



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**23 CFR Part 771**

**Federal Transit Administration**

**49 CFR Part 622**

**[Docket No. FHWA-2013-0007]**

**FHWA RIN 2125-AF48**

**FTA RIN 2132-AB05**

**Environmental Impact and Related Procedures**

**AGENCY:** Federal Highway Administration, Federal Transit Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) joint procedures that implement the National Environmental Policy Act (NEPA) by adding new categorical exclusions (CE) for projects within an existing operational right-of-way and projects receiving limited Federal funding, as described in sections 1316 and 1317, respectively, of the Moving Ahead for Progress in the 21st Century Act (MAP-21).

**DATES:** Effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** For the Federal Highway Administration: Kreig Larson, Office of Project Delivery and Environmental Review, HEPE, (202) 366-2056, or Jomar Maldonado, Office of the Chief Counsel, (202) 366-1373, Federal Highway Administration, 1200 New Jersey Ave., SE., Washington, DC

20590-0001. For the Federal Transit Administration: Megan Blum at (202) 366-0463, Office of Planning and Environment (TPE), (202) 366-0463; or Dana Nifosi at (202) 366-4011, Office of Chief Counsel (TCC). Office hours are from 8:00 a.m. to 4:30 p.m. E.T., Monday through Friday, except Federal holidays.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

On July 6, 2012, President Obama signed into law MAP-21, Pub. L. 112-141, 126 Stat. 405, which contains new requirements that the FHWA and the FTA, hereafter referred to as the “Agencies,” must meet in complying with NEPA (42 U.S.C. 4321 et seq.). Sections 1316 and 1317 of MAP-21 require the Secretary of Transportation to promulgate regulations designating two types of actions as categorical exclusions in 23 CFR part 771: (1) any project (as defined in 23 U.S.C. 101(a)) within an existing operational right-of-way; and (2) any project that receives less than \$5,000,000 of Federal funds or with 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, respectively. The Agencies are carrying out this rulemaking on behalf of the Secretary.

The Agencies’ joint procedures at 23 CFR part 771 describe how the Agencies comply with NEPA and the Council on Environmental Quality (CEQ) regulations implementing NEPA, and include categorical exclusions that identify actions the Agencies have determined do not normally have the potential for significant environmental impacts and therefore do not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS), pursuant to 40 CFR 1508.4. Section 771.117 applies to FHWA actions and section 771.118 applies to FTA actions.

Sections 771.117(c) and 771.118(c) establish specific lists of categories of actions, or (c)-list CEs, that the Agencies have determined normally do not individually or cumulatively have a significant effect on the human environment, and do not require an EA or EIS. Sections 771.117(d) and 771.118(d) establish example lists of categorical exclusions, or (d)-list CEs, that the Agencies also have determined are normally categorically excluded from further NEPA review but require Agency approval based on additional documentation demonstrating that the specific criteria for the CE are satisfied and that no significant environmental impacts will result from the action. Additionally, sections 771.117 and 771.118 include the requirement for considering unusual circumstances, which is how the Agencies consider extraordinary circumstances in accordance with the CEQ regulations. These refer to circumstances in which a normally excluded action may have a significant environmental effect and, therefore, requires an EA or EIS. Examples of unusual circumstances include substantial controversy on environmental grounds, significant impacts on properties protected by section 4(f) of the Department of Transportation (DOT) Act (23 U.S.C. 138; 49 U.S.C. 303) or section 106 of the National Historic Preservation Act (NHPA), or inconsistencies with any Federal, State, or local law, requirement, or administrative determination relating to the environmental aspects of the action (23 CFR 771.117(b); 23 CFR 771.118(b)). This rulemaking does not change the procedural requirements for the Agencies' approval of projects as CEs, either for (c)-list CEs or for (d)-list CEs.

In order to qualify for either of the new CEs, the action must comply with NEPA requirements relating to connected actions and segmentation (see, e.g., 40 CFR 1508.25, and 23 CFR 771.111(f)). To avoid impermissible segmentation, the action must have

independent utility, connect logical termini when applicable (i.e., linear facilities), and not restrict consideration of alternatives for other reasonably foreseeable transportation improvements. In addition, even though a CE may apply to a proposed action, thereby satisfying NEPA requirements, all other requirements applicable to the activity under other Federal and State statutes and regulations still apply, such as the Clean Water Act (CWA), Clean Air Act, General Bridge Act of 1946, section 4(f) of the DOT Act, NHPA, and the Endangered Species Act (ESA). Some of these requirements may require the collection and analysis of information, or coordination and consultation efforts that are independent of the Agencies' NEPA CE determination. Also, some of these requirements may involve actions by other Federal agencies (such as approvals or issuance of permits) that could inform the Agency determination regarding unusual circumstances and potentially trigger a different level of NEPA review for those Federal agencies. These requirements must be met before the action proceeds, regardless of the availability of a CE for the transportation project under 23 CFR part 771.

This final rule contains a description of the notice of proposed rulemaking (NPRM) issued on February 28, 2013 (78 FR 13609), a summary of public comments received on that NPRM and responses to those comments, as well as a description of the final regulatory text at the end of this rule. Those changes to the regulatory text not described in the summary and response to comments are described in the Section-by-Section Analysis. Following the Section-by-Section Analysis, this rule explains the various rulemaking requirements that apply and how they have been met. Finally, this rule provides the regulatory text.

### **Notice of Proposed Rulemaking**

On February 28, 2013, the Agencies published an NPRM, in which the Agencies proposed 2 new CEs to be listed in 23 CFR 771.117(c) and 23 CFR 771.118(c) as mandated by sections 1316 and 1317 of MAP-21. The Agencies proposed CEs based on the statutory language provided under sections 1316 and 1317, as well as clarifying language the Agencies proposed to achieve the overall purposes of sections 1316 and 1317 or avoid confusion in program administration. The NPRM sought comments on how the Agencies proposed to interpret and implement the provisions.

The public comment period closed on April 29, 2013. The Agencies considered all comments received when developing this final rule.

### **Summary of Comments and Responses**

The Agencies received comments from a total of 40 entities, which included 12 State DOTs and agencies, 4 transit agencies, 8 State/local transportation entities, ten transportation interest groups, 3 national/regional environmental interest groups, one Federal agency, and 2 individuals. The submitted comments have been organized by section (1316 or 1317) and by theme or topic.

All of the 40 parties commenting on the NRPM generally supported the proposed CEs contained in MAP-21 sections 1316 and 1317. Thirty-five reviewers commented on the proposed CE language at sections 771.117(c)(22) and 771.118(c)(12) for projects within the “operational right-of-way.” Thirty-two parties commented on the Agencies’ proposed CE language at sections 771.117(c)(23) and 771.118(c)(13) for projects receiving limited Federal assistance. Eleven parties commented on the need to review or document “unusual circumstances” for projects seeking to use either of the proposed CEs. Nine of the commenting parties supported the proposed rule as it was written in the

NPRM. The majority of commenters suggested additional clarifications on the use of the CEs, including expanding or limiting their scope.

### General

Five State DOTs, two transportation interest groups, three national/regional environmental interest groups, and one Federal agency submitted comments regarding the requirements for the CEs to address unusual circumstances or to document the absence of such circumstances. Seven commenters expressed the opinion that requiring additional documentation is inconsistent with the statutory direction to include these CEs in 23 CFR 771.117(c). Four commenters expressed the opinion that requiring evaluation and documentation for the consideration of unusual circumstances is appropriate and consistent with the statute. One commenter recommended a clarification that documentation should be retained by the applicant and not require further approval by the Agencies. Another commenter indicated that the proposed rule restricted the availability of the new CEs by establishing a “no unusual circumstances” test, and that nowhere in MAP-21 did Congress incorporate the “no unusual circumstances” test to the proposed CEs.

The MAP-21 sections 1316 and 1317 require that the new CEs be consistent with 40 CFR 1508.4. Section 1508.4 requires Federal agencies to take into account “extraordinary circumstances in which a normally excluded action may have a significant environmental effect.” The Agencies use the term “unusual circumstances” when defining extraordinary circumstances. The Agencies addressed the need for considering unusual circumstances in the NPRM preamble and noted that actions falling under the new CEs are not exempt from meeting this requirement. Consideration of unusual

circumstances applies to all CEs addressed in sections 771.117(c) and (d), and 771.118(c) and (d); the Agencies are not creating a new standard for assessing actions through this rulemaking. The potential for unusual circumstances for a project does not automatically trigger an EA or EIS. The regulations require the Agencies to conduct appropriate environmental studies to determine if the CE classification is proper (23 CFR 771.117(b) and 771.118(b)). This means that documentation is expected to demonstrate that there are no unusual circumstances that warrant a higher level of NEPA review even when the project does not require detailed documentation and Agency review. The Agencies have not created a new “no unusual circumstances” requirement because that requirement is long-standing. Instead, in the NPRM, the Agencies re-emphasized the need to consider unusual circumstances for all CEs as required by 40 CFR 1508.4 and the Agencies’ NEPA implementing procedures at 23 CFR part 771.

One commenter expressed appreciation for the reference to unusual circumstances, but indicated that some of the criteria were not necessarily adequate safeguards. The commenter indicated that reviews under section 4(f) of the DOT Act and section 106 of the NHPA were examples when thresholds in an environmental law would not determine whether or not the impact of an action is significant for NEPA purposes. Another commenter indicated that regulatory requirements protecting wetlands, endangered species, and historic properties would continue to apply and would ensure that unusual circumstances applicable to these resources are identified and addressed.

The Agencies consider unusual circumstances in determining whether an action that would normally be classified as a CE deserves another level of NEPA review. Sections 771.117(b) and 771.118(b) provide non-inclusive lists of examples for

consideration. “Significant impact on properties protected by section 4(f) of the DOT Act and Section 106 of the [NHPA]” is included in the list of examples. In the Agencies’ experience these examples have been appropriate for identifying when an action that would otherwise be classified as a CE merits an EA or EIS for the consideration of environmental impacts. It is important to note that unusual circumstances may require the consideration of factors, impacts, or resources that do not fall under an established regulatory framework (for example, substantial controversy on environmental grounds). The Agencies do not believe that compliance with legal requirements should be the only unusual circumstance considered for projects.

One commenter indicated that language in the NPRM requiring actions under the proposed CE to meet applicable requirements under other Federal and State laws should be deleted from the final rule. Two commenters expressed appreciation for the inclusion of the NPRM preamble reference that other laws may require collection and analysis of information independent of the Agencies’ NEPA determination, and the discussion that these other laws may trigger a different level of NEPA review for another Federal agency. The commenters indicated that this was the intent of Congress because these provisions in MAP-21 did not apply to or require rulemaking from any other Federal agency. One commenter questioned whether it was possible for FHWA to implement sections 1316 and 1317 without running afoul of environmental statutes such as ESA and section 404 of the CWA. The commenter expressed that accompanying complementary changes to those statutes should be made in conjunction to the changes in part 771 to realize congressional intent to streamline the project delivery process.

A determination that an action qualifies for a CE under the Agencies’ NEPA

procedures is not an exemption from the environmental laws that apply to that project. A project may not require the higher level of NEPA analysis associated with an EA or EIS and still require analysis under section 106 of the NHPA, section 404 of the CWA, section 7 of the ESA, or section 4(f) of the DOT Act. Applicants need to apply and obtain applicable environmental permits and approvals even for projects that qualify for CEs. The MAP-21 neither amended nor exempted these laws, and they continue to apply.

Two commenters indicated that the two proposed CEs could cover actions that already qualify for other CEs in part 771. One commenter was having difficulty in identifying examples where a project would qualify for the proposed CEs but not for an existing CE and requested specific examples of projects where these CEs would apply that are not currently addressed by other existing CE categories. One commenter indicated that the NPRM failed to streamline the NEPA process as it had hoped. Another commenter indicated that the NPRM limited the availability of the CEs to such an extent that the relevant provisions of MAP-21 appear meaningless or redundant with existing law. Two commenters noted that the statutory language for the CEs should be read in the context of the overarching policy of accelerating project delivery. In this context, the commenters observed, the rule should provide maximum flexibility to limit redundant and lengthy process driven environmental reviews, and new flexibility to expand the universe of projects that can be approved as CEs. One commenter stated that expansion of the CE list would save time and costs for project sponsors without compromising protection of the environment. One commenter indicated that the new CE for operational right-of-way would benefit the State by allowing some additional projects to be classified

as CEs. The commenter also provided numbers, but no specific details of planned projects that would meet the Federal fund threshold that would benefit from the CE. Another commenter noted that increased use of CEs along with the streamlined approval process associated with simpler Federal-aid projects is appropriate. The commenter indicated this strategy will ultimately deliver public benefits from Federal-aid transportation improvements more rapidly and also improve environmental protection by enabling Federal resource agencies to focus their efforts on more complicated projects that warrant significant environmental review. One commenter indicated that MAP-21's goal of increasing the use of CEs will help reduce delay in the current review and approval process for transportation projects by clarifying the type of projects that appropriately qualify for less intensive environmental reviews.

The Agencies agree there may be actions that qualify for the CEs subject to this rule that could qualify for other CEs in part 771. The regulation does not compel the use of the new CEs in these instances. The Agencies and applicants can continue to rely on other available CEs if their use is appropriate. The Agencies agree that the appropriate use of CEs can result in time and cost savings.

Three commenters indicated that small and low-cost bicycle and pedestrian projects (including sidewalks, cross walks, pathways, etc.) within an existing built environment should not require detailed documentation to qualify for a CE unless special circumstances exist. The commenters recommended modifying the rule to encourage the use of a CE where a project qualifies for two or more CEs and there are no unusual circumstances.

Many bicycle and pedestrian projects qualify for CEs that do not require detailed

review by the Agencies (see e.g., section 771.117(c)(3) (construction of bicycle and pedestrian lanes, paths, and facilities)). Applicability of a (c)-list CE, however, does not mean that additional information is not needed from project applicants on environmental considerations to demonstrate the applicability of a CE. In some circumstances this documentation is needed to address unusual circumstances or for meeting other environmental considerations and requirements.

The Agencies are not modifying the rule to encourage the use of a CE when a project qualifies for two or more CEs. The use of a CE when it applies is encouraged regardless of whether the action would also qualify for another CE. One CE should be used per FHWA or FTA action.

One commenter recommended adding the two new CEs as examples in the (d)-list CE rather than adding them as (c)-list CEs. Another commenter indicated that it is possible to have projects that meet the new CEs but require a great deal of analysis to determine if there are any significant impacts. The commenter suggested that for projects qualifying for the new CEs, the NEPA documentation would be minor, but the analysis would in many circumstances be the same as currently required for projects in the (d)-list. Another commenter indicated that these new CEs were different from the other CEs in part 771 because they were not based on the scope of a project, but rather on the project's location or level of Federal funding involved. The commenter indicated that the proposed CEs appeared to be screening criteria for projects where a specific scope is cited.

The statute requires the new CEs be located in section 771.117(c) for FHWA actions and, in the Agencies interpretation, in section 771.118(c) for FTA actions (given

the addition of this parallel section after the enactment of MAP-21). The Agencies do not have the discretion to place these new CEs in sections 771.117(d) and 771.118(d). The Agencies recognize that these two statutorily mandated CEs are different than other CEs in that they are unrelated to a project's scope and its potential level of environmental impacts. Projects receiving less than the Federal funding threshold established in the statute may have the potential to cause significant impacts depending on the context of what is proposed and its surrounding environment. Similarly, the location of a project within an existing operational right-of-way may have the potential to cause significant impacts depending on the context of what is proposed and its surrounding environment. The Agencies agree with the commenters that without information on the scope of the project and its context (such as timing, surrounding environment, context and intensity of impacts) it would be difficult to determine if the project can be appropriately classified as a CE or if another level of NEPA review is needed even if the project meets the conditions of the CE. The Agencies believe that the consideration of unusual circumstances will identify when the project may need more documentation or another level of NEPA review.

Three commenters encouraged DOT to disseminate clear guidance on when a CE is appropriate—especially in cases where more than one CE could apply. One commenter suggested the Agencies develop training and guidance materials for State DOT and Federal staff to ensure that those responsible for implementation can administer the CE process with confidence and uniformity. One commenter recommended the development of training, guidance, and frequently asked questions to ensure consistent implementation of the CEs. The commenter recommended a training goal of preparing

State DOTs to make CE determinations in place of the Agencies. One commenter urged the Agencies to actively monitor and audit the use of these new CEs for the first few years in order to evaluate whether additional guidance is necessary.

The Agencies interpreted the comments and their reference to DOT to apply to the Agencies engaged in this rulemaking. The Agencies have training institutes, the National Highway Institute and the National Transit Institute, that conduct NEPA courses across the nation for employees of the Agencies, State DOTs, transit agencies, consultants, and other Federal, State, and local entities involved in transportation NEPA processes. The Agencies also have guidance on their NEPA processes, including CEs. The Agencies will provide information on the availability of the new CEs to their environmental and field staff. The FTA will update its Guidance for Implementation of FTA's Categorical Exclusions (23 CFR 771.118) to reflect the new CEs and post it on FTA's public Web site ([www.fta.dot.gov](http://www.fta.dot.gov)), as well. The FHWA will provide any additional guidance and assistance, as necessary. In addition, section 1323 of MAP-21 requires a report to Congress "on the types and justification for the additional categorical exclusions granted under the authority provided under sections 1316 and 1317" not later than October 1, 2014. This report will provide information and help determine if any additional guidance is needed.

One commenter suggested the Agencies consider further modifications to create predictable expectations for the completion of CEs such as guidelines, time limits, or deadlines for the completion of CEs.

The Agencies encourage timely review of environmental documents. However, the Agencies recognize that individual projects and their impacts are unique and subject

to other requirements, which makes establishing standard review times problematic. Projects approved through the new CEs subject to this rule normally would not require further NEPA approvals, though the Agencies expect documentation exhibiting that the project fits the CE and that no unusual circumstances are present. This may be achieved with a complete project description. However, if the project has the potential to result in impacts to resources protected under other environmental laws, additional documentation and review time could be needed for that project. For example, the consultation required under Section 106 of the NHPA already has regulatory timeframes in 36 CFR part 800 associated with consultation between Federal agencies and the State Historic Preservation Officer. The Agencies cannot shorten that consultation process through review times mandated by their regulation.

One commenter stated that less restrictive rulemaking and subsequent agency guidance would allow agencies to make CE determinations and documentation to the project record earlier in the process such as in the long range planning and multiyear project programming. The commenter indicated that making this determination earlier in the process without further and broad based staff engagement would allow for a more reliable project delivery process, streamlined project delivery, and ensure program continuity necessary to better deliver transportation improvements.

Consideration of environmental impacts of a project during the transportation planning process is encouraged by the Agencies (see 23 CFR part 771 and part 450; 23 U.S.C. 168; and the Agencies' Planning and Environmental Linkages guidance at <http://www.environment.fhwa.dot.gov/integ/>). This consideration early in the process can expedite environmental review, especially if actions are planned in a way that allows

them to meet the criteria for the CEs listed in Sections 771.117 or 771.118. The NEPA review may be conducted in parallel with the planning process. However, it is important to note that the Agencies cannot make a determination that a project qualifies for a CE until there is sufficient project information to determine the likely project impacts and the project is contained in the applicable transportation improvement program(s) under 23 U.S.C. 134-135. As a result, a CE determination normally does not occur until the planning process is finished.

One commenter stated the statute required that regulations for both new CEs be promulgated within 150 days of July 6, 2012, the date MAP-21 was signed into law, and that this deadline was exceeded by several months.

Sections 1316 and 1317 require the Secretary to designate the new CEs “not later than 180 days” after MAP-21’s enactment and to promulgate regulations to carry out this requirement no later than 150 days from its enactment. Section 3 establishes that “any reference to date of enactment shall be deemed to be a reference to the effective date” of MAP-21, which is October 1, 2012. Sections 1316 and 1317 do not automatically create new CEs; their designation requires administrative action by the Agencies in the form of rulemaking. On February 28, 2013, the Agencies, acting on behalf of the Secretary, issued proposed regulations to “designate” the new CEs. The Agencies issued the proposal 150 days from the effective date of MAP-21.

Section 771.117(c)(22) and 771.118(c)(12)

In the NPRM the Agencies proposed identical language for an operational right-of-way CE in sections 771.117(c)(22) and 771.118(c)(12): “Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way.

The operational right-of-way includes those portions of the right-of-way that have been disturbed for an existing transportation facility or are regularly maintained for transportation purposes. This area includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, substations, etc.) and other areas regularly maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, or park and ride lots with direct access to an existing transit facility. It does not include portions of the existing right-of-way that are not currently being used or not regularly maintained for transportation purposes.”

The Agencies are adopting operational right-of-way CEs that are slightly different from the proposed language. The final CE language is identical for both FHWA and FTA and would cover “[p]rojects, 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. This area includes 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, 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.”

The discussion of comments below describes the rationale for these changes and differences.

#### Description of operational right-of-way

Nine State DOTs, 3 regional transit agencies, 10 national transportation interest groups, 7 State/local transportation groups, 3 national/regional environmental interest groups, 1 Federal agency, and 1 individual commented on the description of “operational right-of-way” used in the NPRM. Eighteen commenters noted the NPRM’s description of operational right-of-way was inconsistent with that used in MAP-21, and that any final language should be consistent with the statute. Ten commenters specifically noted that describing operational right-of-way as property that is “needed,” “used,” “disturbed,” and “regularly maintained” limits the universe of actions that would otherwise qualify for the CE. Three commenters indicated that a CE for projects within a right-of-way is appropriate because environmental reviews have already occurred prior to the acquisition and additional reviews would be duplicative. Three commenters noted that the NPRM’s use of terms such as “disturbed” in the description of right-of-way could result in destruction of buffer zones or other areas that are not regularly maintained. Three commenters stated that undisturbed and unmaintained land along a right-of-way in current use may have been obtained to keep the public away in order to make operations in the right-of-way safer. The commenters indicated that projects in these areas would qualify for the CE under the statutory language, but they would not qualify under the regulatory language. One commenter indicated that the use of the term “disturbed”

would result in the requirement of archeological investigations to determine if the area had been disturbed. Another commenter suggested placing safeguards, such as a documentation requirement, to confirm the timing of the disturbance. One commenter objected to the exclusion of areas where the transportation facility has fallen into disuse. One commenter requested a clarification of whether operations and maintenance included trash pick-up, weed control, snow storage, maintenance of cut slopes, and rockfall mitigation. The commenter requested a clarification that the determination that an area was “previously disturbed” could be based on observation and did not require actual construction plans for verification. The commenter also requested that separated bike and pedestrian facilities be considered transportation facilities under the rule. Eight commenters supported the NPRM’s limitation of operational right-of-way to existing transportation facilities. One commenter provided a comment that section 1316 was intended to apply only to projects where there is an existing right-of-way. The commenter opposed an interpretation that would allow State DOT’s to acquire right-of-way for a future project and then use the CE for a project once it has been identified for the corridor.

Due to the number of comments received regarding the NPRM’s proposed description of “operational right-of-way” and upon further consideration, the Agencies have made various modifications. The Agencies are not redefining “operational right-of-way.” The Agencies are interpreting the phrase “existing operational right-of-way” by providing that this “refers to right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose.” The purpose for including the phrase “disturbed for an existing transportation facility” is to clarify that a

transportation facility must already exist at the time of the review of the proposed project being considered for the CE. The Agencies are using “disturbed” as defined in the New Oxford American Dictionary “having its normal pattern or function disrupted” or “interfere with the normal arrangement or function of” (New Oxford American Dictionary 497 (Elizabeth J. Jewell & Frank R. Abate ed., 1st ed., Oxford Press 2001)). Evidence that the area was disturbed for a transportation facility should be provided (such as photographs, visual inspection), but this does not mean that archeology surveys or construction plans for the original facility are required to demonstrate that the area has been disturbed. As explained in the NPRM, the term “transportation facility” is used in this CE to establish that the existing facility or structure must be related to surface transportation. The phrase is intended to be used in its plain meaning, and is specifically not intended to be limited to the term “transportation facilities” as defined under 23 CFR 973.104, which is applicable to the Indian Reservation Roads Program. The term in this CE includes bicycle and pedestrian facilities.

The purpose for including the phrase “maintained for a transportation purpose” is to include areas that may not be traditionally considered a transportation facility but are maintained to serve a transportation purpose for an existing transportation facility such as clear zones and areas for safety and security of the transportation facility. A transportation facility that has fallen in disuse may require an assessment to determine if it is still being maintained for a transportation purpose and, therefore, qualifies as an operational right-of-way. The term “maintained” is used as defined in the New Oxford American Dictionary “cause or enable [a condition or state of affairs] to continue” (New Oxford American Dictionary at 1030). Applicants do not need to develop or engage in

regular maintenance actions within these areas to ensure they become part of the existing operational right-of-way in the future. Natural methods of managing roadside vegetation, clear zones, and areas necessary for maintaining the safety and security of a transportation facility are covered as requested by the commenters. The term, as used in the CE, does not cover areas outside those areas necessary for existing transportation facilities, such as uneconomic remnants or excess right-of-way that is secured by a fence to prevent trespassing, or that are acquired and held for a future transportation project. Lastly, the Agencies included “mitigation areas” and “areas maintained for safety and security of a transportation facility” in the list of examples of features that comprise the existing operational right-of-way. The concept of “mitigation areas” is included in the statutory definition of “operational right-of-way” in section 1316 of MAP-21 and is being added to the final rule for consistency.

The Agencies found that section 1316’s phrase “existing operational right-of-way” was subject to various interpretations. One interpretation would allow the use of the CE for the construction of a project in an undeveloped area as long as real property interests were previously acquired for its future construction. This interpretation would ignore the use of the modifier “existing” before “operational right-of-way” in the statutory language in section 1316. The Agencies interpret the addition of that modifier to mean that proposed projects on property interests acquired for a future project but simply held in perpetuity with no associated transportation use cannot be covered by this CE. In addition, the Agencies interpret the reference to a “project” in the statutory definition of operational right-of-way to be different from the proposed project being evaluated for the CE. The Agencies interpret the statute to refer to a past transportation

project when defining the footprint of the operational right-of-way.

The Agencies concluded that restating the statute in the regulation would not facilitate its implementation because it could allow an unreasonable interpretation. The meaning of the phrase “existing operational right-of-way” in the statute required the Agencies’ interpretation to ensure consistent and legally defensible use of the CE. The Agencies interpret the addition of that modifier by Congress to mean that property interests acquired and held for a future project are not covered by this CE if there is no existing transportation facility or the area is not maintained for a transportation purpose for an existing transportation facility. This interpretation is supported by the statute’s use of the adjective “existing” to modify “operational right-of-way;” the reference in the statutory definition to a project that is different from the proposed project being considered for the CE; and the particular examples used in the statute to describe the operational right-of-way (such as roadway, bridges, interchanges, landscaping, clear zones, etc.).

One commenter expressed concern that the proposed CE limited the ability of the States to shift roadway alignments and straighten dangerous curves.

The text of the CE would not affect a project sponsor’s ability to shift roadway alignments, straighten dangerous curves, or engage in other eligible project activities for safety purposes. Rather, the CE text only affects the level of NEPA review that would be required for the eligible project. A number of safety projects, such as those shifting roadway alignments and straightening curves, may be accommodated within an existing operational right-of-way. Other CEs may be available for those projects that extend beyond the existing operational right-of-way limits (such as construction beyond the clear

zone area).

One commenter expressed concerns with a potential expansion of the CE to allow its use for projects in buffer zones or undeveloped areas, indicating that many historic parkways and other roads include wooded areas that serve as crucial character-defining features of historic roadways or an important mitigation role in shielding historic districts and other neighborhoods from adjacent highways.

The Agencies note that the statutory definition of operational right-of-way includes “mitigation” and “clear zones” areas. Mitigation sites, such as wooded areas mitigating impacts of highways on historic districts, noise walls, and buffer zones used for transportation safety purposes are part of the operational right-of-way. However, the Agencies and the applicants must consider unusual circumstances to determine if the CE is the appropriate NEPA classification. In addition, the applicability of a NEPA CE for a transportation project does not exempt compliance with other environmental requirements. In the case of a buffer area that is a character defining feature of a historic property, the Agencies and the applicants must comply with the requirements of section 106 of NHPA and section 4(f) of the DOT Act. Consideration of unusual circumstances and compliance with other environmental laws may trigger the need to identify substitute mitigation or compensatory measures, as appropriate. The Agencies note that the inclusion of “mitigation” as a component of the operational right-of-way is in the statute and regulation does not override, waive, or alter the mitigation commitments that were established for the original transportation facility. The use of mitigation areas for a new project may trigger other actions to meet the original mitigation commitments.

Examples of features or components of an operational right-of-way

Two commenters requested that the CE language explicitly apply to transportation project areas that are on land acquired to mitigate a project. One commenter expressed concerns with including land acquired for mitigation as part of the operational right-of-way.

Mitigation areas are explicitly recognized in the statutory definition of operational right-of-way. The Agencies are adding the term “mitigation areas” to the list of example features associated with the physical footprint of a transportation facility to be consistent with the statutory definition of “operational right-of-way” in section 1316 of MAP-21. The Agencies note that the inclusion of “mitigation” as a component of the operational right-of-way in the statute and regulation does not override, waive, or alter the mitigation commitments that were established for the original transportation facility. The use of mitigation areas for a new project may trigger other actions to meet the original mitigation commitments.

One transit agency requested that the rule clarify whether operational right-of-way needed to be contiguous with an existing road or guideway.

Public transportation facilities often have non-contiguous features that are part of a transportation system and are, therefore, part of the operational right-of-way. One example mentioned in the proposed rule is substations, which include transit power substations. This example has been moved to the list of examples of other areas maintained for transportation purposes in the final CE text. Other examples in the public transportation context include transit maintenance yards and transit venting structures. The Agencies have added these examples to their CE text to clarify that these types of structures are included in the footprint of the operational right-of-way.

One commenter requested the addition of “parking structures,” (e.g., revise the example of “park and ride lots” to read “park and ride lots and structures”) to the list of examples of features that comprise the operational right-of-way.

The Agencies consider “park and ride lots” to include both surface lots and parking structures. The Agencies changed the term to “parking facilities” in order to provide clarity and maintain consistency with other CEs found in part 771 and how those terms are used by the Agencies.

One commenter expressed concerns with the inclusion of clear zones as these could entail a large footprint. The commenter indicated that clear zones can cover more than 35 feet on both sides of roadway. Another commenter stated that operational right-of-way should not include the full width of clear zones on either side of a road because standards for clear zones have become much wider recently for safety purposes. The commenter expressed that the standard should be limited to the operation, construction, or mitigation of the original roadway at the time it was purchased.

The Agencies found that the statute was clear in identifying clear zones of an existing transportation facility as part of the operational right-of-way. This means that construction of a transportation facility within already existing clear zones would qualify for the CE unless unusual circumstances exist that warrant an EA or EIS. However, a project within the operational right-of-way that requires the creation of new clear zones or extension of clear zone areas beyond what already exists would not qualify for this CE.

One commenter recommended adding noise walls and fencing to the list of examples of elements or components that are part of the operational right-of-way. The commenter also requested the addition of facilities within the right-of-way, but that are

performed by other government entities.

The Agencies did not intend to create an all-inclusive list of components or features that comprise the operational right-of-way. Some of the additions recommended by the commenters are captured by features listed in the final regulatory text. For example, noise walls are a form of mitigation, which is included in the text. Some fencing structures may be necessary to maintain safety and security of an existing transportation facility and would, therefore, be part of the operational right-of-way. Other fencing structures may have been established to preserve a property, but are not necessary to maintain safety and security of an existing transportation facility. These features would not be considered part of an existing operational right-of-way. The identity of the entity that owns, maintains, or operates the transportation feature (for example, bridge, road, mitigation, clear zone, parking, etc.) is not a factor in determining whether the feature is part of the operational right-of-way. The test is whether the feature is in use or is maintained for a transportation purpose.

#### Real property interests

Five commenters noted that the statute refers to “all real property interests” acquired for the construction, operation, or mitigation of a project, and this includes property acquired for corridor preservation and future transportation facility capacity expansion. One commenter expressed an opinion that the term should include prescriptive easements, leases, utility easements, and other non-fee simple property interests. Another commenter opposed an interpretation that would allow development of transportation projects on real property interests that are less than fee simple interests, such as utility easements and leases. One commenter proposed regulatory language that

the CE cover “all real property interests acquired or secured for the construction, operation, or mitigation of a project or transportation corridor” (emphasis added). Seven commenters objected to the requests to expand the CE to cover actions occurring within areas acquired, but not developed, for corridor preservation and facility expansion. One commenter indicated that an expansion of the CE to cover projects that would take place in property that has been acquired but not developed could be combined with the “significant expansion” of advanced acquisition allowed under section 1302 of MAP-21 to create a strong incentive for aggressive land acquisition in an effort to insulate potential future transportation projects from a higher level of NEPA review (e.g. an EA or EIS). The commenter expressed concerns with an interpretation of the CE that would allow the development of previously acquired areas owned for decades but that had not received final approval from FHWA under NEPA because of litigation, new information, lack of funding, or other problems. One commenter expressed that right-of-way purchased under section 1302 of MAP-21 should not be included in the operational right-of-way definition because such land has independent utility, rather than utility for construction, operations, or mitigation purposes.

The Agencies do not interpret the statutory CE provision in a manner that would allow construction of a project in an undeveloped area simply because the real property interests were previously acquired. The use of the modifier “existing” to describe the operational right-of-way means that a transportation facility must already exist at the location where the proposed project will be built. Areas acquired and held as a transportation corridor for a future project would not constitute an existing operational right-of-way. The real property interest in question must be disturbed for an existing

transportation facility or maintained for a transportation purpose for an existing transportation facility. Utility use and occupancy agreements, and other real property interests that are not maintained for existing transportation purposes would not be part of the existing operational right-of-way.

One commenter noted that the proposed rule does not clearly address whether section 1316 CEs apply to project-related work that requires temporary construction easements rather than permanent acquisition.

The Agencies have concluded that the geographic reference in the CE is for the final project. The final project must be entirely within the operational right-of-way. The method to construct a project within the operational right-of-way is accounted for in the CE since it is presumed a CE accounts for all connected actions (see CEQ Final Guidance on Establishing, Applying, and Revising Categorical Exclusions under NEPA, 75 FR 75628, 75632, Dec. 6, 2010). This includes temporary work taking place outside an operational right-of-way that is necessary for the construction of a project within the operational right-of-way. Therefore, this CE also covers temporary easements and temporary work needed for the project even if this work is outside an operational right-of-way. It is important to note that temporary easements and work are subject to review for any unusual circumstances (such as work taking place in endangered species habitat) that would trigger the need for a higher level of NEPA review for the project. Furthermore, some temporary work such as the construction of a detour road or bridge may require a higher level of scrutiny to ensure adequate consideration of unusual circumstances. Finally, the Agencies do not interpret the CE to apply to the construction of a permanent project within an area acquired as temporary easements for the

construction of past projects. Temporary easements end once the original project is completed and, therefore, cannot be considered “existing” transportation facilities when a new project is being considered.

One commenter indicated that the description of the operational right-of-way in the proposal conflicted with the definition of “right-of-way” in 23 CFR 710.105 and the requirements for managing real property within the boundaries of a federally assisted facility. The commenter’s opinion was that using a definition that does not include all real property within the right-of-way boundary of a project would undermine the State’s ability to acquire any real estate beyond the proposed “operational right-of-way” boundaries and will impede the State’s ability to manage the entire right-of-way. The commenter indicated that the proposed rule would undermine the State’s defense and necessity for acquisition outside the operational right-of-way boundaries.

Section 710.105 defines the term “right-of-way” as “real property and rights therein used for the construction, operation, or maintenance of a transportation or related facility funded under title 23 of the United States Code.” “Real property” is defined in the same section as “land and any improvements thereto, including but not limited to, fee interests, easements, air or access rights, and the rights to control use, leasehold, and leased fee interests.” These terms are consistent with the description of “existing operational right-of-way” provided in the final rule. The Agencies note that the new CE does not overturn or modify applicable State laws and requirements for the acquisition of land. Those laws may require agencies to articulate and substantiate the necessity for their acquisition.

One commenter requested a clarification on whether operational right-of-way

includes easements that are necessary for operations and maintenance of existing transportation facilities. The commenter provided an example of a situation where a Federal land management agency provides an easement through the Federal land for the State's construction, operation, and maintenance of a transportation facility.

The Agencies interpret existing operational right-of-way provision to include easements provided by Federal land management agencies for the construction, operation, and maintenance of transportation projects that use Federal lands. The CE would apply to FHWA or FTA actions contained within an easement area already granted by a Federal land management agency. However, the Agencies note that the CE only applies to FTA and FHWA actions. The decision to grant an easement or other approvals in Federal lands may constitute major Federal actions for the Federal land management agencies, which could require them to conduct their own NEPA reviews for their actions. Sections 771.117(c)(23) and 771.118(c)(13)

In the NPRM, the Agencies proposed identical language for a limited Federal assistance CE in sections 771.117(c)(23) and 771.118(c)(13). The proposed CE language was for “[f]ederally funded projects that do not require Administration actions other than funding, and: (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 project cost.”

The Agencies are adopting final CE language that is different from the proposed language. The final CE language is identical for both FHWA and FTA and would cover “Federally-funded projects: (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 project cost.” The discussion of comments below describes the rationale for these changes and differences.

#### Federally-funded projects and Administration actions other than funding

Twenty-five entities commented on the NPRM language limiting the application of the CE to situations in which the only Agency action involved is funding. Eighteen commenters expressed the position that such a limitation to the scope of the CE is inconsistent with the statutory language that provides that the CE is available to “any” project. One commenter indicated that the NPRM’s preamble statement that the CE would apply to projects that only involve Agency funding decisions and actions was unclear. One commenter stated that funding approval and approval of construction could be considered two separate actions under the CEQ definition of “major Federal action” in 40 CFR 1508.18, and this would prevent the use of the CE for any construction project. The commenter also indicated that other approvals would be considered separately from funding, such as approvals of right-of-way or design approvals. One commenter expressed his belief that the congressional intent was to utilize this CE on Interstate projects even if an Interstate Access Justification report was needed. Another commenter stated that other Administration actions such as Interstate access approvals or nationwide permits from the U.S. Army Corps of Engineers do not have the potential on their own or collectively to create significant environmental impacts. Six commenters supported the exclusion of Administration actions other than funding such as approvals for Interstate access. One commenter discussed two examples of major highway projects that did not receive Federal-aid but still required detailed NEPA reviews because of FHWA’s involvement in the approval of a request for an Interstate System access change under 23

U.S.C. 111(a). Another commenter recommended including Interstate access in the regulatory text if it was going to be excluded from the CE's applicability. The commenter also recommended including in the preamble and the regulatory text the example of right-of-way disposals as another type of action that does not require Federal aid but that should not automatically qualify for a CE in this category.

The Agencies have revised the text of the CE in response to the commenters, which recommended expanding the CE to all projects that fall within the monetary thresholds established by Congress (that is, no more than \$5 million or no more than 15 percent in Federal funding for a project with total estimated cost of no more than \$30 million). As noted in the NPRM, the action has to have some level of Federal assistance in order to qualify for the CE. This is based on the Agencies' understanding that the title of section 1317, the use of the term "funds" in section 1317(1)(A)-(B), and the Conference Report articulated a congressional intent to limit the CE to federally funded projects. Projects not funded with Federal funds but requiring other forms of approvals from the Agencies do not qualify for this CE. The Agencies note that other CEs continue to be available for projects that do not meet this condition. For example, a project not funded with Federal funds that require an Interstate System access change approval from FHWA may qualify for a CE under FHWA's (d)-list CEs (for example section 771.117(d)(7) (approvals for changes in access control)).

The proposal set forth in the NPRM would have prevented the use of the CE for projects that receive Federal-aid within the established thresholds but that required other Agency approvals (such as approvals for changes in access control). However, the commenters highlighted ambiguities in the proposed rule that would have led to

confusion in its application. For example, one commenter indicated that approval of construction could be interpreted to be a separate approval from the decision to fund the project and this would render the CE meaningless. In addition, interpreting the statutory provision in this manner would be inconsistent with the principle that the scope of a CE must include all connected actions (see CEQ Final Guidance on Establishing, Applying, and Revising Categorical Exclusions under NEPA, 75 FR 75628, 75632, Dec. 6, 2010). The language in section 1317 does not exclude a subgroup of projects that require other Agency approvals. A project receiving Federal funds within the statutory thresholds and that also requires other Agency approvals qualifies for the CE under the statutory provision in section 1317. As a result, the Agencies are deleting the phrase “that do not require Administration actions other than funding” in the final rule.

The Agencies understand that Federal funding alone is not a reliable indicator of the significance of the environmental impacts associated with a project. However, the Agencies find that the statute clearly conveys the congressional direction that FHWA or FTA projects receiving Federal funding below the thresholds should be presumed to not trigger EA and EIS requirements. This presumption applies unless the project involves unusual circumstances that make its application improper. The uniqueness of this CE (that is, a CE determination based on dollar thresholds instead of a particular scope or description of the action) makes the consideration of unusual circumstances particularly important to ensure that projects that receive Federal funds below the established thresholds are not processed as CEs when the unusual circumstances warrant another level of NEPA review.

#### Funding criterion

Nine entities commented specifically on the second statutory funding criterion for projects with a total estimated to cost of not more than \$30,000,000 and Federal funds of less than 15 percent of the total estimated project cost. Four commenters recommended the deletion of this criterion to avoid confusion since projects meeting this threshold would also meet the threshold in the first criterion for projects receiving less than \$5,000,000 in Federal funds. One commenter suggested that Congress intended to apply the CE to projects that cost more than \$30,000,000 and receive Federal funds of less than 15 percent (\$4,500,000) of the project's estimated cost. Four commenters submitted general comments on section 1317 indicating that the statutory language for this CE was clear and did not need revisions.

The Agencies will retain the two criteria. Although \$4,500,000 is 15 percent of the total estimated project cost for a project with total estimated project cost of \$30,000,000, and this is below the \$5,000,000 threshold in the first criterion, the Agencies decided to retain the provision because it is explicitly stated in the law.

#### Re-evaluation

Four commenters commented on the Agencies' statement in the NPRM that re-evaluations could be triggered under 23 CFR 771.129 if, after the limited Federal assistance CE was used, there was a change to the project that raised the level of Federal funding beyond the funding thresholds, and there was still an FHWA and/or FTA action to be taken. Two of those commenters indicated that the final rule should clarify that when the State relies upon the second criterion, the only changes that could trigger re-evaluation would be an increase in the percentage of Federal funds above the 15 percent threshold or a change in the project's scope to include activities not included by the

original CE. Another of the commenters indicated that requiring re-evaluation for changes in the funding thresholds appeared to be contrary to the intent of MAP-21 that specifies “estimated” project costs. The fourth commenter stated that the Agencies’ statement on re-evaluation was in direct conflict with section 1317 of MAP-21 because it states that the CE applies to the estimated project cost and not final project costs.

Re-evaluation would 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. The need for re-evaluation is not unique to this CE. This CE, however, highlights the importance of obtaining accurate cost estimates and the need for careful deliberation before applying this CE to a project that is close to the established thresholds. The applicant and the Agency(s) would consult prior to any request for further approvals or grants (including approval of project plans, specifications, or estimates) to ascertain whether the CE designation remains valid. Even when a change occurs, the project may continue to qualify for a CE under other CEs designated in part 771, if it meets the requirements of the CE. An interpretation that the only basis for determining the applicability of the CE should be the applicant’s estimate without opportunity to re-evaluate would not promote good project cost estimates and would be inconsistent with the Agencies’ re-evaluation process that applies to all NEPA reviews.

#### Inflation and small cost increases

One commenter indicated that the funding thresholds should be indexed for inflation. The commenter stated that the funding thresholds will become outdated with inflation, and Congress likely did not intend for the value of the thresholds to be eroded

over time. Another commenter recommended building some flexibility into the process to accommodate small cost increases or changes in the Federal participation rate. The commenter stated that planning level costs estimates and anticipated Federal participation rates available at the project development stage where NEPA review occurs are likely to change as the project advances to construction.

The Agencies find that the statutory language regarding the funding thresholds is clear. Therefore, the Agencies do not provide for inflation considerations or for small cost increases beyond the thresholds provided, and do not make the suggested changes.

#### Independent utility, logical termini, and restriction of consideration alternatives

Three commenters supported the requirement that the projects demonstrate independent utility, connect logical termini, and not restrict consideration of alternatives, but recommended a clarification that projects can qualify for the CE even if they are built in segments. They indicated that pedestrian, bicycle, and shared use pathway projects are often built in phases even though the overall project meets the funding threshold. One commenter stated that the limited Federal assistance CE, by its very nature, creates an incentive to divide transportation projects into smaller components if doing so would enable the project to come within the scope of the CE. The commenter recommended documentation demonstrating that the project has independent utility, connects logical termini, and does not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

The Agencies agree with the commenters. A CE must capture the entire proposed action, which includes all connected actions (see CEQ “Final Guidance on Establishing, Applying, and Revising Categorical Exclusions under NEPA,” 75 FR 75628, 75632, Dec.

6, 2010). The requirement that the projects demonstrate independent utility, connect logical termini, and not restrict consideration of alternatives reflects the Agencies' test for determining the full scope of a project for NEPA review purposes and avoiding impermissible segmentation. This does not prohibit the construction of a transportation facility in phases so long as the full project scope receives NEPA review before the first phase begins construction. Typically, the documentation for the project will be sufficient to demonstrate that the proposal has independent utility, connects logical termini (for linear projects), and does not restrict consideration of alternatives for other reasonably foreseeable transportation improvements. In some instances, additional information may be needed to establish that these criteria will be met.

#### Use of CE by multiple Federal agencies

One commenter recommended the use of the CE for multiple Agency funding decisions and actions. The commenter mentioned the Partnership for Sustainable Communities among the U.S. Department of Housing and Urban Development, U.S. Environmental Protection Agency, and DOT as an initiative that allows for multiagency collaboration that should extend to this CE's use. Two commenters indicated that the proposed CEs appear to apply to all types of Federal funds used for transportation facility projects and should not be limited to only FHWA's rules.

Although the CE takes into account to all sources of Federal funding for a transportation project, the statute is very specific in limiting the CE to the FHWA and FTA joint NEPA procedures. A CE determination for FHWA or FTA does not satisfy the NEPA procedural requirements for other Federal agencies that also have actions for the same project (such as permits or other approvals). The CE is only available for

FHWA and FTA actions.

### **Section-by-Section Analysis**

The Agencies provide guidance throughout the Summary and Response to Comments section above on their interpretation of the CEs as modified in response to public comment. A minor additional change is made to remove section 771.118(d)(5) due to the availability of the new section 771.118(c)(12). The changes are described in this section.

#### Section 771.117

The FHWA is adding paragraph (c)(22) to this section for “[p]rojects, 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. This area includes 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, areas maintained for safety and security of a 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.”

The FHWA is also adding paragraph (c)(23) to this section for “Federally funded projects (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 project cost.”

#### Section 771.118

FTA is adding paragraph (c)(12) to this section with the same text as the new paragraph (22) in section 771.117(c). FTA is also adding paragraph (c)(13) to this section with the same text as the new paragraph (23) in section 771.117(c).

FTA reviewed its existing list of CEs at section 771.118, and determined that paragraph (d)(5) (“[c]onstruction of bicycle facilities within existing transportation right-of-way”) is subsumed by paragraph (c)(12). Therefore, FTA is removing paragraph 771.118(d)(5) to reduce CE application confusion, and is reserving it for a future section 771.118(d) example.

#### **Statutory/Legal Authority for this Rulemaking**

The Agencies derive explicit authority for this rulemaking action from 49 U.S.C. 322, which provides authority to “[a]n officer of the Department of Transportation [to] prescribe regulations to carry out the duties and powers of the officer.” That authority is delegated to the Agencies in 49 CFR 1.81(a)(3), which provides that the authority to prescribe regulations contained in 49 U.S.C. 322 is delegated to each Administrator “with respect to statutory provisions for which authority is delegated by other sections in [49 CFR Part 1].” Included in 49 CFR Part 1, specifically 49 CFR 1.81(a)(5), is the delegation of authority with respect to NEPA, the statute implemented by this final rule. Moreover, the CEQ regulations that implement NEPA provide at 40 CFR 1507.3 that agencies shall continue to review their policies and NEPA implementing procedures and revise them as necessary to insure full compliance with the purposes and provisions of

NEPA.

### **Rulemaking Analyses and Notices**

The Agencies considered all comments received before the close of business on the comment closing date indicated above, and the comments are available for examination in the docket at Regulations.gov. The Agencies also considered comments received after the comment closing date and filed in the docket prior to this final rule.

### **Executive Orders 12866 and 13563 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Agencies determined that this action is not a significant regulatory action under section 3(f) of Executive Order 12866 nor is it significant within the meaning of DOT regulatory policies and procedures (44 FR 11032). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It is anticipated that the economic impact of this rulemaking are minimal. The changes to this rule are requirements mandated by MAP-21 to increase efficiencies in environmental review by making changes in the Agencies' environmental review procedures.

The activities in this final rule are inherently limited in their potential to cause significant environmental impacts because the use of the CEs is subject to the unusual circumstances provision in 23 CFR 771.117(b) and 23 CFR 771.118(b), respectively.

These provisions require appropriate environmental studies, and may result in the reclassification of the NEPA evaluation of the project to an EA or EIS, if the Agencies determine that the proposal involves potentially significant or significant environmental impacts. These changes will not adversely affect, in any material way, any sector of the economy. In addition, these changes will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

### **Regulatory Flexibility Act**

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.), the Agencies must consider whether this final rule would have a significant economic impact on a substantial number of small entities. “Small entities” include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. The Agencies do not believe this final rule will have a significant economic impact on entities of any size, and the Agencies received no comment in response to our request for any such information in the NPRM. These revisions could expedite environmental review and thus would be less than any current impact on small business entities. Thus, the Agencies determine that this final rule will not have a significant economic impact on a substantial number of small entities.

### **Unfunded Mandates Reform Act of 1995**

This final rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). This final rule will not

result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$148.8 million or more in any one year (2 U.S.C. 1532).

**Executive Order 13132 (Federalism Assessment)**

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The Agencies have analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132 and determined that this action will not have a substantial direct effect on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications. The Agencies have also determined that this action will not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions. The NPRM invited State and local governments with an interest in this rulemaking to comment on the effect that adoption of specific proposals may have on State or local governments. No State or local governments provided comments on this issue.

**Executive Order 13175 (Tribal Consultation)**

Executive Order 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that “significantly or uniquely affect” Indian communities and that impose “substantial and direct compliance costs” on such communities. The Agencies have analyzed this action

under Executive Order 13175, dated November 6, 2000, and believe that it will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal law.

Therefore, a tribal summary impact statement is not required. The Agencies received no comment in response to our request in the NPRM for comments from Indian tribal governments on the effect that adoption of specific proposals might have on Indian communities.

#### **Executive Order 13211 (Energy Effects)**

The Agencies have analyzed this action under Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” dated May 18, 2001. The Agencies determined that this action is not a significant energy action under that order because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

#### **Executive Order 12372 (Intergovernmental Review)**

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to these programs and were carried out in the development of this rule.

#### **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et seq.), no Federal agency shall conduct or sponsor a collection of information unless in advance the agency has obtained approval by and a control number from the Office of Management and Budget (OMB), and no person is required to respond to a collection of information

unless it displays a valid OMB control number.. The Agencies determined that the final rule does not contain collection of information requirements for the purposes of the PRA.

#### **Executive Order 12988 (Civil Justice Reform)**

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

#### **Executive Order 12898 (Environmental Justice)**

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a), 91 FR 27534, May 10, 2012, require DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations in the United States. The DOT Order requires DOT agencies to address compliance with the Executive Order and the DOT Order in all rulemaking activities. In addition, both Agencies have issued additional documents relating to administration of the Executive Order and the DOT Order. On June 14, 2012, the FHWA issued an update to its EJ order, FHWA Order 6640.23A, “FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations” (available online at [www.fhwa.dot.gov/legregs/directives/orders/664023a.htm](http://www.fhwa.dot.gov/legregs/directives/orders/664023a.htm)). The FTA also issued an update to its EJ policy, “FTA Policy Guidance for Federal Transit Recipients,” 77 FR 42077, July 17, 2012 (available online at [www.fta.dot.gov/legislation\\_law/12349\\_14740.html](http://www.fta.dot.gov/legislation_law/12349_14740.html)).

The Agencies evaluated the CE under the Executive Order, the DOT Order, the FHWA Order, and the FTA Circular. The Agencies determined that designation of the new CEs for actions within the operational right-of-way and for actions with limited Federal assistance through this rulemaking will not cause disproportionately high and adverse effects on minority or low income populations. The rule simply adds a provision to the Agencies' NEPA procedures under which they may decide in the future that a project or program does not require the preparation of an EA or EIS. The rule itself has no potential for effects until it is applied to a proposed action requiring approval by the FHWA or FTA.

At the time the Agencies apply a CE established by this rulemaking, the Agencies have an independent obligation to conduct an evaluation of the proposed action under the applicable EJ orders and guidance. The adoption of this rule does not affect the scope or outcome of that EJ evaluation. Nor does the new rule affect the ability of affected populations to raise any concerns about potential EJ effects at the time the Agencies consider applying a new CE. Indeed, outreach to ensure the effective involvement of minority and low income populations in the environmental review process is a core aspect of the EJ orders and guidance. For these reasons, the Agencies also determined no further EJ analysis is needed and no mitigation is required in connection with the designation of the CEs for actions within the operational right-of-way and for actions with limited Federal assistance.

#### **Executive Order 13045 (Protection of Children)**

The Agencies analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The Agencies certify that

this action is not economically significant rule and will not cause an environmental risk to health or safety that may disproportionately affect children.

### **Executive Order 12630 (Taking of Private Property)**

The Agencies analyzed this final rule under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights” and determined the rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630.

### **National Environmental Policy Act**

This action will not have any effect on the quality of the environment under NEPA. Agencies are required to adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: those that normally require preparation of an EIS; those that normally require preparation of an EA; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). The CEQ regulations do not direct agencies to prepare a NEPA analysis or document before establishing Agency procedures (such as this regulation) that supplement the CEQ regulations for implementing NEPA. The CEs are one part of those agency procedures, and therefore establishing CEs does not require preparation of a NEPA analysis or document. Agency NEPA procedures are generally procedural guidance to assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency’s final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The determination that establishing CEs does not require NEPA analysis and documentation was upheld in Heartwood, Inc. v. U.S. Forest

Service, 73 F. Supp. 2d 962, 972-73 (S.D. Ill. 1999), aff'd, 230 F.3d 947, 954-55 (7th Cir. 2000).

### **Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

### **List of Subjects**

#### **23 CFR Part 771**

Environmental protection, Grant programs—transportation, Highways and roads, Historic preservation, Public lands, Recreation areas, Reporting and recordkeeping requirements.

#### **49 CFR Part 622**

Environmental impact statements, Grant programs—transportation, Public transit, Recreation areas, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Agencies are amending 23 CFR part 771 and 49 CFR part 622 as follows:

## **TITLE 23 -- HIGHWAYS**

### **PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES.**

1. The authority citation for part 771 is revised to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 106, 109, 128, 138, 139, 315, 325, 326, and

327; 49 U.S.C. 303 and 5323(q); 40 CFR Parts 1500-1508; 49 CFR 1.81, 1.85, and 1.91; Pub. L. 109-59, 119 Stat. 1144, sections 6002 and 6010; Pub. L. 112-141, 126 Stat. 405, sections 1315, 1316 and 1317.

§ 771.117 [Amended]

2. Amend §771.117 by adding paragraphs (c)(22) and (c)(23) to read as follows:

§ 771.117 FHWA categorical exclusions.

\* \* \* \* \*

(c) \* \* \*

(22) 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. This area includes 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, 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) Federally-funded projects:

(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 project cost.

\* \* \* \* \*

§ 771.118 [Amended]

3. Amend §771.118 by adding paragraphs (c)(12) and (c)(13) and removing and reserving paragraph (d)(5) to read as follows:

§ 771.118 FTA categorical exclusions.

\* \* \* \* \*

(c) \* \* \*

(12) 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. This area includes 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, 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.

(13) Federally-funded projects:

(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 project cost.

\* \* \* \* \*

(d) \* \* \*

(5) [Reserved]

\* \* \* \* \*

## **TITLE 49 -- TRANSPORTATION**

### **PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES**

4. The authority citation for part 622 is revised to read as follows:

Authority: 42 U.S.C. 4321 et seq.; 49 U.S.C. 303 and 5323(q); 23 U.S.C. 139 and 326; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; 40 CFR parts 1500–1508; 49 CFR 1.81; and Pub. L. 112-141, 126 Stat. 405, sections 1315, 1316 and 1317.

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Gregory G. Nadeau  
Deputy Administrator  
Federal Highway Administration

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Peter Rogoff  
Administrator  
Federal Transit Administration

