

# Chapter 2

## Class of Action



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# Chapter 2 Class of Action

## NEPA ASSIGNMENT – CE Assignment vs. Full Assignment

The Nebraska Department of Transportation (NDOT) entered CE Assignment pursuant to [23 USC 326](#) on September 5, 2018. Under CE Assignment, NDOT assumed FHWA responsibilities for determining whether specific projects are categorically excluded from the requirement to prepare an EA or EIS. NDOT, rather than FHWA, now makes CE determinations for most projects (for exceptions, see [Chapter 1, Overview](#), Section 1.5). All EAs and EISs, as well as CE determinations not assignable to NDOT under [23 USC 326](#), continue to be formally approved by FHWA. Once full NEPA Assignment under [23 USC 327](#) is in place, all types of environmental approvals (CE, EA, and EIS, with limited exceptions; see [Chapter 1, Overview](#), Section 1.5) will be made by NDOT.

This chapter describes the environmental impact statement, categorical exclusion, and environmental assessment under the National Environmental Policy Act of 1969 (NEPA), together referred to as classes of action by the Federal Highway Administration (FHWA); summarizes the Nebraska Department of Transportation (NDOT) process for determining a project's class of action; and identifies the documentation requirements for these activities.

## 2.1 Classes of Action

NDOT determines the project's class of action early in the NEPA documentation process for every project that is funded by federal transportation funding. NDOT and local public agency (LPA) projects that are fully funded with state or local funds do not require a class of action determination by NDOT.<sup>1</sup>

FHWA NEPA regulations define three environmental classes of action, as follows:

- Class I – Environmental impact statement (EIS)
- Class II – Categorical exclusion (CE)
- Class III – Environmental assessment (EA)

Each class of action has different documentation and compliance requirements, as described below.

### 2.1.1 Environmental Impact Statement

Actions that significantly affect the environment require an EIS ([23 Code of Federal Regulations \[CFR\] 771.115\(a\)](#)). The EIS process includes a Notice of Intent, Draft EIS, Final EIS, and Record of Decision. [Chapter 6, Environmental Impact Statement](#), of this *Environmental Procedures Manual* (Manual) presents detailed information on EIS requirements.

### 2.1.2 Categorical Exclusion

Actions that do not individually or cumulatively have a significant effect on the environment are excluded from the requirement to prepare an EIS or an EA and instead require a CE ([23 CFR 771.115\(b\)](#)). The majority of NDOT-administered projects in Nebraska are processed as CEs. Actions that typically meet the definition of a CE are identified in two specific lists, commonly referred to as the

<sup>1</sup> Projects that do not receive federal transportation funding, but require a federal action or permit from at least one other federal agency, may require associated NEPA documentation. In this instance, the class of NEPA action is determined by the federal agency that executes the action or permit.

(c) list ([23 CFR 771.117\(c\)](#)) and the (d) list ([23 CFR 771.117\(d\)](#)). While (c) list actions normally do not require more than routine review, (d) list actions generally require additional analysis to determine that the CE designation is appropriate and the action will not involve significant environmental effects. See [Chapter 4, Categorical Exclusion](#), for more information.

### 2.1.3 Environmental Assessment

Actions for which the significance of the environmental effects is not clearly established require an EA ([23 CFR 771.115\(c\)](#)). An EA is prepared to determine if the environmental effects are significant and if further analysis and documentation are needed. If analysis in the EA determines that environmental effects would be significant, then an EIS is prepared. If analysis in the EA determines that environmental effects would not be significant, then a Finding of No Significant Impact is prepared.

## 2.2 Determining the Class of Action

To determine the class of action for a project, NDOT considers the types of activities that the project would involve and the probable environmental impacts that would occur. In addition, NDOT evaluates the project for logical termini and independent utility, and ensures that it does not restrict consideration of alternatives for other reasonably foreseeable transportation improvements. See [Chapter 3, Project Development and Documentation](#), Section 3.2, for additional information on these topics. The assigned NDOT NEPA Specialist coordinates with NDOT's Public Involvement Unit and Civil Rights Officer to determine the preliminary public outreach approach for the project. When needed, the NDOT NEPA Specialist may also coordinate with additional technical resource specialists to determine if specialized resource analysis is necessary. When determining class of action, the NDOT NEPA Specialist should understand the potential for significant impacts and whether unusual circumstances exist, as discussed below.

Research conducted to determine the class of action also helps establish accurate time estimates for completing the environmental process, which helps establish reasonable expectations for project cost and schedule.

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### 2.2.1 Significant Impacts

The significance of an environmental impact should be analyzed in several contexts, including society as a whole, the affected region, and the locality. Both short- and long-term effects are relevant, as are indirect and cumulative impacts.

According to Council on Environmental Quality regulations ([40 CFR 1508.27](#)), determining the significance of environmental impacts requires consideration of both context and intensity.

The significance of an environmental impact should be analyzed in several **contexts**, including society as a whole, the affected region, and the locality. Both short- and long-term effects are relevant, as are indirect and cumulative impacts.

The significance of an environmental impact should also be analyzed for **intensity**, or the severity of the impact. The

following factors should be considered in evaluating intensity ([40 CFR 1508.27\(b\)](#)):

- Impacts that may be both beneficial and adverse
- The degree to which the proposed action affects public health or safety

- Unique characteristics of the geographical area
- The degree to which the effects on the environment are likely to be highly controversial
- The degree to which effects are uncertain or involve unique or unknown risks
- The degree to which the action may establish a precedent for future actions with significant effects
- Whether the action is related to other actions with individually insignificant but cumulatively significant impacts
- The degree to which the action may adversely affect cultural resources listed in, or eligible for listing in, the National Register of Historic Places, or may cause loss or destruction of significant scientific, cultural, or historical resources
- The degree to which the action may adversely affect an endangered or threatened species or its habitat
- Whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment

In many cases, the determination of significance is obvious because of the absence of impacts on a resource. In other cases, the degree to which the project may affect a resource needs to be considered. To properly assess the potential for significant impacts, some level of analysis is necessary. This could include the review of desktop resources, a site visit, or coordination with project planners and engineers. The potential for significant impacts is reviewed throughout the project development process, and a decision to elevate a project's class of action can be made by the NDOT Environmental Documents Unit (EDU) Manager at any time.

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Controversy, as it applies to assessing significance, must focus on disagreements over the anticipated environmental effects of the project (social, economic, natural). Simple project opposition or a high degree of public interest, absent a relationship to environmental effects, is not considered a "highly controversial" effect. To be considered in an assessment of significance, project opposition must be related to the effects of the project.

After review of the factors listed above, the NDOT NEPA Specialist will review with the EDU Manager circumstances where significant impacts may be present. The EDU Manager will ultimately make the significance determination and determine the appropriate class of action.

## 2.2.2 Unusual Circumstances

If an action involves any of the following unusual circumstances, it may not meet the requirements of a CE and may instead require an EA or an EIS ([23 CFR 771.117\(b\)](#)):

- Significant environmental impacts
- Substantial controversy on environmental grounds
- Significant impacts on properties protected by Section 4(f) of the U.S. Department of Transportation Act of 1966 or Section 106 of the National Historic Preservation Act of 1966
- Inconsistencies with any federal, state, or local law, requirement, or administrative determination relating to the environmental aspects of the action

Any action that normally would be classified as a CE, but involves unusual circumstances, requires appropriate environmental studies to determine if the CE classification is proper. Should there be any unusual circumstances identified for a project, the NDOT NEPA Specialist consults the EDU Manager, who will determine whether the CE classification remains appropriate. The EDU Manager will make the decision to elevate a project to an EA or EIS.

## 2.3 Documenting the Class of Action

The findings of a Planning and Environmental Linkages study may support the class of action determination (see NDOT's *Planning and Environmental Linkages Guidance Document*).

Upon project definition and completion of the associated programming request form (see [Chapter 1, Overview](#), Sections 1.8.2 and 1.8.3), NDOT determines its recommended class of action and documents the class of action recommendation on the Probable Class of NEPA Action Form (NDOT-53). An NDOT-53 is prepared by an NDOT NEPA Specialist for every NDOT or LPA project that receives federal-aid funding.

The following information is required on the NDOT-53:

- Project name, project number, and control number
- Preliminary assessment of the presence or absence of various environmental resources (for example, Section 4(f) properties, historic properties, threatened and endangered species, wetlands, water bodies, and hazardous materials) and potential project impacts
- Project location map
- Document preparer's signature
- Preliminary assessment of the presence or absence of environmental justice, Title VI of the Civil Rights Act of 1964, and limited English proficiency populations, and Civil Rights Officer signature
- Preliminary assessment of the need for noise and air studies, and Professionally Qualified Staff (PQS) signature
- Determination of the preliminary public involvement approach, and signature of the Public Involvement Unit
- Probable Class of NEPA Action determination (CE, EA, or EIS) and NDOT reviewing and approving signatures

Although the scope of work and project description are not specifically defined in the NDOT-53, either a Highway Improvement Programming Request Form (NDOT-73; for NDOT-administered projects in Nebraska) or a Local Public Agency Project Programming Request Form (NDOT-530; for LPA projects) is attached to the NDOT-53. Both of these programming request forms and their attachments define the project and its potential to result in environmental impacts.

The NDOT-53 is approved by NDOT. When NDOT determines that a project likely qualifies for a CE action, an NDOT NEPA Specialist compiles information and prepares the form, and an NDOT NEPA Specialist who did not prepare the NDOT-53 evaluates the compiled information and makes the class of action determination. When NDOT determines that the class of action is uncertain or the project may require an EA or EIS, the NDOT-53 is prepared by an NDOT NEPA Specialist, reviewed by an NDOT NEPA Specialist or NDOT Environmental Project Manager, and then sent to the EDU Manager for the class of action determination. If the EDU Manager determines that the project may require preparation of an EA or an EIS, the NDOT-53 is provided to FHWA for review and approval.

## 2.4 Changes to the Class of Action

Should NDOT determine, as NEPA documentation is developed, that the original class of action is no longer appropriate, a change in class of action will be made. Documentation of the new class of action and rationale for the change will be developed, approved by the NDOT EDU Manager, and included in the project file. Until NEPA Assignment, NDOT will consult with FHWA to approve a change in class of action to an EA or an EIS. Examples of changes in class of action include the following:

- Downgrading an EIS to an EA – results from a change in scope or location, or both, that alters the project to the extent that it would not result in significant impacts. This also requires rescinding the Notice of Intent to prepare an EIS.
- Downgrading an EA to a CE – results from a change in scope or location, or both, to the extent that the project now qualifies as a CE.
- Upgrading a CE to an EA – results from a change in scope or location, or both, to the extent that the project no longer qualifies as a CE.
- Upgrading an EA to an EIS – results from a change in scope or location, or both, that would potentially result in significant impacts.

## 2.5 Laws, Regulations, and Guidance

The following regulations pertain to classes of action:

- [23 CFR 771, Environmental Impact and Related Procedures](#)
  - [23 CFR 771.115, Classes of Actions](#)
  - [23 CFR 771.117, FHWA Categorical Exclusions](#)
- [40 CFR 1500–1508, Council on Environmental Quality NEPA Regulations](#)
  - [40 CFR 1501.3, When to Prepare an Environmental Assessment](#)
  - [40 CFR 1501.4, Whether to Prepare an Environmental Impact Statement](#)
  - [40 CFR 1502, Environmental Impact Statement](#)
  - [40 CFR 1508.4, Categorical Exclusion](#)
  - [40 CFR 1508.9, Environmental Assessment](#)
  - [40 CFR 1508.11, Environmental Impact Statement](#)
  - [40 CFR 1508.27, Significantly](#)