

## Environmental Alert

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### Ready for Comment: Transportation Agencies Propose New National Environmental Policy Act Categorical Exclusions

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On February 28, 2013, the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) issued a Notice of Proposed Rulemaking (NPR) to provide interested parties with the opportunity to comment on two new Categorical Exclusions (CEs) under the National Environmental Policy Act (NEPA). The new CEs are proposed as required by the October 1, 2012 transportation bill, Moving Ahead for Progress in the 21st Century Act (MAP-21) (Pub. L. No. 112-141) (to be codified at 42 U.S.C. § 4332(a)). Projects that qualify for a CE are excluded from NEPA's requirement to prepare an environmental assessment (EA) or an environmental impact statement (EIS). As required by MAP-21, the NPR proposes CEs for highway and transit projects that:

- . Occur within an existing operational right-of-way; or
- . Receive less than 5 million dollars of federal funds, or, where the total project cost is less than 30 million dollars, receive federal funds for less than 15 percent of the total project cost.

This rulemaking is another step in the implementation of MAP-21 by FHWA and FTA.<sup>i</sup> In 2011, the Department of Transportation conducted a review of existing CEs and considered the need for additional CEs in response to Executive Order 13563, "Improving Regulation and Regulatory Review."<sup>ii</sup> MAP-21 required the FHWA and FTA to conduct a comprehensive review of CE use since 2005 and requests for new CEs and, based on the information gathered in the survey, to propose additional CEs through rulemaking. Based on the environmental provisions of MAP-21, we expect announcements of modified regulations for additional categorical exclusions, as well as programmatic environmental reviews or guidance concerning integration of planning and environmental review, a process for approving and documenting a lead federal agency, a four-year accelerated complex project schedule, and programmatic mitigation plans.

Although MAP-21 promises to streamline the environmental review process for qualifying transportation projects, project proponents will still need to have a big-picture strategy to make their projects a success and take full advantage of the MAP-21 benefits. Venable has extensive experience assisting clients with the development and planning of transportation projects, including integration of technical and legal information and creation of legally defensible project records for agency action. We can assist project proponents in determining whether their projects qualify for MAP-21 streamlining and guide them in effective strategies for compliance with other environmental statutes, including the Clean Water Act (CWA), the National Historic Preservation Act (NHPA), and Section 4(f) of the Transportation Act.

***The proposed CEs are open for public comment until April 29, 2013.***

#### Why Comment?

While these particular CEs are required by statute, the two categories may not sufficiently cover projects that should be excluded based on minimal environmental impacts. This notice provides an opportunity to address the scope of categorical exclusions to ensure that this NEPA streamlining tool is available on a practical level for project proponents. Moreover, the agencies should hear from potential project proponents to assemble a record that reflects whether these legislative steps actually affect transportation project delivery, the ultimate goal of streamlining.

#### Description of Proposed CEs

To qualify for the new CE, the FHWA or FTA will have to develop a project record showing that a project fits within one of the two new categories and that no "unusual circumstances exist" that would require additional environmental studies. Unusual circumstances may include significant impacts to the

environment, properties protected under Section 4(f) of the DOT Act, properties covered by Section 106 of the National Historic Preservation Act (NHPA), or significant public controversy. Existing regulations covering “segmentation” of projects (40 C.F.R. § 1508.25 and 23 C.F.R. § 771.111(f)) and other federal laws and regulations (e.g. Clean Water Act, Clean Air Act, and Endangered Species Act) will apply, notwithstanding these new CEs. In addition, it is important to note that action on the project by another agency (e.g. a Clean Water Act Section 404 permit issued by the U.S. Army Corps of Engineers) may trigger NEPA analysis.

### **Projects Within an Existing Operational Right-of-Way**

Under the NPR, projects occurring in an existing operational right-of-way will qualify for a CE, absent any unusual circumstances. “Project” is currently defined under 23 U.S.C. § 101(a) as “any undertaking eligible for assistance under [title 23].” Operational right-of-way is defined in Section 1316(b) of MAP-21 as “all the real property interest 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.” The NPR proposes to define operational right-of-way as “portions of the right-of-way that have been disturbed for an existing transportation facility or are regularly maintained for transportation purposes.” Rights-of-way that were previously acquired but are **not** currently being used for the above activities are not considered operational rights-of-way. This includes rights-of-way acquired for future projects or expansions of existing projects. Projects that shift from one transportation use to another and those that increase capacity of an existing facility will be eligible for the CE, absent unusual circumstances.

### **Projects Receiving Limited Federal Funding**

The second proposed CE is for projects that receive limited federal funds. Funding includes loans, grants, loan guarantees, or lines of credit. A project will qualify for the proposed CE if it does not require “Administration action other than funding” and receives less than 5 million dollars in federal funds or has a total cost of less than 30 million dollars, of which less than 15 percent is federal funds. “Administration action” is defined under 23 C.F.R. § 771.107(c) to include approval of activities such as joint- and multiple-use permits or changes in access control. Federal funding includes any federal source, not just funds from the FHWA and FTA.

### **Conclusion**

The NPR is intended to streamline the environmental review process in accordance with the goals of MAP-21. CEs are an important part of the streamlining process in that they completely avoid costly EAs or EISs. Project proponents should continue to be aware of the obligations under other federal laws and regulations under these new classes of CEs.

***The comment period for the NPR ends on April 29, 2013.***

Counsel in **Venable’s Environmental Practice Group** are experienced with NEPA and MAP-21. Contact any of the authors or your Venable counsel for more information.

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<sup>i</sup> Margaret N. Strand, Gregory S. Braker, and Megan M. Roberts-Satinsky, *Federal Transportation Agencies Issue Interim NEPA Guidance* (January 2013, [available here](#)).

<sup>ii</sup> Department of Transportation, *Plan for Implementation of Executive Order 13563 Retrospective Review and Analysis of Existing Rules* (August 2011, [available here](#)).