

Chapter 2

Class of Action



Contents

Chapter 2 Class of Action	2-1
2.1 Classes of Action	2-1
2.1.1 Environmental Impact Statement.....	2-1
2.1.2 Categorical Exclusion	2-2
2.1.3 Environmental Assessment.....	2-2
2.2 Determining the Probable Class of Action	2-2
2.2.1 Significant Impacts	2-2
2.2.2 Unusual Circumstances	2-3
2.3 Documenting the Probable Class of Action.....	2-3
2.4 Changes to the Probable Class of Action.....	2-4
2.5 Laws, Regulations, and Guidance	2-5

Chapter 2 Class of Action

NEPA ASSIGNMENT

The Nebraska Department of Transportation (NDOT) entered CE Assignment pursuant to [23 USC 326](#). 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), 42 U.S.C. 4331 et seq., collectively referred to as classes of action by the Federal Highway Administration (FHWA), 23 U.S.C. 139 and 23 CFR Part 771f; 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 probable class of action during the planning phase of 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.¹

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 have a reasonably foreseeable significant effect on the quality of the human environment require an EIS (42 U.S.C. 4336(b)(1); 23 USC 139(a)(4); [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 (23 U.S.C. 139; 23 CFR 771.123 et seq.), Chapter 6, Environmental Impact Statement, of this *Environmental Procedures Manual* (Manual) presents detailed information on EIS requirements.

¹ 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.

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 (42 U.S.C. 4336(a); 23 U.S.C. 139(q); [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 (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 (42 U.S.C. 4336(b)(2); 23 U.S.C. 139(a)(3); [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 Probable Class of Action

To determine the probable class of action for a project, during the planning phase, NDOT considers the types of activities 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 the project 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.

When determining the probable class of action, the NDOT NEPA Specialist should understand the potential for significant impacts and whether unusual circumstances exist, as discussed below. When needed, the NDOT NEPA Specialist should coordinate with technical resource specialists and the project sponsor to obtain additional information.

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

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.

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:

- 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 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 analysis could include a 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) Supervisor at any time.

Assessment of controversy 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. Project opposition must be related to the effects of the project. In determining whether relocation impacts have the potential to be significant or have unusual circumstances, analysis should include the likelihood for substantial controversy (do the people who would be relocated object), and if there is a history of controversial relocations in the area, among other considerations.

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) Supervisor at any time.

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.

2.3 Documenting the Probable Class of Action

Upon project definition and completion of the associated programming request form (see [Chapter 1, Overview](#)), NDOT documents the probable class of action through the Probable Class of NEPA Action Form (NDOT-53) and coordination with the EDU Supervisor and FHWA as needed. An NDOT-53 is prepared by an NDOT NEPA Specialist for most NDOT or LPA sponsored projects that receive federal-aid funding. Projects documented with a Minor Categorical Exclusion (MCE) form typically do not

require a NDOT-53 to be completed. The exception is the *MCE for Pavement Repairs & Treatment within Existing Roadway*, which requires a completed NDOT-53.

The NEPA Specialist will ensure the following preliminary resources and potential impacts are reviewed for the probable class of action determination:

- Section 4(f) properties
- Historic properties
- Threatened and Endangered Species
- Wetlands and water bodies
- Hazardous Materials

Additional information included on the NDOT-53 for reference:

- Project name, project number, and control number
- Project location map
- Document preparer's signature
- Probable Class of NEPA Action determination 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.

When the NEPA Specialist determines a project likely qualifies as a CE assigned to NDOT under the CE Assignment MOU, another NDOT NEPA Specialist or an Environmental Project Manager who did not prepare the NDOT-53 evaluates the compiled information and makes the class of action determination.

If the NEPA Specialist determines the project is not likely to qualify as a CE assigned to NDOT under the CE Assignment MOU, the NEPA Specialist will indicate on the NDOT-53 form the reasons underlying the exclusion and send the form to the EDU Supervisor for signature. These reasons may include the presence of unusual circumstances, the potential for significant impacts to identified resources, or other considerations defined in this guidance. If the EDU Supervisor determines that the project is not assignable, the NDOT-53 is provided to FHWA for review and approval. NDOT will begin working with FHWA as the lead federal agency under NEPA to proceed with documentation and review of the project following the appropriate NEPA procedures.

2.4 Changes to the Probable Class of Action

Should NDOT determine as NEPA documentation is developed that the probable class of action is no longer appropriate, a change in probable class of action will be made. Documentation of the new probable class of action and rationale for the change will be developed, and acknowledgement by the NDOT EDU Supervisor will be included in the project file. NDOT will consult FHWA for changes to the probable class of action for projects not assigned to NDOT. 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 laws and regulations pertain to classes of action:

- [42 USC 4336 et seq.](#), Procedure for determination of level of review
- [23 USC 139](#), Efficient environmental reviews for project decisionmaking and One Federal Decision
- [23 CFR 771, Environmental Impact and Related Procedures](#)
- [23 CFR 771.115, Classes of Actions](#)
- [23 CFR 771.117, FHWA Categorical Exclusions](#)