

24.1 General Discussion

This chapter summarizes the regulations and federal coordination requirements that local agencies must follow on projects that receive funding from the Federal Highway Administration (FHWA). Detailed guidance for complying with the federal requirements is provided in the publication entitled *NEPA Categorical Exclusions – A Guidebook for Local Agencies*.

Projects involving federal funds, permits, or land are governed by a number of environmental requirements, including but not limited to:

- National Environmental Policy Act (NEPA) of 1969, 42 USC 4321, et. seq.
- Council on Environmental Quality Regulations for Implementing NEPA, 40 CFR, Part 1500, et. seq.
- Federal Highway Administration and Federal Transit Administration Implementing Regulations, 23 CFR, Parts 771, 772, and 774
- Environmental Impact and Related Procedures, 49 CFR, Part 622
- Section 7 of the Endangered Species Act (ESA), 50 CFR, Part 402
- Section 106 of the National Historic Preservation Act, 36 CFR, Part 800
- Presidential Executive Order 12898 – Environmental Justice
- Section 4(f) of the U.S. Department of Transportation Act of 1966, 23 CFR 774

Prior to approval of final NEPA documents, FHWA regulations require that a subsequent phase of a project be programmed into the current State Transportation Improvement Plan (STIP). Eligible phases include Right of Way and Construction. In cases where no federal Right of Way or Construction funding is available for a subsequent phase, projects may be listed in the STIP by allocating local agency money for the subsequent project phase.

Approval of NEPA, in particular the final signature on the Categorical Exclusion Documentation Form, does not signify an approval of the State Environmental Policy Act (SEPA), nor any applicable local, state, and federal permits. Local agencies are responsible for ensuring compliance with SEPA and obtaining all applicable local, state, and federal permits. While the local agency may utilize the analysis completed in the NEPA process to assist in the completion of SEPA and applicable permits, NEPA approval must not be misconstrued as a guaranteed approval of any other local, state, or federal requirement. The local agency must work with other agencies, as appropriate, to provide the required analysis to complete their responsibilities under SEPA and other local, state, and federal permit and process requirements.

24.2 NEPA Classification

Projects subject to NEPA fall into one of the three following classifications:

- Class I Projects require preparation of an Environmental Impact Statement (EIS) because the action is likely to have significant adverse environmental impacts.
- Class II Projects are Categorical Exclusions (CE). These actions are not likely to cause significant adverse environmental impacts. They meet the definitions contained in 40 CFR 1508.4 and 23 CFR 771.117.
- Class III Projects require preparation of an Environmental Assessment (EA) because the project's impact on the environment is not clearly understood.

- .21 NEPA Class I Projects (EIS)** – Actions that are likely to have significant impact on the environment because of their effects on land use, planned growth, development patterns, traffic volumes, travel patterns, transportation services, natural resources, or because they are apt to create substantial public controversy. See Appendix B in the *NEPA Categorical Exclusions – A Guidebook for Local Agencies* for guidance on preparing an EIS. Projects that usually require an EIS, as defined in 23 CFR 771.115, are:
- New controlled-access freeway.
 - Highway project of four or more lanes in a new location.
 - New construction or extension of fixed rail transit facilities (e.g., rapid rail, light rail, commuter rail, automated guideway transit).
 - New construction or extension of a separate roadway for buses or high-occupancy vehicles not located within an existing highway facility.

Although examples are given, it is important to remember that the size and significance of the potential impacts determine the need for an EIS, not the size of the project.

- .22 NEPA Class II Projects (CE)** – Actions that meet descriptions contained in NEPA rules (40 CFR 1508.4, 23 CFR 771.117) and do not typically involve significant environmental impacts. Unless specifically requested by other agencies or due to either unusual circumstances or public controversy, these actions do not require an EIS or an EA. Class II projects typically:

- Do not induce significant impacts to planned growth or land use.
- Do not require the relocation of significant numbers of people.
- Do not have a significant impact on any natural, cultural, recreational, historic, or other resource.
- Do not involve significant air, noise, or water quality impacts.
- Do not have significant impacts on travel patterns.
- Do not otherwise, either individually or cumulatively, have any significant environmental impacts.

Class II Projects are subdivided into two subcategories, which determine the documentation and approval requirements.

1. **C-list Categorical Exclusions (c-list CE)** – Class II Projects that FHWA has delegated approval to WSDOT. The following federal actions meeting the CEQ and FHWA criteria for c-list CEs are listed in FHWA regulations (23 CFR 771.117 (c)) and can be approved by Local Programs without signature by FHWA:
 - a. Activities which do not involve or lead directly to construction, such as planning and technical studies; grants for training and research programs; research activities as defined in 23 USC 307; approval of a unified work program and any findings required in the planning process pursuant to 23 USC 134; approval of statewide programs under 23 CFR part 630; approval of project concepts under 23 CFR part 476; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and federal aid system revisions which establish classes of highways on the federal aid highway system.
 - b. Approval of utility installations along or across a transportation facility.
 - c. Construction of bicycle and pedestrian lanes, paths, and facilities.

- d. Activities included in the state's highway safety plan under 23 USC 402.
- e. Transfer of Federal lands pursuant to 23 USC 317 when the subsequent action is not an FHWA action.
- f. The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.
- g. Landscaping.
- h. Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.
- i. Emergency repairs under 23 USC 125.
- j. Acquisition of scenic easements.
- k. Determination of payback under 23 CFR part 480 for property previously acquired with federal aid participation.
- l. Improvements to existing rest areas and truck weigh stations.
- m. Ridesharing activities.
- n. Bus and rail car rehabilitation.
- o. Alterations to facilities or vehicles in order to make them accessible for elderly and/or persons with disabilities.
- p. Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.
- q. The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a CE.
- r. Track and railbed maintenance and improvements when carried out within the existing right of way.
- s. Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.
- t. Promulgation of rules, regulations, and directives.
- u. Deployment of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience. Examples include, but are not limited to, traffic control and detector devices, lane management systems, electronic payment equipment, automatic vehicle locaters, automated passenger counters, computer-aided dispatching systems, radio communications systems, dynamic message signs, and security equipment including surveillance and detection cameras on roadways and in transit facilities and on buses.
- v. Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. Existing operational right-of-way refers to right-of-way that has been disturbed for an existing transportation facility

or is maintained for a transportation purpose. This area includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, etc.) and other areas maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities. Portions of the right-of-way that have not been disturbed or that are not maintained for transportation purposes are not in the existing operational right-of-way.

- w. Federally-funded projects:
 - (i) That receive less than \$5,613,345.90 of Federal funds; or
 - (ii) With a total estimated cost of not more than \$33,680,075.42 and Federal funds comprising less than 15 percent of the total estimated project cost.
- x. Localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.
- y. Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. 1341; 1342) carried out to address water pollution or environmental degradation.
- z. Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes), if the action meets the constraints in paragraph (e) of this section.
- aa. Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints in paragraph (e) of this section.
- ab. Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings, if the actions meet the constraints in paragraph (e) of this section.
- ac. Purchase, construction, replacement, or rehabilitation of ferry vessels (including improvements to ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities which themselves are within a CE.
- ad. Rehabilitation or reconstruction of existing ferry facilities that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in the existing facility's capacity. Example actions include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.

2. **D-list Categorical Exclusions (d-list CE)** – Class II Projects that typically require additional documentation and may require FHWA approval. The second part of CFR (23 CFR 771.117 (d)) is known as the “d-list”. Examples of d-list projects identified in 23 CFR 771.117 (d) include but are not limited to:
 - a. This section has been deleted.
 - b. This section has been deleted.
 - c. This section has been deleted.
 - d. Transportation corridor fringe parking facilities.
 - e. Construction of new truck weigh stations or rest areas.
 - f. Approvals for disposal of excess right of way or for joint or limited use of right of way, where the proposed use does not have significant adverse impacts.
 - g. Approvals for changes in access control.
 - h. Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.
 - i. Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.
 - j. Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.
 - k. Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.
 - l. Acquisition of land for hardship or protective purposes. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.
 - (i) Hardship acquisition is early acquisition of property by the applicant at the property owner’s request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

- (ii) Protective acquisition is done to prevent imminent development of a parcel which may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.
 - a. Where a pattern emerges of granting CE status for a particular type of action, the FHWA will initiate rulemaking proposing to add this type of action to the list of categorical exclusions in paragraph (c) or (d) of this section, as appropriate.
 - m. Actions described in paragraphs (c)(26), (c)(27), and (c)(28) of this section that do not meet the constraints in paragraph (e) of this section.
 - a. Actions described in (c)(26), (c)(27), and (c)(28) of this section may not be processed as CEs under paragraph (c) if they involve:
 - (1) An acquisition of more than a minor amount of right-of-way or that would result in any residential or nonresidential displacements;
 - (2) An action that needs a bridge permit from the U.S. Coast Guard, or an action that does not meet the terms and conditions of a U.S. Army Corps of Engineers nationwide or general permit under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899;
 - (3) A finding of “adverse effect” to historic properties under the National Historic Preservation Act, the use of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (section 4(f)) except for actions resulting in *de minimis* impacts, or a finding of “may affect, likely to adversely affect” threatened or endangered species or critical habitat under the Endangered Species Act;
 - (4) Construction of temporary access, or the closure of existing road, bridge, or ramps, that would result in major traffic disruptions;
 - (5) Changes in access control;
 - (6) A floodplain encroachment other than functionally dependent uses (e.g. bridges, wetlands) or actions that facilitate open space use (e.g., recreational trails, bicycle and pedestrian paths); or construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.
- .23 NEPA Class III Projects (EA)** – Actions that have uncertain or poorly understood impacts on the environment. The EA determines the extent and level of environmental impact. An EA may support a NEPA Finding of No Significant Impact (FONSI) or indicate that an EIS is warranted. The content and complexity of an EA will vary depending on the project. See Appendix C of the *NEPA Categorical Exclusions – A Guidebook for Local Agencies* for details on EA procedures and documentation requirements.

24.3 Early Project Coordination & Environmental Mitigation

Many projects require early coordination with a range of federal, state, local agencies and tribal governments to ensure there are a minimum of delays to permitting

and construction. Local agencies are encouraged to coordinate and communicate with federal, state and local agencies and tribal governments to discuss technical issues. However, discussions related to environmental mitigation require the advance participation by the FHWA Area Engineer and/or the designated Local Programs Environmental Engineer to assure that all parties understand whether potential environmental mitigation measures will be eligible for federal reimbursement prior to a commitment being made.

Note that all elements of Emergency Repair (ER) project work require advance coordination and approval by FHWA to ensure that Federal participation is allowable.

When there are multiple federal lead agencies, early coordination between those agencies is crucial to ensure that all agencies' NEPA requirements are met.

24.4 Project Re-Evaluation

Whenever single or cumulative conditions have occurred that might cause new or more severe environmental impacts, the local agency shall re-evaluate an environmental document.

A written re-evaluation is required when any one of the following conditions exists:

1. There is a change to the project scope. This requires a reevaluation even if the NEPA approval is less than three years old. (Some kinds of scope changes, such as those that include work outside of the previous study areas, are likely to result in a determination that a supplemental NEPA document is needed.)
2. An acceptable FEIS has not been submitted to FHWA within three years from the date of the DEIS circulation.
3. Federal approvals of major steps to advance the project (such as FHWA approval to acquire right of way or approval of PS&E) have not occurred within three years of NEPA approval (that is, FHWA's approval of the NEPA CE Documentation Form, issuance of a FONSI, or ROD).
4. There is a law change that is relevant to the information provided in the original document (i.e., a new species is listed as threatened or endangered under ESA). This is required even if the NEPA approval is less than three years old.
5. New information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the NEPA document. (This is likely to result in a determination that a supplemental NEPA document is needed.)

The re-evaluation needs to indicate whether any new information is known that alters the previous analysis and findings. If so, the local agency needs to conduct appropriate environmental studies to support the updated conclusions.

The re-evaluation is submitted in written form to the Region LPE. The Region LPE will transmit a copy of the re-evaluation to Local Programs for review and coordination with FHWA. Based on the findings of the re-evaluation, FHWA will determine if additional documentation is appropriate (for example, a supplemental EIS, updated EA or NEPA CE Documentation Form, depending on the original NEPA classification).

24.5 Supplemental Document

If a project re-evaluation results in a determination that the NEPA document must be supplemented, the supplement should follow the same procedures as those used for the original document. The scope of the supplement can be limited to the changes to the project. FHWA should be consulted regarding the scope and disciplines that must be analyzed.

24.6 Other Federal Requirements

The NEPA document must include information on how the project complies with other federal regulations and requirements. These include but are not limited to cultural resources (Section 106 of the National Historic Preservation Act), federally listed endangered species (Section 7 of ESA), parklands and historic properties (Section 4(f) of the Department of Transportation Act), and environmental justice (Executive Order 12898, Title VI of the Civil Rights Act of 1964).

The *NEPA Categorical Exclusions – A Guidebook for Local Agencies* provides guidance on meeting the federal regulations and requirements that must be considered under NEPA.

24.7 Tribal Consultation

In addition to the Section 106 process, FHWA and local agencies must consult with the affected tribes on projects that potentially affect treaty rights. Local Programs process for sharing discipline reports with tribes is described in the *NEPA Categorical Exclusions – A Guidebook for Local Agencies* (Appendix O).

24.8 Environmental Permitting

The local agency is responsible for ensuring that all required permits and approvals are obtained prior to initiating construction. The webpage below provides an overview of environmental permits that commonly apply to transportation projects.

<https://wsdot.wa.gov/engineering-standards/design-topics/environment/environmental-permits-approvals>

The Governor's Office of Regulatory Assistance has developed a web-based tool to assist users to identify the permits that are required for different types of projects.

This tool can be accessed at:

www.oria.wa.gov/site/alias__oria/347/Permitting.aspx

24.9 NEPA Categorical Exclusion Documentation Forms

<https://wsdot.wa.gov/publications/fulltext/forms/140-100.pdf>

24.10 NEPA Categorical Exclusions – A Guidebook for Local Agencies

https://wsdot.wa.gov/sites/default/files/2021-10/LP_CE-Guidebook-Secure.pdf

24.11 Plain Talk Toolkit

https://wsdot.wa.gov/sites/default/files/2021-10/ENV-NSEPA_RdrFrlyFolio.pdf

24.12 Reader-Friendly Tool Kit

https://wsdot.wa.gov/sites/default/files/2021-10/ENV-NSEPA_RFToolKit.pdf