

Chapter 12

CATEGORICAL EXCLUSION

MDT ENVIRONMENTAL MANUAL

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Chapter 12

CATEGORICAL EXCLUSION

12.1 OVERVIEW

The *Council on Environmental Quality (CEQ) Regulations* that implement the *National Environmental Policy Act (NEPA)* (42 USC 4321, et seq.) require Federal agencies to reduce paperwork and delays in the NEPA compliance process through the use of categorical exclusions (CEs). The regulations define CEs as categories of actions that do not individually or cumulatively have a significant effect on the human environment and are, therefore, exempt from requirements to prepare an environmental impact statement (EIS) or an environmental assessment (EA). The *CEQ Regulations* require Federal agency procedures to provide for “extraordinary circumstances” in which a normally excluded action may have a significant effect.

The Federal Highway Administration (FHWA) regulations for compliance with NEPA and the *CEQ Regulations* are in Title 23 of the *Code of Federal Regulations (CFR)*, Part 771. They address requirements for CEs in 771.115(b) “Class II (CEs)” and 771.117 “Categorical Exclusions.”

The MDT regulations for compliance with the *Montana Environmental Policy Act (MEPA)* (MCA 75-1-101, et seq.), in Subchapter 18.2.2 of the *Administrative Rules of Montana (ARM)*, address requirements for CEs in ARM 18.2.236 “Definitions,” ARM 18.2.237 “General Requirements of the Environmental Review Process” and ARM 18.2.261 “Actions that Qualify for a Categorical Exclusion.”

Although actions that qualify as CEs generally require less documentation for NEPA and MEPA compliance, they still require consideration of the potential for effects on the full range of environmental issue areas. In addition, those actions are still subject to compliance with other applicable Federal, State and Tribal laws, regulations and Executive Orders (e.g., the *Endangered Species Act of 1973*, Section 106 of the *National Historic Preservation Act*, Section 4(f) of the *US Department of Transportation Act*, Executive Order 11990 “Protection of Wetlands,” MCA 87-5-101, et seq. “Nongame and Endangered Species”). Where other environmental directives apply to a project proposed for CE classification, appropriate analyses, coordination and documentation must be completed in accordance with those other directives before CE approval can be given.

This Chapter provides guidance on the criteria, documentation and procedures for classifying MDT projects as CEs for NEPA and/or MEPA compliance.

12.2 LAWS, REGULATIONS AND GUIDANCE

12.2.1 40 CFR 1500 through 1508 CEQ Regulations

These regulations establish the policy and procedural framework for Federal agency compliance with NEPA. Sections 1500.4(p) and 1500.5(k) provide direction on the use of CEs and Section 1508.4 defines “Categorical Exclusion.”

12.2.2 23 CFR 771 “Environmental Impact and Related Procedures”

Section 771.115(b) provides that Class II actions (CEs) are actions that do not individually or cumulatively have a significant environmental effect and are excluded from the requirement to prepare an EA or EIS.

Section 771.117(a) defines CEs as actions that meet the definition contained in 40 CFR 1508.4 and, based on past experience with similar actions, do 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.

Section 771.117(b) discusses “unusual circumstances” that require completion of appropriate environmental studies to determine if a CE classification is proper for an action that otherwise would normally qualify as a CE.

Section 771.117(c) provides a specific list of actions that normally qualify as CEs, provided they do not involve unusual circumstances.

Section 771.117(d) provides that, when appropriately documented, additional projects may also qualify as CEs. Section 771.117(d) also includes a list of examples of these types of projects.

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

ARM 18.2.236(5) includes the following definition:

“Categorical Exclusion” refers to 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.

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 the extraordinary circumstances that require preparation of an EA or an EIS for a project that would otherwise qualify for a CE.

12.2.4 FHWA Technical Advisory T 6640.8A

The Technical Advisory, dated October 30, 1987, identifies CEs as actions or activities that meet the definition in 23 CFR 771.117(a) and, based on FHWA's experience, do not have significant environmental effects. The CEs are divided into two groups based on the action's potential for impacts. The level of documentation necessary for a particular CE depends on the group the action falls under as explained in the following Sections.

12.2.4.1 Documentation of Applicability

Experience has shown that the first group of 20 categories of actions listed in 23 CFR 771.117(c) never or almost never cause significant environmental impacts. These categories are non-construction actions (e.g., planning, grants for training and research programs) or limited construction activities (e.g., pedestrian facilities, landscaping, fencing). These actions are automatically classified as CEs, and except where unusual circumstances are brought to FHWA's attention¹, do not require approval or documentation by FHWA. However, other environmental laws may still apply. For example, installation of traffic signals in a historic district may require compliance with Section 106, or a proposed noise barrier that would use land protected by Section 4(f) would require preparation of a Section 4(f) evaluation (23 CFR 774.7). In most cases, information is available from planning and programming documents for the FHWA Division Office to determine the applicability of other environmental laws. However, any necessary documentation should be discussed and developed cooperatively by the highway agency and FHWA.

The second group consists of actions with a higher potential for impacts than the first group, but due to minor environmental impacts still generally meets the criteria for CEs. In 23 CFR 771.117(d), the regulation lists examples of 12 actions that past experience has found appropriate for CE classification. However, the second group is not limited to these 12 examples. Other actions with a similar scope of work may qualify as CEs. For actions in this group, site location is often a key factor. Some of these actions on certain sites may involve unusual circumstances or result in significant adverse environmental impacts. Because of the potential for impacts, these actions require some information to be provided by the highway agency so that FHWA can determine if the CE classification is proper (23 CFR 771.117(d)). The level of information to be provided should be commensurate with the action's potential for adverse environmental impacts. Where adverse environmental impacts are likely to occur, the level of analysis should be sufficient to define the extent of impacts, identify appropriate mitigation measures, and address known and foreseeable public and agency concerns. At a minimum, the information should include a description of the proposed action and, as appropriate, its immediate surrounding area, a discussion of any specific areas of environmental concern (e.g., Section 4(f), wetlands, relocations) and a list of other Federal actions required, if any, for the proposal.

¹ Based on MDT experience, fencing projects are examples of CE-type actions that may involve potential for unusual circumstances (e.g., wildlife/habitat effects) that warrant careful consideration to ensure a particular project is eligible for approval as a CE.

The documentation of the decision to advance an action in the second group as a CE can be accomplished by one of the following methods:

1. Minor Actions from List of Examples. Minor construction projects or approval actions need only minimum documentation. Where project-specific information for minor construction projects is included with the Section 105 program² and clearly shows that the project is one of the 12 listed examples in Section 771.117(d), the approval of the Section 105 program can be used to approve the projects as CEs. Similarly, the three approval actions on the list (i.e., examples 6, 7 and 12) should not normally require detailed documentation, and the CE determination can be documented as a part of the approval action being requested.
2. Other Actions from List of Examples. For more complex actions, additional information and possibly environmental studies will be needed. This information should be furnished to FHWA on a case-by-case basis for concurrence in the CE determination.
3. Actions Not on List of Examples. Any action that meets the CE criteria in 23 CFR 771.117(a) may be classified as a CE even though it does not appear on the list of examples in Section 771.117(d). The actions on the list should be used as a guide to identify other actions that may be processed as CEs. The documentation to be submitted to FHWA must demonstrate that the CE criteria are satisfied and the proposed project will not result in significant environmental impacts. The classification decision should be documented as a part of the individual project submissions.

12.2.4.2 Consideration of Unusual Circumstances

Section 771.117(b) lists those unusual circumstances where further environmental studies will be necessary to determine the appropriateness of a CE classification. Unusual circumstances can arise on any project normally advanced with a CE; however, the type and depth of additional studies will vary with the type of CE and the facts and circumstances of each situation. For those actions on the fixed list (first group) of CEs, unusual circumstances should rarely, if ever, occur due to the limited scope of work. Unless unusual circumstances come to the attention of the highway agency or FHWA, they need not be given further consideration. For actions in the second group of CEs, unusual circumstances should be addressed in the information provided to FHWA with the request for CE approval. The level of consideration, analysis and documentation should be commensurate with the action's potential for significant impacts, controversy or inconsistency with other agencies' environmental requirements.

Where an action may involve unusual circumstances, sufficient early coordination, public involvement and environmental studies should be undertaken to determine the likelihood of significant impacts. If no significant impacts are likely to occur, the result of environmental studies and any agency and public involvement should adequately support such a conclusion and be included in the request to FHWA for CE approval. If significant impacts are likely to

² In 1987, when the Technical Advisory was issued, the reference to the "Section 105 program" was based on the provisions of 23 USC 105 that were then in effect. At that time, Section 105 addressed requirements and procedures for State highway departments to submit programs of proposed projects for use of apportioned Federal-aid highway funds. 23 USC 105 has subsequently been amended several times and no longer addresses the submittal of programs of projects for use of Federal-aid highway funds. Accordingly, the reference to the "Section 105 program" is no longer valid.

occur, an EIS must be prepared (23 CFR 771.123(a)). If the likelihood of significant impacts is uncertain even after studies have been undertaken, the highway agency should consult with FHWA to determine whether to prepare an EA or an EIS.

12.2.5 FHWA Memorandum “Categorical Exclusion (CE) Documentation and Approval”

This March 30, 1989, memorandum, accessible on the FHWA website, provides guidance for programmatic CE approvals and includes a model programmatic CE agreement.

12.3 PROCEDURES

12.3.1 Identify CE Type

Upon completion of the class of action determination process for a proposed project (see [Chapter 10 “Class of Action Determination”](#)), the PDE documents the preliminary decision regarding the appropriate level of environmental documentation for NEPA and MEPA compliance. For actions that appear to qualify for a CE, the PDE indicates the type of CE on the Level of Environmental Documentation Form. For MDT projects, the types of CEs include the following:

1. CE(c). These are the project types listed in 23 CFR 771.117(c) and ARM 18.2.261(1) as actions that normally qualify for a CE(c).
2. Statewide Programmatic CE(d). These are project types potentially eligible as CEs in accordance with 23 CFR 771.117(d) that have been approved by FHWA for coverage under a programmatic CE agreement. Individual projects require completion of an environmental checklist to verify that they qualify for a Statewide Programmatic CE. MDT has Statewide Programmatic CEs for the following:
 - a. 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. MDT submitted this Statewide programmatic agreement to FHWA on February 18, 2005. FHWA approved the agreement on March 4, 2005.
 - b. Highway-Rail Grade Crossing Projects. These include railroad signal installations, circuitry upgrades, closures and improved crossing surfaces. MDT submitted this Statewide programmatic agreement to FHWA on February 8, 2006. FHWA approved the agreement on February 14, 2006.
3. Individual Programmatic CE(d). These are project types potentially eligible as CEs in accordance with 23 CFR 771.117(d) that have been approved by FHWA for coverage under a programmatic CE agreement with MDT, dated April 12, 2001. Each project requires completion of an environmental checklist to verify that it qualifies for an Individual Programmatic CE.
4. Narrative CE(d). These are project types potentially eligible as CEs in accordance with 23 CFR 771.117(d) that require narrative documentation for each project to establish the basis for determining that the action qualifies as a CE and will not result in a significant environmental effect.

12.3.2 Conduct Preliminary Coordination

The PDE initiates contacts with potentially interested and/or affected organizations and agencies (e.g., community, county, State, Tribal, Federal) to request information for assessing project-related environmental impacts and determining whether a project involves unusual circumstances or extraordinary circumstances. Depending on the proposed preliminary scope

of work, type of project and geographic/jurisdictional location, the PDE sends Request for Environmental Information letters to the agencies and organizations. The PDE also coordinates with appropriate offices within MDT to request information to assist in evaluating the project's potential environmental impacts. If no letters are sent out, the PDE documents the reasons in a memo to the file.

12.3.3 Gather and Analyze Information

The PDE coordinates with the Resources and Hazardous Waste Sections within the Environmental Services Bureau (ESB) to initiate field studies and/or other environmental data gathering (e.g., Montana Cadastral Maps, online environmental databases). The scope of the data gathering is based on the proposed preliminary scope of work, type of project, geographic location and information obtained during the Preliminary Field Review (PFR) and in response to Request for Environmental Information letters and other preliminary coordination contacts. This data gathering may include, but is not limited to:

- detailed information necessary for identifying and evaluating the full range of environmental, social and economic resources, and concerns in the project area (e.g., land use, businesses, neighborhoods, air quality, noise, water quality, wetlands, threatened and endangered species, floodplains, historic and archaeological resources, hazardous waste sites, visual impacts);
- the project's potential effects on the resources and concerns in the project area; and
- the need for accomplishing actions for compliance with other applicable laws, regulations and executive orders associated with resources that may be affected.

The Project Manager coordinates with the MDT Public Information Office to prepare and issue a news release describing the proposed project and indicating where interested persons can obtain additional information about the project and/or provide comments. The PDE provides input for the news release as needed or requested. Where a proposed CE project may involve right-of-way acquisition, construction impacts, temporary road closures, detours, etc., or has potential for controversy, the PDE may coordinate with the MDT Public Information Office to initiate additional public involvement measures as a component of the information gathering activities.

The PDE and other ESB staff coordinate environmental resource information with the Design Team (DT) for consideration in refining the project design to avoid and minimize adverse environmental effects to the extent practical.

For a proposed CE project, the level of information gathering is commensurate with the need to verify whether the project qualifies as a CE(c) or meets the terms of a programmatic CE(d), if applicable, and/or to ensure identification and assessment of all environmental resource issues and concerns that could potentially result in unusual circumstances or extraordinary circumstances. If potential for unusual circumstances or extraordinary circumstances is identified, the PDE coordinates with other ESB staff as necessary to conduct additional environmental studies for determining the appropriateness of the CE classification. The type and scope of the studies will vary with the facts and circumstances of each situation. If the results of the additional environmental studies indicate that a project involves circumstances

that make it ineligible for classification as a CE, the PDE returns to the class of action determination process; see [Chapter 10 “Class of Action Determination.”](#) If the additional environmental studies indicate the project does not involve circumstances that would make it ineligible for classification as a CE, the PDE proceeds with information gathering and analysis for processing the action for CE approval.

The PDE analyzes the information obtained regarding environmental resources and concerns in the project area and the project’s potential effects. The PDE also coordinates with other ESB staff as necessary to determine the status of compliance with requirements of any other applicable directives and to verify when compliance has been or will be achieved.

See [Chapter 15 “Section 4\(f\) Evaluations”](#) and [Part II “Environmental Analyses” \(Chapters 19 through 46\)](#) for further guidance on information gathering and evaluation of effects for various resource issues. See [Chapter 16 “Public Involvement”](#) for further guidance on public involvement.

12.3.4 Prepare Documentation

Upon completing the analysis of the environmental information for a proposed project and determining the project appears eligible for CE approval, the PDE prepares the necessary documentation to support the CE classification. This includes documentation for compliance with Section 4(f) and/or other environmental requirements, if applicable. The form of the documentation depends upon the type of CE, as described in the following Sections.

Note that in all cases, when studies are conducted for particular resource issues or concerns to determine the appropriateness of classifying a project as a CE, the PDE includes a summary of the studies as part of the documentation for CE approval.

12.3.4.1 CE(c)

The PDE prepares a Notification Memorandum for signature by the Environmental Engineering Section Supervisor (EESS) or Environmental Services Bureau Chief (ESBC). The memorandum is addressed to the Fiscal Programming Bureau and includes information on the following:

- project number;
- project name;
- control number;
- project description, including indication of applicable action type from 23 CFR 771.117(c);
- confirmation that the action qualifies as a CE under ARM 18.2.261;
- statement on compliance with other environmental directives, if applicable; and

- basis for determining the project does not involve unusual circumstances or extraordinary circumstances that would disqualify it from classification as a CE.

12.3.4.2 CE(d) Statewide Programmatic

The DT for the Pavement Preservation Project or Highway-Rail Grade Crossing Project completes the appropriate environmental checklist (on ESB share drive) for the project and submits it to the PDE. The PDE reviews the information in the completed environmental checklist to ensure the proposed project conforms to the requirements for the applicable Statewide Programmatic CE. Upon determining that the Statewide Programmatic CE is the appropriate classification for the proposed project, the PDE coordinates the environmental checklist for signature by the EESS or ESBC.

12.3.4.3 CE(d) Individual Programmatic

The PDE completes the Programmatic Categorical Exclusion Approval Worksheet (on ESB share drive) and, if applicable, Programmatic Section 4(f) documentation or a Full Section 4(f) Evaluation for the proposed project. The PDE circulates the Programmatic Categorical Exclusion Approval Worksheet and, if applicable, the Section 4(f) documentation, within ESB for review and comment. After completion of the ESB review and resolution of any comments received, the PDE prepares and signs the Individual Programmatic CE(d) Checklist. The PDE coordinates the Individual Programmatic CE(d) Checklist and Programmatic Section 4(f) documentation or Full Section 4(f) Evaluation for signature by the EESS.

12.3.4.4 CE(d) Narrative Report

The PDE prepares narrative documentation of the analyses and results regarding the environmental effects of the proposed project, including evidence of compliance with other environmental directives, if applicable. The narrative documentation describes the proposed project, summarizes the information gathered on the affected environment and briefly describes the analyses conducted and the results obtained for each of the environmental resources/issues involved with the project. The PDE includes a project location map in the documentation and attaches a copy of the PFR Report. If applicable, the PDE also prepares Programmatic Section 4(f) documentation or a Full Section 4(f) Evaluation.

The PDE coordinates preparation of the narrative documentation with FHWA and DT, as appropriate. It is an iterative process involving review and revision of drafts as necessary to satisfactorily address comments and concerns. After all comments and concerns are resolved, the PDE finalizes the Narrative CE(d) Report and, if applicable, Programmatic Section 4(f) documentation or Full Section 4(f) Evaluation and coordinates the document(s) for signature by the EESS or ESBC.

12.3.5 Obtain Approval

The following Sections describe the processes for approval of the different types of CEs.

12.3.5.1 CE(c)

After the EESS or ESBC signs the Notification Memorandum, the PDE sends the memorandum to the Fiscal Programming Bureau and provides a copy to FHWA and/or the Montana Environmental Quality Council (EQC). If FHWA and the EQC do not raise concerns in response to the memorandum, the CE classification is considered effective as of the date the memorandum was signed. If FHWA and/or the EQC raise concerns, the PDE coordinates with the DT, other ESB staff and FHWA and/or the EQC as necessary to address the concerns. If the concerns cannot be satisfactorily resolved, the PDE returns to the class of action determination process; see [Chapter 10 “Class of Action Determination.”](#) If the concerns are satisfactorily resolved, the CE classification is considered effective as of the date of resolution.

12.3.5.2 Statewide Programmatic CE(d)

The CE classification is approved once the PDE distributes the environmental checklist signed by the EESS or ESBC to all parties on the established distribution list, including FHWA and/or the EQC.

12.3.5.3 Individual Programmatic CE(d)

After the EESS or ESBC signs the Individual Programmatic CE(d) Checklist and, if applicable, Programmatic Section 4(f) documentation or Full Section 4(f) Evaluation, the PDE sends two signed originals of the CE(d) checklist and, if applicable, Section 4(f) documentation to FHWA for approval. The PDE also provides a project location map and a copy of the PFR Report for the project with each CE(d) checklist. FHWA signs and returns one set of the documentation indicating approval of the CE(d) classification and, if applicable, 4(f) approval. Upon receipt of the signed documentation, the PDE distributes copies in accordance with the current distribution list. The PDE also uploads the signed documentation to the MDT Document Management System (DMS) and sends an e-mail to interested persons with a link to the file on the DMS. The CE(d) classification is considered effective as of the date the CE(d) checklist was signed by FHWA.

12.3.5.4 Narrative CE(d)

After the EESS or ESBC signs the Narrative CE(d) and, if applicable, Programmatic Section 4(f) documentation or Full Section 4(f) Evaluation, the PDE sends two signed originals of the Narrative CE(d) and, if applicable, Section 4(f) documentation to FHWA for approval. FHWA signs and returns one set of the documentation indicating approval of the CE classification and, if applicable, 4(f) approval. Upon receipt of the signed documentation, the PDE distributes copies in accordance with the current distribution list. The PDE also uploads the signed documentation to the DMS and sends an e-mail to interested persons with a link to the file on the DMS. The CE(d) classification is considered effective as of the date the Narrative CE(d) was signed by FHWA.

12.3.6 Reevaluate CE Classification

After determining that a project qualifies as a CE, if the project scope or limits change or if the project is split, MDT reevaluates the action and its potential environmental impacts to determine if the CE classification is still appropriate.

In addition, as provided in 23 CFR 771.129 "Reevaluations," after a Federally-funded project is approved as a CE, MDT must consult with FHWA prior to requesting any major approvals or grants to establish whether or not the CE designation remains valid. These consultations are documented when determined necessary by FHWA. For CEs that are more than three years old, MDT reevaluates the project to determine whether it still meets the criteria for a CE. In accordance with the March 31, 1999 agreement between MDT and the FHWA, if the project still meets the criteria for a CE, MDT sends a letter to FHWA documenting that determination. FHWA concurrence in the determination is not necessary. For instances where a project no longer meets the criteria for a CE, some level of NEPA/MEPA review will be required.

