “(c)” list in 23 CFR § 771.117. In addition, we would like clarification regarding the circumstances under which re-evaluation would be required.

*Exclusion of Actions that Require Other Administration Approvals.* The NPRM states in the preamble that the proposed CE is intended to be “limited to situations where the only Agency action involved is funding.” This limitation would prevent the CE from being applied to situations where a project requires another FHWA or FTA approval - e.g., FHWA approval for a change in Interstate access. The statutory language requires the CE to cover “any project” that meets the specified funding thresholds. As such, this restriction should not be imposed on the availability of this CE.

Documentation Requirements. It is unclear whether the proposed rule would require documentation demonstrating the absence of unusual circumstances before applying the CEs for projects with limited federal assistance. Section 1317 directs that the CEs for projects with limited federal assistance be included in the “(c)” list. Consistent with that intent, documentation should not normally be required prior to application of these CEs.

Re-Evaluation After NEPA Completion. The NPRM states that “A change occurring after the NEPA determination, while there is still an FHWA and/or FTA action to be taken, that raises the level of Federal funding beyond the thresholds specified in the CEs will trigger re-evaluation under 23 CFR 771.129 and possible preparation of additional NEPA documentation.” The CE has two elements:

- It applies if the project “received” \$5 million or less in federal funding. This element is based on the actual amount of Federal funding received.
- It also applies if the project has an “estimated project cost” of not more than \$30 million and federal funds comprise less than 15% of that amount.

If the State relies on the second element, the applicability of the CE would be determined solely based on the “*estimated project cost*” at the time the NEPA documentation is prepared. The preamble to the final rule should clarify that, when a State relies upon the second element of Section 1317, the only changes that could trigger reevaluation of the CE would be (1) increase in the percentage of federal funds above the 15% threshold, or (2) change in the project itself to include activities not covered by the original CE.

For these reasons, we recommend that the proposed CEs for projects with limited federal assistance be revised to apply to all projects that meet the specified funding thresholds. Other regulatory requirements would continue to apply ensuring that unusual circumstances are identified and addressed.

Thank you for the opportunity to submit comments. If you 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 stylized and cursive.

Bud Wright  
Executive Director