

BLOG POST

DOT's New NEPA Categorical Exclusion May Actually Speed Project Delivery

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By [Lowell Rothschild](#)

Spurred on by Congress, on Monday, the Federal Highway and Transit Administrations adopted a categorical exclusion which may spare some projects a detailed review under the National Environmental Policy Act. Specifically, projects that receive less than \$5,000,000 in federal funding will be presumed not to have to undertake any NEPA review at all.

The fact that there would be some type of CatEx along this line was never in doubt – in July 2012, Congress included a provision in Section 1317 of the highway bill (called “MAP-21”) specifically ordering DOT to (1) designate a CatEx for any project that receives less than \$5 million in federal funding and (2) promulgate a rule to carry out the CatEx. The question was how DOT would implement this mandate: Would any project whatsoever that received less than \$5 million be excluded, even if DOT had other major decisions to make on the project – decisions that would normally require NEPA review?

Initially, it looked like DOT would limit the CatEx to projects that fell below the funding ceiling and needed no other significant approvals – the CatEx FHWA and FTA proposed on February 28, 2013 included “the phrase ‘that do not require Administration actions other than funding’ to clarify that the [CatEx] is limited to situations where the only Agency action involved is funding.” DOT made that point clear with an example – “a project that would receive Federal funding at or below the specified limits but that also would need an Interstate access approval from FHWA under section 111(a) of title 23, U.S.C., could not be processed as a CE under the proposed rule.”

However, the final rule eliminates that restriction, intentionally and with an explanation. I try not to quote extensively from agency decisions in blog posts, but the explanation here is important, since it makes clear that the only criterion that matters to obtain the CatEx is the \$5 million threshold –

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).

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[However, t]he 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.

In short, any project that receives less than \$5 million in federal funds is presumed to be categorically excluded from NEPA review, even if it requires other DOT approvals.

There’s one catch – the project has to receive some amount of federal funding to qualify for the exclusion. A project that requires a federal permit, authorization or other approval and doesn’t receive any funding, does not qualify. The proposed rule gives several examples of what qualifies as federal funding, including “Federal grants, loans, loan guarantees, lines of credit, and projects receiving funds authorized for the Federal Lands Access Program, the Federal Lands Transportation Program, and the Tribal Transportation Program.”

So the interesting question going forward is whether projects will modify their funding strategies to gain the benefit of the new CatEx. We’ll have to wait and see.