**Grant Wright**

**Categorical Exclusions**

**Including FHWA 23 CFR 771.117, c and d**

**Summary:** **Applicability:**

Categorical Exclusions (CEs) are actions (or projects) that do not have significant effect on the human environment per findings of a Federal agency. CEs are allowed exceptions from National Environmental Policy Act (NEPA) requirements including environmental assessments and environmental impact statements.

CEs are defined by the Council of Environmental Quality (CEQ) in 40 CFR § 1508.4 - Categorical exclusion, and Federal regulations that govern individual Federal agencies such as 23 C.F.R. 771.117 for the Federal Highway Administration (FHWA). 23 C.F.R. 771.117 (c) and (d) contain lists of activities that meet the CE criteria for the FHWA. The c list actions usually do not need supplemental documentation, d list actions will require additional documentation with a CE application.

Extraordinary circumstances will negate the use of a CE for an action, these may include impacts on wetlands, endangered species, and cultural sites.

**Permit Name**

Categorical Exclusions are referred to as CEs and Cat Exs. They exempt further investigation of environmental effects normally required of projects by NEPA. CEs are not permits, they are used to satisfy the NEPA procedures required of Federal Agencies.

**APPLICABILITY**

Nearly all projects with federal funding requires NEPA. Some may qualify for CEs.

For the FHWA 23 C.F.R. 771.117 c and d list actions may meet the CE criteria.

40 CFR § 1508.4 - Categorical exclusion.

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect.

**PROCESSING TIMES**

Less than 60 months for sure (the median time for an EIS)  
 <https://www.environment.fhwa.dot.gov/nepa/timeliness_of_nepa.aspx>

**Agency Coordination:**

Lead Agency - **FHWA, Department of Transportation and Public Facilities (DOT&PF) is a designated agency in Alaska. Per 23 USC 327 and a Memorandum of Understanding between FHWA and DOT&PF dated Nov. 3rd, 2017.**

Complementary Roles of Other Public Agencies

A Federal Agency may not use CEs from other agency’s written procedures. CEs from other agencies may be used to prove that an action has no significant effect when amending the Federal Register for the interested agency to include the action as a CE.

Federal, State, and Local Government agencies may need to be consulted to determine impact on wildlife, floodplains, historic buildings etc. The AK DOT Cat Ex Documentation form lists many of these in the Comments and Coordination section

**Key people:** DOT CatEx form has signature spaces for Environmental Impact Analyst, Engineering Manager, and Regional Environmental Manager

AK DOT Statewide Environmental Office Document Prep

<http://www.dot.state.ak.us/stwddes/desenviron/resources/docprep.shtml>

AK DOT Categorical Exclusion Manual

<http://www.dot.state.ak.us/stwddes/desenviron/assets/pdf/manual/ch03.pdf>

AK DOT Doug - [douglas.kolwaite@alaska.gov](mailto:douglas.kolwaite@alaska.gov)

Statewide Environmental Program Manager

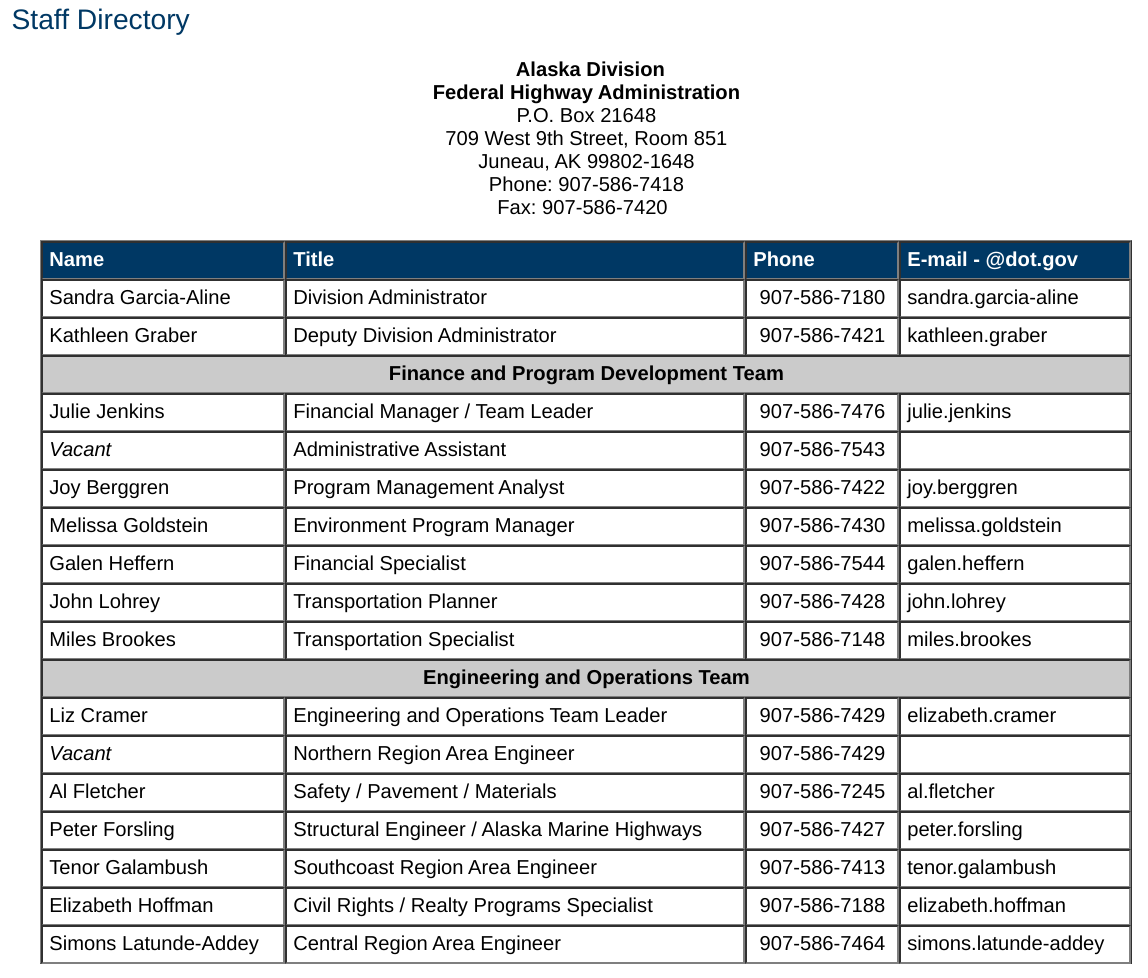
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FHWA Alaska Division: <https://www.fhwa.dot.gov/akdiv/>

**Information Necessary:**

Documentation (from DOT CatEx Documentation Form:

Project Information

* Project Name
* Federal Project Number
* State Project Number
* Primary / Ancillary Project Connections
* CE Designation in 23 CFR 771.117
* Project Scope (STIP Project Description)
* Project Purpose and Need
* Project Description

Environmental Consequences

* Right of Way Impacts
* Social and Cultural Impacts
* Economic Impacts
* Land Use and Transportation Plans
* Impacts to Historic Properties
* Wetland Impacts
* Water Body Involvement
* Fish & Wildlife
* Threatened & Endangered Species
* Invasive Species
* Contaminated Sites
* Air Quality
* Floodplain Impacts
* Noise Impacts
* Water Quality Impacts
* Construction Impacts
* Section 4(f)/6(f) 23 CFR 774

Permits and Authorizations

* USACE
* Coast Guard
* ADF&G Fish Habitat
* Flood Hazard
* ADEC Non-Domestic Wastewater Plan
* ADEC 401
* ADEC APDES
* Noise
* Eagle Permit
* Others

Comments and Coordination

* Public/Agency involvement
* Public meetings
* Public notifications
* Agency meetings

Environmental Commitments and Mitigation Measures - Summary

**Special definitions**

CE – Categorical Exclusion

CEQ – Council on Environmental Quality

CFR – Code of Federal Regulations

DOT&PF – Department of Transportation & Public Facilities

EA – Environmental Assessment

EIS – Environmental Impact Statement

FHWA – Federal Highway Administration

MOU – Memorandum of Understanding

NEPA – National Environmental Policy Act

QA/QC – Quality Assurance/Quality Control

REM – Regional Environmental Manager

USC – United States Code

**Enforcement and Penalties:**

Lawsuits, Project Delay, Denial of Funding, Negative Perception

<https://www.fema.gov/possible-consequences-not-following-national-environmental-policy-act-process>

**Other Resources**

FHWA Classes of Action Page

<https://www.environment.fhwa.dot.gov/nepa/classes_of_action.aspx>

US DOT FHWA Categorical Exclusion Video (6 min)

<https://www.youtube.com/watch?v=-Bx973AEe0k>

US DOT NEPA Categorical Exclusion Survey Review - 2012

<https://www.environment.fhwa.dot.gov/nepa/sec1318report.pdf>

CEQ Memorandum on Revising Categorical Exclusion under NEPA

<https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf>

AK DOT Categorical Exclusion Manual

<http://www.dot.state.ak.us/stwddes/desenviron/assets/pdf/manual/ch03.pdf>

AK DOT Statewide Environmental Office

<http://www.dot.state.ak.us/stwddes/desenviron/index.shtml>

AK DOT NEPA Assignment and CE Assignment

<http://www.dot.state.ak.us/stwddes/desenviron/resources/nepa.shtml>

AK DOT Statewide Environmental Office Document Prep

<http://www.dot.state.ak.us/stwddes/desenviron/resources/docprep.shtml>

**REGULATIONS (CFR)**

State

Alaska has best practices but no statewide NEPA style regulation. The State DOT&PF has assumed responsibility for NEPA review from the FHWA since 2017. The State DOT makes determinations and approves CEs for FHWA projects.

Federal

<https://www.law.cornell.edu/cfr/text/40/1508.4>

40 CFR 1508.4 - Categorical exclusion.

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

<https://www.law.cornell.edu/cfr/text/23/771.117>

23 CFR § 771.117 - FHWA categorical exclusions.

(a) CEs are actions that meet the definition contained in 40 CFR 1508.4, and, based on FHWA's past experience with similar actions, do not involve significant environmental impacts. They are actions that: 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.

(c) and (d) list current FHWA CEs approved for use.

**(c)** The following [actions](https://www.law.cornell.edu/cfr/text/23/771.117) meet the criteria for CEs in the CEQ regulations ([40 CFR 1508.4](https://www.law.cornell.edu/cfr/text/40/1508.4)) and [paragraph (a)](https://www.law.cornell.edu/cfr/text/23/771.117#a) of this section and normally do not require any further NEPA approvals by the FHWA:

**(1)** Activities that do not involve or lead directly to construction, such as planning and research activities; grants for training; engineering to define the elements of a proposed [action](https://www.law.cornell.edu/cfr/text/23/771.117) or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions that establish classes of highways on the Federal-aid highway system.

**(2)** Approval of utility installations along or across a transportation facility.

**(3)** Construction of bicycle and pedestrian lanes, paths, and facilities.

**(4)** Activities included in the State's highway safety plan under [23 U.S.C. 402](https://www.law.cornell.edu/uscode/text/23/402).

**(5)** Transfer of Federal lands pursuant to [23 U.S.C. 107(d)](https://www.law.cornell.edu/uscode/text/23/107#d) and/or [23 U.S.C. 317](https://www.law.cornell.edu/uscode/text/23/317) when the land transfer is in support of an [action](https://www.law.cornell.edu/cfr/text/23/771.117) that is not otherwise subject to FHWA review under NEPA.

**(6)** The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.

**(7)** Landscaping.

**(8)** Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.

**(9)** The following [actions](https://www.law.cornell.edu/cfr/text/23/771.117) for transportation facilities damaged by an incident resulting in an emergency declared by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act ([42 U.S.C. 5121](https://www.law.cornell.edu/uscode/text/42/5121)):

**(i)** Emergency repairs under [23 U.S.C. 125](https://www.law.cornell.edu/uscode/text/23/125); and

**(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.

**(10)** Acquisition of scenic easements.

**(11)** Determination of payback under [23 U.S.C. 156](https://www.law.cornell.edu/uscode/text/23/156) for property previously acquired with Federal-aid participation.

**(12)** Improvements to existing rest areas and truck weigh stations.

**(13)** Ridesharing activities.

**(14)** Bus and rail car rehabilitation.

**(15)** Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.

**(16)** Program [administration](https://www.law.cornell.edu/cfr/text/23/771.117), technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.

**(17)** The purchase of vehicles by the [applicant](https://www.law.cornell.edu/cfr/text/23/771.117) where the use of these vehicles can be accommodated by existing facilities or by new facilities that themselves are within a CE.

**(18)** Track and railbed maintenance and improvements when carried out within the existing right-of-way.

**(19)** Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.

**(20)** Promulgation of rules, regulations, and directives.

**(21)** Deployment of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience. Examples include, but are not limited to, traffic control and detector devices, lane management systems, electronic payment equipment, automatic vehicle locaters, automated passenger counters, computer-aided dispatching systems, radio communications systems, dynamic message signs, and security equipment including surveillance and detection cameras on roadways and in transit facilities and on buses.

**(22)** Projects, as defined in [23 U.S.C. 101](https://www.law.cornell.edu/uscode/text/23/101), that would take place entirely within the existing operational right-of-way. Existing operational right-of-way means all real property interests acquired for the construction, operation, or mitigation of a project. This area includes the features associated with the physical footprint of the project including but not limited to the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway. This also includes fixed guideways, mitigation areas, areas maintained or used for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transportation power substations, transportation venting structures, and transportation maintenance facilities.

**(23)** Federally funded projects:

**(i)** That receive less than $5,000,000 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see *www.fhwa.dot.gov* or *www.fta.dot.gov*) of Federal funds; or

**(ii)** With a total estimated cost of not more than $30,000,000 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see *www.fhwa.dot.gov* or *www.fta.dot.gov*) and Federal funds comprising less than 15 percent of the total estimated project cost.

**(24)** Localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.

**(25)** Environmental restoration and pollution abatement [actions](https://www.law.cornell.edu/cfr/text/23/771.117) to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the [Federal Water Pollution Control Act](https://www.law.cornell.edu/topn/clean_water_act) ([33 U.S.C. 1341](https://www.law.cornell.edu/uscode/text/33/1341); 1342)) carried out to address water pollution or environmental degradation.

**(26)** Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes), if the [action](https://www.law.cornell.edu/cfr/text/23/771.117) meets the constraints in [paragraph (e)](https://www.law.cornell.edu/cfr/text/23/771.117#e) of this section.

**(27)** Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints in [paragraph (e)](https://www.law.cornell.edu/cfr/text/23/771.117#e) of this section.

**(28)** Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings, if the [actions](https://www.law.cornell.edu/cfr/text/23/771.117) meet the constraints in [paragraph (e)](https://www.law.cornell.edu/cfr/text/23/771.117#e) of this section.

**(29)** Purchase, construction, replacement, or rehabilitation of ferry vessels (including improvements to ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities that themselves are within a CE.

**(30)** Rehabilitation or reconstruction of existing ferry facilities that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in the existing facility's capacity. Example [actions](https://www.law.cornell.edu/cfr/text/23/771.117) include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.

**(d)** Additional [actions](https://www.law.cornell.edu/cfr/text/23/771.117) that meet the criteria for a CE in the CEQ regulations ([40 CFR 1508.4](https://www.law.cornell.edu/cfr/text/40/1508.4)) and [paragraph (a)](https://www.law.cornell.edu/cfr/text/23/771.117#a) of this section may be designated as CEs only after [Administration](https://www.law.cornell.edu/cfr/text/23/771.117) approval unless otherwise authorized under an executed agreement pursuant to [paragraph (g)](https://www.law.cornell.edu/cfr/text/23/771.117#g) of this section. The [applicant](https://www.law.cornell.edu/cfr/text/23/771.117) must submit documentation that demonstrates that the specific conditions or criteria for these CEs are satisfied, and that significant environmental effects will not result. Examples of such [actions](https://www.law.cornell.edu/cfr/text/23/771.117) include but are not limited to:

**(1)**-(3) [Reserved]

**(4)** Transportation corridor fringe parking facilities.

**(5)** Construction of new truck weigh stations or rest areas.

**(6)** Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.

**(7)** Approvals for changes in access control.

**(8)** Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

**(9)** Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required, and there is not a substantial increase in the number of users.

**(10)** Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.

**(11)** Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning, and where there is no significant noise impact on the surrounding community.

**(12)** Acquisition of land for hardship or protective purposes. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

**(i)** Hardship acquisition is early acquisition of property by the [applicant](https://www.law.cornell.edu/cfr/text/23/771.117) at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

**(ii)** Protective acquisition is done to prevent imminent development of a parcel that may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

**(13)** [Actions](https://www.law.cornell.edu/cfr/text/23/771.117) described in paragraphs (c)(26), (c)(27), and (c)(28) of this section that do not meet the constraints in [paragraph (e)](https://www.law.cornell.edu/cfr/text/23/771.117#e) of this section.