Arizona Association of County Engineers – New Rules for Categorical Exclusions for FHWA Projects

Paul O’Brien
Manager, ADOT
Environmental Planning Group
MAP-21

- What are the new rules for Categorical Exclusions?
- What changes did MAP-21 introduce?
- What is MAP-21?
- What is a Categorical Exclusion?
- What is NEPA?
MAP-21

“Moving Ahead for Progress in the 21st Century”

- The latest federal transportation funding authorization (signed into law on July 6, 2012)
- Map-21 introduced changes to existing laws and regulations.
- 23 CFR 771 “Environmental Impact and Related Procedures”; FHWA’s implementing regulations under the National Environmental Policy Act (NEPA)
The National Environmental Policy Act (NEPA) of 1969

- NEPA requires federal agencies to incorporate environmental considerations in a systematic interdisciplinary approach
- NEPA requires all federal agencies to prepare a detailed statement assessing impacts significantly affecting the environment
- Council of Environmental Quality (CEQ) established
The National Environmental Policy Act (NEPA) of 1969

- Review and approval under NEPA is required for Federal-Aid Highway Projects (ADOT and LPA projects)
  - Federal funds for Design, Right-of-Way and/or Construction

- Other Federal actions (regardless of project funding):
  - Certain permits
  - Action by federal land management agencies (FS, BLM, BIA, etc.)
  - Design Exceptions on the National Highway System (NHS)
  - A change in access control on the Interstate Highway System
NEPA Classes of Action

NEPA Documents:

• Environmental Impact Statement (**EIS**)
  - Impacts *significant*

• Environmental Assessment (**EA**)
  - Significance of impacts are not clearly known

• Re-Evaluation
  - Revisit after NEPA approval (time elapsed or design changes)
NEPA Class of Action

Environmental Impact Statement (EIS)

A new access-controlled facility requires an EIS by regulation

SR 202L – New Freeway
NEPA Class of Action

Environmental Assessment (EA)

Major corridor improvements or reconstruction

I-17 – Cordes Junction Interchange Reconstruction
NEPA Class of Action

Environmental Assessment (EA)

Major bridge rehabilitation or replacement in a sensitive environment

I-15 – Bridge #6
NEPA Classes of Action

NEPA Documents

• **Categorical Exclusion (CE)**
  - Impacts *not significant* (under the law)
  - For action “categorically excluded” from having to prepare an EIS if it meets certain criteria previously determined as having no significant environmental impact
  - A number of federal agencies have developed lists of actions which are normally categorically excluded from having to prepare an EIS under their NEPA regulations
NEPA Classes of Action

1970
• All federal agencies are to prepare a “detailed statement” assessing the environmental impact of a project (only EISs prepared)

1978
• Council of Environmental Quality (CEQ) issued regulations 40 CFR 1500-1508 that created different levels of NEPA review and the “categorical exclusion.”
NEPA Classes of Action

1980
- FHWA regulations updated (new CEQ regulations)
  - One group of “Listed CEs” (23 CFR 771.115)

1987
- 23 CFR 771.117 revised
  - Split CEs into two groups in sections (c) and (d); the “c-list” and the “d-list”.
  - Each section has lists of qualifying categories of “actions” (project types)
NEPA Classes of Action

• Categorical Exclusions (CEs)
  – 23 CFR 771.117(c)
    • “Undocumented CE”
    • Also called “Group One” in Arizona
    • One page memo with coordination/consultations noted

  – 23 CFR 771.117(d)
    • “Documented CE”
    • Also called a “Group Two” in Arizona
    • Condensed Clearance Memo or CE Checklist
NEPA Class of Action

Categorical Exclusion (CE) – ("c-list")

Traffic Guide Sign – minor impacts with limited ground disturbance
NEPA Class of Action

Categorical Exclusion (CE) – (“d-list” with CE Checklist)

New HOV lanes in existing median
NEPA Class of Action

Categorical Exclusion (CE) – ("d-list" with Condensed Clearance Memo)

Pavement Preservation Project - work on the existing roadway
NEPA Class of Action

Categorical Exclusion (CE) – (“d-list” with CE Checklist)

Pavement Preservation Project— including work off the roadway such as culvert extensions and slope flattening, etc.
NEPA Class of Action

Categorical Exclusion (CE) – (“c-list or “d-list”)

Bridge Rehabilitation
Regulatory Hierarchy

- United States Code (USC) [Law]
  - 23 (Highways) and 42 (Public Health) {NEPA}

- Council of Environmental Quality (CEQ) Regulations
  - 40 CFR 1500

- FHWA NEPA Regulations
  - 23 CFR 771

- FHWA Headquarters Guidance
  - Technical Advisory T6640.8A for NEPA Documents
  - 4(f) Policy Paper

- FHWA AZ Division Guidance

- ADOT Environmental Planning Group Guidance
Other Major Laws in Transportation Project Development

- Historic Preservation Act of 1966 (Section 106)
- DOT Act of 1966 (4(f) Properties)
- Clean Air Act of 1963 & 1970 Amendments
- Clean Water Act of 1972 (404 Permits)
- Endangered Species Act of 1973 (Section 7 Consultation)
- Migratory Bird Treaty Act of 1918
Federal Highway Authorizations

MAP-21

- MAP-21 changes to Categorical Exclusions defined in 23 CRF 771.117
  - (a) Definition of CEs – **No Changes**
  - (b) Limitations of CEs – **No Changes**
  - (c) “c-listed” actions – **Modified and New CEs**
  - (d) “d-listed” actions - **CEs moved to c-list**

- Note; 23 CFR 771.117 has remained largely unchanged since 1987.
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- Did all these new CEs become effective when MAP-21 was signed into law?
  - No. Map-21 required the Secretary of Transportation to propose Federal Rulemaking

- Rulemaking is how federal agencies (FHWA) prepare regulations (23 CFR 771) under their authority
  - Administrative Procedures Act defines the process
  - Proposed rule, Final rule, consideration of public comments, Final rule (Federal Register)
  - The final rule establishes when the revised regulations become effective.
23 CRF 771.117(a) – Definition of CEs

“Categorical exclusions (CEs) are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental impacts. They are actions which: do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.”
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- **23 CRF 771.117(b)** – Puts conditions or limitations on CEs
  - Any action which normally would be classified as a CE but could involve **unusual circumstances** will require the FHWA, in cooperation with the applicant, to conduct appropriate environmental studies to **determine if the CE classification is proper***. Such unusual circumstances include:
    - (1) Significant environmental impacts;
    - (2) Substantial controversy on environmental grounds;
    - (3) Significant impact on properties protected by section 4(f) of the DOT Act or section 106 of the National Historic Preservation Act; or
    - (4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

- Note*; This will most likely be for determining the type of CE (“c-list” or “d-list”)
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- 23 CRF 771.117(b) (continued)
  - “Unusual circumstances” comes from CEQ 40 CFR 1508.4 Categorical Exclusions
  - This is not new with MAP-21 and dates back to the 1978 CEQ regulations and the 1980 FHWA regulations
  - Think - “Other Major Laws in Transportation Project Development”
• 23 CRF 771.117(b) (continued)

• Due Diligence is how we assess “unusual circumstances”
  – Independent utility and logical termini
  – Collection and analysis of data
  – Coordination
  – Consultation
  – Evaluation

• Note; “unusual circumstances” may keep a project as a “d-listed” CE, as opposed to “c-listed”, but this is **highly unlikely** to ‘bump’ a project from a CE to an EA or EIS.
MAP-21 Section 1301

- Section 1301 Declaration of Policy and Project Delivery Initiative
  - “….it is in the national interest to accelerate project delivery and reduce costs...and to ensure that transportation project development is done in an efficient and effective manner...”
MAP-21 Section 1315

• Modified Categorical Exclusion for Emergency Projects under 771.117(c)(9) [February 19, 2013]
  – Previously only referenced Title 23:
    • “Emergency repairs under 23 U.S.C. 125”
  – Section 1107 of MAP-21 amended 23 U.S.C. 125:
    • (d)(1)A) Definition of comparable facility. — In this paragraph, the term “comparable facility” means a facility that meets the current geometric and construction standards required for the types and volume of traffic that the facility will carry **over its design life**
MAP-21 Section 1315

- Amended 771.117(c)(9) by adding section (ii)

  (ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:

  (A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and

  (B) Is commenced within a 2-year period beginning on the date of the declaration.
MAP-21 Section 1315

“c-listed” CE for an Emergency Project within the existing right-of-way

Reconstruction could include a wider bridge under (c)(9) before MAP-21

Unusual circumstances?

404 permits

Possible Endangered Species Act
MAP-21 Section 1315

“c-listed” CE for an Emergency Project

Reconstruction could now include a climbing lane, if warranted, under the revised (c)(9)

Unusual circumstances?

Archaeological concerns

Possible Endangered Species Act
MAP-21 Section 1316

• New Categorical Exclusions for projects within the “operational right-of-way” [February 12, 2014]
  – Added 771.117(c)(22)
  – Makes projects within the ‘operational right-of-way’ of a transportation facility “c-list” CEs
  – Operational ROW “has been disturbed” and “regularly maintained” within the ROW (footprint)
    • Clear Zones
    • Landscaping
    • Temporary Construction Easements (TCEs)
MAP-21 Section 1316

New Categorical Exclusions for projects within the operational right-of-way

Includes areas “has been disturbed” or is “maintained for a transportation purpose”

Clear zone and landscaping
MAP-21 Section 1316

An operational right-of-way could be a wide area
MAP-21 Section 1316

An operational right-of-way could be quite narrow.
MAP-21 Section 1316

The “clear zone” cited in the regulation. These distances vary depending on the slopes, design speed, traffic volumes, etc. (AASHTO)

Engineering and environmental need jointly determine this criteria
MAP-21 Section 1316

Project is within the operational right-of-way (not just looking ROW to ROW)

Unusual circumstances?

With limited information it appears to qualify as a “c-listed” CE
MAP-21 Section 1316

Project is within the operation right-of-way

“Features associated with the physical footprint of the transportation facility”

Unusual circumstances?
404 permits
Potential T&E/ESA issues
MAP-21 Section 1316

Project is within the operational right-of-way

But, there could be significant issues and potential impacts under the National Historic Preservation Act in a Historic District

Potential 4(f) issues
MAP-21 Section 1316

Project is within the operational right-of-way

But, there could be significant issues and potential impacts under the National Historic Preservation Act

Potential 4(f) issues
MAP-21 Section 1317

• New Categorical Exclusions for projects with limited Federal assistance [February 12, 2014]
  – Added 771.117(c)(23)
  – Makes projects with limited Federal funds a “c-listed” CE
    – $5 million or less total project cost with all Federal funds
    – $30 million or less total project cost with no more than 15% Federal funds contribution
MAP-21 Section 1317

Project is not within the operational right-of-way (assume new ROW) – does not qualify under (c)(22)

But, are the federal funds on the project less than $5 million? – it could qualify under (c)(23)

Unusual circumstances?
MAP-21 Section 1318

Section 1318 – Four provisions:

1) Survey use of CEs on transportation projects
2) Adds new CEs requested by State DOTs, MPOs and LPAs
3) Reclassifies the first three categories of actions currently under 23 CFR 771.117(d) to being listed under paragraph (c)
4) Expansion of DOT/State programmatic agreements (PCE)
MAP-21 Section 1318

Section 1318 Continued:

- Proposed rule published September 19, 2013
- Currently still in rulemaking
- Proposed rule includes:
  - Four new “c-list” CEs from the MAP-21 survey
  - Moves the top three “d-list” CEs to the “c-list” to an extent for projects that meet a proposed set of constraints to be included in the regulations.
  - Nationally consistent criteria for all PCE agreements
    - ADOT has a PCE with FHWA that will be updated
MAP-21 Section 1318

• Section 1318 Continued:
  – Proposed four new “c-list” CEs:
    1) Geotechnical and other investigations*
    2) Environmental restoration, and pollution abatement including stormwater facility retrofits
    3) Ferry vessel purchase, replacement and rehabilitation
    4) Ferry terminal facility rehabilitation and reconstruction

  – * Appears to be the most relevant in Arizona
MAP-21 Section 1318

• Section 1318 Continued:
  – Proposed three “d-list” CEs moved to the “c-list”
    1) Modernization of a highway including shoulders and auxiliary lanes
    2) Highway safety & traffic operational improvements
    3) Bridge reconstruction, rehabilitation & replacement and RR grade separations
MAP-21 Section 1318

- Section 1318 Continued:
  - Three “d-list” CEs moved to “c-list” with six constraints:
    1) Minor amounts of ROW
    2) Level of 404 permit (Nationwide or General)
    3) No “adverse effect” under the NHPA, no 4(f) use except “de minimis” and no “likely to adversely affect” T & E species or critical habitat under the Endangered Species Act
    4) No adverse temporary closure or access impacts
    5) No change in access control (Interstate highways)
    6) No floodplain encroachment or construction in, across or adjacent to a river of the National System of Wild and Scenic Rivers
MAP-21 Section 1315 to 1318

- “C-listed” CEs (projects that are emergencies, in the operational right-of-way or less than $5 million in cost) still need to consider other laws and regulations.
MAP-21 Sections 1315 to 1318
Summary

What does all this mean? Good news:

- *Some* types of projects previously prepared as CE’s with a full CE Checklist (or Condensed Clearance Memo) *may* be prepared without one in the future ("d-list" CEs now classified as "c-list" CEs)
- Time and cost savings for developing Federal-Aid Highway Projects with *some* reduction in documentation
- Many LPA Projects will qualify as “c-listed” CEs
MAP-21 Sections 1315 to 1318

Summary

• What does all this mean? But, remember:
  • The critical path in project development still needs to be managed! “c-listed” CE does not mean delay the environmental work needed
  • Surveys, Section 106 consultation, Section 7 consultation, 404 permits, etc. (unusual circumstances/other laws and regulations)
  • Consult with ADOT EPG as early as possible and confirm anticipated NEPA classification with FHWA
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Questions?

Thank You