

Chapter 10

CLASS OF ACTION DETERMINATION

MDT ENVIRONMENTAL MANUAL

October 2010

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Chapter 10

CLASS OF ACTION DETERMINATION

10.1 OVERVIEW

The *Council on Environmental Quality (CEQ) Regulations* and Federal Highway Administration (FHWA) regulations for implementing the *National Environmental Policy Act (NEPA)* (42 USC 4321, et seq.) and the MDT regulations for implementing the *Montana Environmental Policy Act (MEPA)* (MCA 75-1-101, et seq.) each describe three levels of documentation for complying with the environmental process requirements — categorical exclusion (CE), environmental assessment (EA) and environmental impact statement (EIS). The term “categorical exclusion” refers to a category of actions, which do not individually or cumulatively have a significant effect on the human environment and for which, therefore, neither an EA nor an EIS is required.

Under both Federal and State requirements, the level of environmental documentation for a proposed project is determined based on whether the action is likely to involve significant environmental effects. In each case, the proposed project scope, affected environment and potential effects are evaluated in making the “class of action” determination. An EIS is required for an action that is likely to have significant environmental effects. A CE is appropriate for actions that do not individually or cumulatively have a significant environmental effect. An EA is required for actions that do not qualify for a CE and for which there is insufficient information to determine if the project’s effects warrant preparation of an EIS. If changes occur in the project scope or the affected environment after the initial class of action determination, the level of environmental documentation is reevaluated in light of the changes and may be modified, if appropriate.

This Chapter provides guidance and procedures for accomplishing and documenting the class of action determination for proposed MDT projects. The guidance and procedures are intended to ensure compliance with NEPA and MEPA and applicable implementing regulations. See [Chapters 11 “Preparing Environmental Documentation,”](#) [12 “Categorical Exclusion,”](#) [13 “Environmental Assessment/FONSI”](#) and [14 “Environmental Impact Statement/ROD”](#) for information and guidance on preparation and processing of each of the three levels of environmental documentation. [Chapter 14](#) also includes guidance on determining when a change in the scope of a project being processed with an EIS warrants preparation of a revised EIS or a supplemental EIS.

10.2 LAWS, REGULATIONS AND GUIDANCE

10.2.1 40 CFR 1500 through 1508 CEQ Regulations

These Parts of the *Code of Federal Regulations* (CFR) establish the policy and procedural framework for Federal agency compliance with NEPA. They provide direction on use of CEs (Section 1500.4(p)), when to prepare an EA (Section 1501.3) and whether to prepare an EIS (Section 1501.4). They also include definitions and guidance for key terms involved in the class of action determination process. These terms include “Categorical Exclusion” (Section 1508.4), “Effects” (Section 1508.8), “Environmental Assessment” (Section 1508.9), “Environmental Impact Statement” (Section 1508.11) and “Significantly” (Section 1508.27).

10.2.2 23 CFR 771 “Environmental Impact and Related Procedures”

Section 771.111 of these regulations addresses the responsibility and timing for the class of action determination on projects involving funding or approvals from FHWA. This Section provides that FHWA will identify the probable class of action as soon as sufficient information is available to identify the probable impacts of the action.

Section 771.115 discusses the following three classes of action that prescribe the level of environmental documentation required in the NEPA process for those projects:

1. EIS. Actions that significantly affect the environment require an EIS (40 CFR 1508.27). Section 771.115 refers to these as Class I actions.
2. CE. Actions that do not individually or cumulative have a significant environmental effect are excluded from the requirement to prepare an EA or EIS. Section 771.115 refers to these as Class II actions.
3. EA. These are actions in which the significance of the environmental impact is not clearly established. Section 771.115 refers to these as Class III actions. All actions that are not Class I or II are Class III. All actions in this class require the preparation of an EA to determine the appropriate environmental document required.

10.2.3 ARM 18.2.235 through 18.2.261 “Rules Implementing the Montana Environmental Policy Act”

These parts of the *Administrative Rules of Montana* (ARM) include the following definitions in ARM 18.2.236:

1. Categorical Exclusion. A type of action that does not individually, collectively or cumulatively require an EA or EIS, as determined by rulemaking or programmatic review adopted by the agency, unless extraordinary circumstances, as defined by rulemaking or programmatic review, occur.
2. Environmental Assessment. A written analysis of a proposed action to determine whether an EIS is required or to serve one or more of the other purposes described in ARM 18.2.237(2).

3. Environmental Impact Statement. The detailed written statement required by Section 75-1-201 of the *Montana Code Annotated* (MCA), which may take several forms:
 - a. Draft Environmental Impact Statement. A detailed written statement prepared to the fullest extent possible in accordance with 75-1-201(1)(b)(iii), MCA and ARM 18.2.235 through 18.2.260. ARM 18.2.243 addresses Preparation and Contents of Draft Environmental Impact Statements.
 - b. Final Environmental Impact Statement. A written statement prepared to the fullest extent possible in accordance with 75-1-201, MCA, and ARM 18.2.244 “Adoption of Draft Impact Statement as Final” or 18.2.245 “Preparation and Contents of Final Environmental Impact Statements” and which responds to substantive comments received on the draft environmental impact statement.
 - c. Joint Environmental Impact Statement. An EIS prepared jointly by more than one agency, either State or Federal, when the agencies are involved in the same or a closely related proposed action.

ARM 18.2.237 discusses criteria for determining the level of environmental review required for a proposed action to comply with 75-1-201, MCA. ARM 18.2.237(4) provides the option of preparing an EA for projects that normally would require an EIS where the project’s environmental effects can be reduced below the level of “significant impacts” through mitigation.

ARM 18.2.238 describes criteria to be considered in determining the significance of impacts on the human environment.

ARM 18.2.261(1) describes types of actions that qualify for a CE unless they involve “extraordinary circumstances.” ARM 18.2.261(2) describes “extraordinary circumstances” that require preparation of an EA or an EIS for a project that would otherwise qualify for a CE.

10.3 PROCEDURES

10.3.1 Evaluate Project Scope and Potential Impacts

The process for determining the class of action (i.e., the level of environmental documentation) for a proposed project begins after completion of the Preliminary Field Review (PFR) for the project and review of the PFR Report by the Project Development Engineer (PDE). The PDE evaluates the proposed project scope and potential impacts determined from the PFR and associated research to make a preliminary determination of the class of action.

The PDE evaluates the project scope and potential impacts in the context of a range of statutory and regulatory criteria, definitions, etc., and the provisions of existing programmatic agreements with FHWA. The PDE uses the information to determine potential eligibility for a CE, appropriateness of preparing an EA or need to prepare an EIS. The following sections provide guidance on the considerations associated with the levels of environmental documentation.

10.3.1.1 Significance of Impacts

The potential for a project to involve significant environmental impacts is the key factor in determining the appropriate class of action. The *CEQ Regulations* and the ARM include provisions to guide the evaluation of potential impacts for significance as discussed in the following sections.

10.3.1.1.1 *CEQ Regulations*

In evaluating potential project impacts, the PDE considers the provisions in 40 CFR 1508.27. This section of the *CEQ Regulations* defines the term “significantly.” It also provides guidance on its meaning as used in NEPA and the factors that must be considered when applying it for evaluation of the effects of specific actions. Both context and intensity must be considered in determining the significance of a project’s potential effects. The PDE reviews the following guidance:

1. Context. Consideration of context means that the significance of an action is analyzed in several contexts (e.g., affected region, number or type of affected interests, locality). Significance varies with the setting of the proposed action. In the case of a site-specific action, significance would usually depend upon the effects in the locale. Both short- and long-term effects are relevant.
2. Intensity. Consideration of intensity refers to the severity of impact. The following points must be considered in evaluating intensity:
 - Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
 - The degree to which the proposed action affects public health or safety.
 - Unique or unusual characteristics of the geographic area (e.g., proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, ecologically critical areas).

- The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- The degree to which the action may adversely affect districts, sites, highways, structures or objects 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 that has been determined to be critical under the *Endangered Species Act of 1973*.
- Whether the action threatens a violation of Federal, State or local law or requirements imposed for the protection of the environment.

10.3.1.1.2 ARM 18.2.238 “Determining the Significance of Impacts”

The PDE also considers the MEPA criteria described in ARM 18.2.238 for determining the significance of impacts. The NEPA and MEPA criteria are largely the same. The MEPA criteria include the following:

- the severity, duration, geographic extent and frequency of occurrence of the impact;
- the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;
- growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;
- the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;
- the importance to the State and to society of each environmental resource or value that would be affected;

- any precedent that would be set as a result of an impact of the proposed action that would commit the Department to future actions with significant impacts or a decision in principle about such future actions; and
- potential conflict with local, State or Federal laws, requirements or formal plans.

An impact may be adverse, beneficial or both. If none of the adverse effects of the impact are significant, an EIS is not required. An EIS is required if an impact has a significant adverse effect, even if the agency believes that the effect on balance will be beneficial.

10.3.1.2 CE Considerations

In evaluating whether a proposed project may be eligible for a CE, the PDE considers the guidance provided in the following Sections.

10.3.1.2.1 Actions that Normally Qualify as CEs

The PDE compares the project scope against the lists of actions in 23 CFR 771.117(c) and ARM 18.2.261(1) to make an initial determination of CE eligibility. Section 771.117(c) provides a specific list of CE actions that normally do not require NEPA documentation (i.e., an EA or EIS) unless they involve unusual circumstances, see [Section 10.3.1.2.2](#). ARM 18.2.261(1) provides a specific list of action types that do not individually, collectively or cumulatively require the preparation of an EA or EIS unless the action involves extraordinary circumstances, see [Section 10.3.1.2.2](#).

10.3.1.2.2 Potential for Unusual Circumstances and/or Extraordinary Circumstances

For projects covered by the lists of actions in the regulations cited above, the PDE considers whether the proposed action involves unusual circumstances and/or extraordinary circumstances that would exclude it from classification as a CE. In accordance with 23 CFR 771.117(b), unusual circumstances include:

- significant environmental impacts;
- substantial controversy on environmental grounds;
- significant impact on properties protected by Section 4(f) or Section 106; or
- inconsistencies with any Federal, State or local law, requirement or administrative determination relating to the environmental aspects of the action.

In accordance with ARM 18.2.261(2), extraordinary circumstances include:

- significant impact on publicly owned parklands, recreation areas, wildlife or waterfowl refuges or any significant historic site;
- significant impact on wetlands or prime farmland;

- significant impact on the human environment that may result from large acquisitions of right-of-way, relocations of persons or businesses, changes in traffic patterns, changes in grade or other types of changes;
- significant impact on air, noise or water quality;
- substantial controversy on environmental grounds; or
- any other kind of significant environmental impact.

10.3.1.2.3 Actions Covered by a Statewide Programmatic CE

In accordance with 23 CFR 771.117(d), additional actions that meet the criteria for a CE in the *CEQ regulations* (40 CFR 1508.4) and 23 CFR 771.117(a) may be designated as CEs only after FHWA approval. Documentation must be submitted to demonstrate that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result.

As allowed by 23 CFR 771.117(d), MDT has developed Statewide Programmatic CEs, approved by FHWA, for specific types of projects. The Statewide Programmatic CEs address the following:

1. Pavement Preservation Projects. These include crack sealing, seal and cover, thin lift overlays (less than or equal to 0.2 ft (61 mm)), mill and fill (less than or equal to 0.2 ft (61 mm)), plant mix leveling, mill open-graded friction course, micro surfacing and fog seal. The following restrictions apply to the pavement preservation CEs:
 - Work may include the following items if done within the existing right-of-way limits:
 - + upgrading bridge rails,
 - + minor work on bridge decks,
 - + new ADA ramps,
 - + curbs and sidewalks associated with the installation of new ADA ramps,
 - + minor repairs to existing curb and sidewalk including replacement sections,
 - + road approaches,
 - + guardrail, or
 - + signing.
 - Work will not extend beyond the existing paved surface for crack seal, seal and cover, mill and fill, plant mix leveling, mill open-graded friction course, micro surfacing, and fog seal projects.
 - Thin lift overlays may extend slightly beyond existing pavement. Some removal of vegetation may be necessary, but flattening of the slopes will not be done.
2. Highway-Rail Grade Crossing Projects. These include closures of crossings, railroad signal installations, circuitry upgrades and improved crossing surfaces.

3. Right-of-Way Actions. These actions include sales of excess lands, land exchanges, discharges of easements, easements, leases/use permits/rentals, permits for public use.

Actions proposed for coverage under one of the Statewide Programmatic CEs must be evaluated to ensure they are a suitable project-type and that they meet the specific terms and conditions of the selected document. The PDE evaluates proposed actions to determine applicability of the Statewide Programmatic CEs.

10.3.1.2.4 Actions Covered by an Individual Programmatic CE

As allowed by 23 CFR 771.117(d), MDT has obtained FHWA approval for Individual Programmatic CEs. An Individual Programmatic CE requires completion of an environmental checklist, available on the MDT intranet, to verify a project's eligibility for coverage. The PDE evaluates the potential impacts of proposed projects against the items in the checklist to determine if the projects may be covered by an Individual Programmatic CE.

10.3.1.2.5 Actions Requiring Narrative Documentation for CE Approval

Some actions require additional documentation to demonstrate that they are appropriately covered by 23 CFR 771.117(d). MDT refers to this type of documentation as a narrative CE(d). The PDE prepares the narrative CE(d) for MDT and FHWA approval. This documentation is necessary to satisfy the requirement of Section 771.117(d) for demonstrating that the action meets the CE criteria in the *CEQ Regulations* and Section 771.117(a) and that significant environmental effects will not result. The PDE evaluates projects against the criteria in 40 CFR 1508.4 and 23 CFR 771.117(a) to determine that the action is appropriately characterized as a CE. The criteria in 40 CFR 1508.4 provide that a CE is a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency in implementation of the *CEQ Regulations*.

The criteria in 23 CFR 771.117(a) provide that a CE is an action that meets the definition contained in 40 CFR 1508.4 and, based on past experience with similar actions, does not involve significant environmental impacts. It is an action that does not:

- induce significant impacts to planned growth or land use for the area;
- require the relocation of significant numbers of people;
- have a significant impact on any natural, cultural, recreational, historic or other resource;
- involve significant air, noise or water quality impacts;
- have significant impacts on travel patterns; or
- otherwise, either individually or cumulatively, have any significant environmental impacts.

10.3.1.3 EA Considerations

In evaluating whether preparation of an EA is appropriate for a proposed project, the PDE considers the guidance provided in the following Sections.

10.3.1.3.1 Actions That Do Not Qualify for a CE and Do Not Clearly Involve Significant Impacts

If the PDE determines a proposed project does not qualify for a CE and there is insufficient information to confirm that the project involves a significant environmental impact, an EA must be prepared, in accordance with 23 CFR 771.115(c) and ARM 18.2.237(3)(a).

10.3.1.3.2 Actions Covered by ARM 18.2.237(4) – Mitigated EA

ARM 18.2.237(4) provides that an agency may prepare an EA whenever the action is one that might normally require an EIS, but it appears that effects that might otherwise be deemed significant can be mitigated below the level of significance through design, or enforceable controls or stipulations or both, imposed by the agency or other government agencies. For an EA to suffice in this instance, the agency must determine that all of the impacts of the proposed action have been accurately identified, that they will be mitigated below the level of significance and that no significant impact is likely to occur.

If the PDE determines a proposed project meets the criteria in this part of the ARM, an EA may be prepared for compliance with MEPA.

10.3.1.4 EIS Considerations

In evaluating whether preparation of an EIS is appropriate for a proposed project, the PDE considers the guidance provided in the following Sections.

10.3.1.4.1 Actions That Normally Require an EIS

23 CFR 771.115(a) lists examples of actions that normally require an EIS, including the following:

- a new controlled-access freeway;
- a highway project of four or more lanes on a new location;
- new construction or extension of fixed rail transit facilities (e.g., rapid rail, light rail, commuter rail, automated guideway transit); and
- new construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing facility.

The PDE evaluates the proposed project scope against the examples listed. For projects that fit one of the listed examples, the PDE considers the results of the PFR to determine if there are reasons why an EIS might not be necessary (e.g., impacts can be mitigated below the level of significant, see [Section 10.3.1.3.2](#)).

10.3.1.4.2 Actions Determined Likely to Involve Significant Impacts

If the results of the PFR and/or early coordination indicate that the nature of the affected environment and the project scope are such that significant impacts are likely to occur, preparation of an EIS is required.

10.3.2 Document Class of Action Determination

After evaluating the project scope and potential environmental impacts, the PDE documents the class of action determination by completing and signing the Level of Environmental Documentation Form, available as a template on the MDT intranet. Signature requirements on the Level of Environmental Documentation Form vary as described below:

1. CE(c). Only the PDE prepares and signs the form.
2. Programmatic CE. Only the PDE prepares and signs the form.
3. Narrative CE. The PDE prepares and signs the form and then coordinates the document for concurrence by the Environmental Engineering Section Supervisor (EESS) or the Environmental Services Bureau Chief (ESBC).
4. EA or EIS. The PDE prepares and signs the form and then coordinates the document for concurrence by the EESS or ESBC and FHWA. For State-funded projects, FHWA concurrence is not required.

After obtaining all necessary signatures, the PDE distributes copies of the completed form within MDT and to FHWA.

Figure 10-1 provides an example of a Level of Environmental Documentation Form. Distribution information shown at the bottom of the form is adjusted as necessary on a project-by-project basis to reflect the applicable District Administrator, project manager's bureau chief and FHWA Operations Engineer. The PDE uses the up-to-date version of the form on the ESB share drive.

10.3.3 Monitor Need for Change in Class of Action

If at any point during subsequent project development activities, impacts or issues are identified that may affect the class of action determination, the PDE evaluates the impacts or issues to determine if a change in the class of action is warranted. If a change is warranted, the PDE documents the basis for the change in the project file and proceeds with further environmental processing in accordance with the class of action determined appropriate.



Montana Department of Transportation
 PO Box 201001
 Helena, MT 59620-1001

Memorandum

To: (Name)
 Engineering Section Supervisor

From: (Name)
 Bedrock Project Development Engineer

Date: (Date)

Subject: Level of Environmental Documentation
 30 km SE of Tar Pit Road
 NH 1-1(1)1
 Control Number: 9999 000

Determination of Appropriate Level of Environmental Documentation (<input checked="" type="checkbox"/> Original or <input type="checkbox"/> Revision)	
Categorical Exclusion (c)	<input type="checkbox"/>
Individual Programmatic Categorical Exclusion (d)	<input checked="" type="checkbox"/>
Narrative Categorical Exclusion (d) ¹	<input type="checkbox"/>
Environmental Assessment ^{1,2}	<input type="checkbox"/>
Environmental Impact Statement ^{1,2}	<input type="checkbox"/>

Note 1: Requires ESB Engineering Section Supervisor or Chief concurrence. **Note 2:** Requires FHWA concurrence.

Is a Clean Water Act Section 404 Permit likely required for the project? Yes No

Rationale/Notes: Reviewed site 4/25/07, PFR dated 5/31/07, and literature sources. Several wetland complexes exist within the project area where the road follows the stream bottom. Bedrock State Park is likely a LWCF 6(f) property. Environmental Services will coordinate with FWP to determine the boundaries of that potential 6(f) area. T-Rex Ranch is along the project corridor and includes potentially historic structures. A cultural resources survey will be necessary. Issues identified subsequent to this memo could change the level of environmental documentation required.

MDT Completed by: _____ Date: _____

MDT Concurred by: _____ Date: _____

FHWA Concurred by: _____ Date: _____

- copies: (Name) Environmental Services Bureau Chief
 (Name) (District) District Administrator
 (Name) (Project Manager's Bureau Chief)
 (Name) Environmental Services Engineering Section Supervisor
 (Name) FHWA Operations Engineer

BKR:SA\ENV_ENG\01 FORM-TEMPLATE\XXXXENLVL001.DOC

Figure 10-1 — LEVEL OF DOCUMENTATION FORM

