

## Clarifications on Exempt Project Determinations

This information is based on consultation with the United States Environmental Protection Agency (U.S. EPA) and the Federal Highway Administration (FHWA) Headquarters' offices on the interpretation of exempt categories under 40 CFR 93.126. The intent of this document will be to better clarify and help streamline the Project of Air Quality Concern (POAQC) interagency consultation process for some projects since that step will *not* be required for projects that are exempt from both project-level and regional conformity.

### **Identification of Exempt Projects under 40 CFR 93.126**

#### What is a Transportation Project?

The definition of a "highway project" or "transit project" is found in 40 CFR 93.101. Transportation Conformity applies to federal highway and transit projects (i.e., those that are funded or approved by FHWA or the Federal Transit Administration [FTA]) that meet one of these two definitions, and not other types of projects. Definitions from 40 CFR 93.101:

"Highway project" is an undertaking to implement or modify a highway facility or highway-related program. Such an undertaking consists of all required phases necessary for implementation. For analytical purposes, it must be defined sufficiently to:

- (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
- (2) Have independent utility or significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
- (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

"Transit project" is an undertaking to implement or modify a transit facility or transit-related program; purchase transit vehicles or equipment; or provide financial assistance for transit operations. It does not include actions that are solely within the jurisdiction of local transit agencies, such as changes in routes, schedules, or fares. It may consist of several phases. For analytical purposes, it must be defined inclusively enough to:

- (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
- (2) Have independent utility or independent significance, i.e., be a reasonable expenditure even if no additional transportation improvements in the area are made; and
- (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Projects that do not fit into these definitions (e.g., vehicle charging stations) are not subject to project-level conformity.

### What are Exempt Projects?

Projects that are exempt from conformity are generally those that are air quality neutral and are organized into the categories of Safety, Mass Transit, Air Quality, and Other. Transportation projects of the types listed in Table 2 of 40 CFR 93.126 are generally exempt from the requirement to determine project-level conformity, except in limited cases. In addition, the projects can proceed in the absence of a conforming transportation plan and Transportation Improvement Program (TIP).

Note that a project of the type listed in Table 2 is not exempt if, through the interagency consultation procedures, it is decided that potentially adverse emissions impacts may exist for any reason (see §93.105(c)(1)(iii)). EPA, FHWA, and FTA are parties to interagency consultation as well as state and local air quality and transportation agencies. States and Metropolitan Planning Organizations (MPOs) must ensure that exempt projects do not interfere with the implementation of approved Transportation Control Measures (TCMs) in a State Implementation Plan (SIP).

### Is the Project on the Exempt List?

To be exempt from project-level conformity, the project must be one of the project types listed in Table 2 of 40 CFR 93.126 of the Transportation Conformity rule. As mentioned above, the project types are grouped into Safety, Mass Transit, Air Quality and Other. The projects listed in Table 2 are shown below.

### Are Projects in the State's Highway Safety Improvement Program Always Exempt?

Yes. As "Highway Safety Improvement Program implementation" is listed in Table 2, projects that are in the state's Highway Safety Improvement Program (HSIP) are exempt, regardless of funding source. That is, projects that are listed in the state's HSIP are exempt even if they are not funded from "Safety" funds but funded by other sources, such as "Surface Transportation Program" funds.

### Can Projects that Are Undertaken for Safety but Are Not Listed in the HSIP Be Exempt?

Under certain circumstances, it's possible that such a project could be exempt under the item "Projects that correct, improve, or eliminate a hazardous location or feature" from 40 CFR 93.126 Table 2. For a project to be exempt under this category, a project sponsor would need to present data to the interagency consultation workgroup to demonstrate that the project would resolve a safety issue. For example, if a transportation agency has accident data to show that a location is hazardous and can explain how the project would correct, improve, or eliminate the hazardous location or feature, with Interagency Consultation Workgroup concurrence the project could move forward as exempt.

However, a project sponsor would *not* need to supply safety data for the following three types of projects, as EPA and FHWA have already agreed that these projects are generally exempt, though this may require concurrence through interagency consultation:

1. Road diets: Based on discussions between EPA and FHWA Headquarters' offices, road diets are exempt under 40 CFR 93.126, Table 2, Exempt Projects. Road diets are done for safety purposes. If a road diet is part of a state's Highway Safety Improvement Program, the road diet is exempt under the item, "Highway Safety Improvement Program implementation." If not, a road diet could still be exempt under the item, "Projects that correct, improve, or eliminate a hazardous location or feature." See this link from FHWA: [https://safety.fhwa.dot.gov/road\\_diets/](https://safety.fhwa.dot.gov/road_diets/)

2. Auxiliary lanes: If an auxiliary lane is less than 1 mile in length, it can be considered exempt under 40 CFR 93.126, Table 2, as “Projects that correct, improve, or eliminate a hazardous location or feature.” This interpretation was also confirmed with EPA and FHWA Headquarters offices.
3. Ramp metering: Again, in coordination with EPA and FHWA Headquarters’ offices, ramp metering projects are also exempt, under 40 CFR 93.126, Table 2, as “Projects that correct, improve, or eliminate a hazardous location or feature.”

Note that 40 CFR 93.105(c)(1)(iii) anticipates that the interagency consultation procedures will include a specific process to evaluate “whether projects otherwise exempted ... should be treated as non-exempt in case where potential adverse emissions impacts may exist for any reason.” Therefore, if a road diet, an auxiliary lane less than 1 mile in length, a ramp meter, or any other project labeled “exempt” has “potential adverse emissions impacts,” refer to the governing interagency consultation procedures for the process to evaluate whether it should be treated as non-exempt.

**TABLE 2—EXEMPT PROJECTS**  
***Safety***

Railroad/highway crossing.  
 Projects that correct, improve, or eliminate a hazardous location or feature.  
 Safer non-Federal-aid system roads.  
 Shoulder improvements.  
 Increasing sight distance.  
 Highway Safety Improvement Program implementation.  
 Traffic control devices and operating assistance other than signalization projects.  
 Railroad/highway crossing warning devices.  
 Guardrails, median barriers, crash cushions.  
 Pavement resurfacing and/or rehabilitation.  
 Pavement marking.  
 Emergency relief (23 U.S.C. 125).  
 Fencing.  
 Skid treatments.  
 Safety roadside rest areas.  
 Adding medians.  
 Truck climbing lanes outside the urbanized area.  
 Lighting improvements.  
 Widening narrow pavements or reconstructing bridges (no additional travel lanes).  
 Emergency truck pullovers.

***Mass Transit***

Operating assistance to transit agencies.  
 Purchase of support vehicles.  
 Rehabilitation of transit vehicles<sup>1</sup>.  
 Purchase of office, shop, and operating equipment for existing facilities.  
 Purchase of operating equipment for vehicles (e.g., radios, fareboxes, lifts, etc.).

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<sup>1</sup> NOTE: In PM<sub>10</sub> and PM<sub>2.5</sub> nonattainment or maintenance areas, such projects are exempt only if they are in compliance with control measures in the applicable implementation plan.

Construction or renovation of power, signal, and communications systems.  
Construction of small passenger shelters and information kiosks.  
Reconstruction or renovation of transit buildings and structures (e.g., rail or bus buildings, storage and maintenance facilities, stations, terminals, and ancillary structures).  
Rehabilitation or reconstruction of track structures, track, and trackbed in existing rights-of-way.  
Purchase of new buses and rail cars to replace existing vehicles or for minor expansions of the fleet<sup>1</sup>  
Construction of new bus or rail storage/maintenance facilities categorically excluded in 23 CFR part 771.

***Air Quality***

Continuation of ride-sharing and van-pooling promotion activities at current levels.  
Bicycle and pedestrian facilities.

***Other***

Specific activities which do not involve or lead directly to construction, such as:

- Planning and technical studies.
- Grants for training and research programs.
- Planning activities conducted pursuant to titles 23 and 49 U.S.C.
- Federal-aid systems revisions.

Engineering to assess social, economic, and environmental effects of the proposed action or alternatives to that action.

Noise attenuation.

Emergency or hardship advance land acquisitions (23 CFR 710.503).

Acquisition of scenic easements.

Plantings, landscaping, etc.

Sign removal.

Directional and informational signs.

Transportation enhancement activities (except rehabilitation and operation of historic transportation buildings, structures, or facilities).

Repair of damage caused by natural disasters, civil unrest, or terrorist acts, except projects involving substantial functional, locational or capacity changes.