



U.S. Department  
of Transportation

**Federal Highway  
Administration**

# 23 U.S.C. § 326 Monitoring Report



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## **A Monitoring Report on the Performance and Quality of the Nebraska Department of Transportation's Categorical Exclusion Assumption Program under 23 USC 326**

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## Executive Summary

Pursuant to 23 U.S.C. 326, on September 5th, 2018 the Federal Highway Administration (FHWA) and Nebraska Department of Transportation (NDOT) executed a Memorandum of Understanding (MOU) to assign NDOT the responsibility for making Categorical Exclusion (CE) determinations and related environmental reviews. Specifically, NDOT assumed responsibility for determining whether a proposed action meets the definition of a CE in 40 CFR 1508.4 and whether the action is specifically listed as a CE within subsections c and d of 23 CFR 771.117.

The purpose of this review is to satisfy the monitoring requirement associated with the above-referenced MOU, as established in 23 U.S.C. 326 (c). The review considers the Nebraska Department of Transportation's (NDOT) performance in carrying out the procedures established for CE assignment, and evaluates the effectiveness of those procedures in achieving compliance with the National Environmental Policy Act (NEPA). This report documents NDOT's compliance with the 326 MOU (hereinafter MOU) and provides observations and successful practices.

The review was completed through execution of several activities, including review of NDOT process and procedure manuals, review of the FHWA 2017 Nebraska Readiness Assessment Report, interviews with NDOT staff and external agency representatives, and a random selection of project file reviews for CEs approved by NDOT during the assessment period.

A four-person CE Monitoring Review Team (Team) comprised of Federal Highway Administration (FHWA) officials from the Nebraska Division, Texas Division, and FHWA Headquarters' Office of Project Development and Environmental Review conducted the review. Review efforts began in February 2019 and culminated in a "monitoring week" the week of March 26, 2019. During monitoring week, the Team conducted on-site interviews, continued to review projects, discussed observations, findings, recommendations, and successful practices by the state, and provided a preliminary report-out of review results at the end of the monitoring week.

During the review, the Team evaluated the six State Performance Requirements listed in Section IV of the MOU:

1. Compliance with governing laws, regulations, Executive Orders, FHWA Policy and the MOU.
2. Processing projects assigned under the MOU: consistency in assessment and documentation standards as outlined in FHWA-accepted NDOT manuals
3. Excluded projects: Determination and documentation of CEs excluded from the CE Assignment Program and retained by FHWA.
4. State resources, qualifications, expertise, standards, and training.
5. State quality control.
6. MOU performance monitoring and quality assurance.

The Team identified approximately a dozen practices NDOT has employed to successfully deliver their program. These practices include the Project Description Forms, the "e" sheets contained within the project plans, and the use of OnBase as the official document repository. In addition, the team identified recommended process improvements for NDOT's consideration that could, when implemented, improve program effectiveness, efficiency, and/or transparency. Some recommendations, for example, could increase efficiencies in process and review timing (e.g., the frequency by which NDOT conducts reevaluations, particularly for local government federal-aid projects).

This report makes several observations and/or findings regarding NDOT's adherence to the CE MOU. For example:

- There have been instances where NDOT has changed procedure without providing the changed guidance to FHWA for review (e.g., NEPA process for Right-of-Way disposals).
- NDOT has processed a re-evaluation and CEs that were not assignable per the MOU.
- FHWA and NDOT should make efforts to improve communications and coordination in sharing process and procedural changes

NDOT must be more diligent to make certain adequate quality controls exist to ensure executed CEs are clear, accurate, and compliant with requirements. Some of the observations made in this review are consistent with early monitoring reviews in other CE assignment states. As with any new program, FHWA recognizes that there can be initial challenges implementing and adjusting to roles, responsibilities, and requirements. FHWA anticipates that NDOT will respond to this review by making necessary program modifications, which FHWA will assess during the next monitoring event. With these program modifications, NDOT will more fully satisfy the requirements of the CE MOU. FHWA is available and willing to provide NDOT with any relevant training and technical assistance in response to this review.

FHWA finds that NDOT is compliant with the terms of the MOU, but there are numerous findings that require NDOT action to ensure substantial compliance. FHWA recommends that NDOT prepare an action plan detailing the corrective steps to resolve the findings contained in the report. For more information on the findings, recommendations, and successful practices identified by the Team, see the Observations Section on page 8 of this report.

## Background

Pursuant to 23 U.S.C. 326, on September 18, 2018 the Federal Highway Administration (FHWA) and Nebraska Department of Transportation (NDOT) executed a Categorical Exclusion (CE) Memorandum of Understanding (MOU) for NDOT's assumption of certain FHWA CE responsibilities. Specifically, NDOT assumed responsibility for determining whether a proposed action meets the definition of a CE in 40 CFR 1508.4 and whether the action is specifically listed as a CE within subsections c and d of 23 CFR 771.117. In addition, for the CE determinations they make, NDOT has assumed the FHWA authorities and responsibilities for coordination and consultation with Federal and state resource agencies for compliance with all applicable Federal environmental laws, as stipulated under Section II(A) of the MOU.

The responsibilities only apply to projects for which NDOT is the direct recipient of Federal-aid highway program funding, oversees local government receipt of federal-aid or is the project sponsor or co-sponsor for a project requiring approval by FHWA. A copy of the executed MOU is included in Appendix A of this report.

MOU stipulation IV(F)(3) establishes that FHWA shall conduct a review of the State's performance under the MOU within six months of the execution of the MOU. Specifically, from the MOU:

The FHWA periodically shall review the State's records and may conduct onsite interviews of State staff to evaluate the State's performance under this MOU. FHWA shall conduct one review within 6 months of the execution of this agreement. Thereafter, monitoring reviews should be coordinated within the review of the State's report under Stipulation IV(F)(2). The FHWA shall provide notice 90 days prior to scheduling on site monitoring review interviews, during which parties will discuss the self-assessment report, the State's performance of the MOU, and FHWA's monitoring activities. Following the conclusion of a monitoring review, FHWA will provide the State with a draft written report summarizing the findings of the monitoring review. No monitoring review shall be scheduled for a date less than 6 months from the date NDOT receives the draft written report from the previous monitoring review. The FHWA anticipates that under normal circumstances, its evaluation of the State's performance will be based on a modified version of a typical FHWA CE process review (to view FHWA guidance on how monitoring should occur visit <http://www.fhwa.dot.gov/hep/6004stateassumpt.htm> )

Modifications to the CE process review will include incorporation of measures specific to the responsibilities assigned to the State pursuant to 23 U.S.C. §326, and will include performance measurements of compliance and timeliness. However, FHWA reserves the right to determine in its sole discretion the frequency, scope, and procedures used for monitoring activities. The State, by its execution of this MOU acknowledges that it is familiar with FHWA CE Process Review procedures and with the expected modifications that will be adopted for the purpose of monitoring the State's MOU performance.

A State must have adequate manuals and procedures in place as part of demonstrating their readiness to take on FHWA's responsibilities. The purpose of a State developing and relying upon environmental manuals and procedures is a demonstration that the State both (1) understands the Federal environmental review requirements and (2) can show how its staff will comply with those requirements and in doing so, prepares documentation of that compliance. To assist NDOT in their request to participate in the CE assignment program, FHWA conducted a Readiness Assessment in 2017 that identified areas where written NDOT Environmental Processes and procedures did not yet exist. FHWA worked with NDOT to help prepare and review process and procedures to satisfy those needs, but at the time of CE assignment, several identified process and procedures remained outstanding (incomplete, undescribed, and/or unwritten). Therefore, an understanding was reached between the agencies as to the priority and timing to complete the outstanding process and procedures. Although this review does not focus on the 2017 Readiness Assessment or the outstanding items from the Readiness Assessment left to complete, some

problem areas identified during the review could be resolved if related written process or procedures were in place.

This monitoring review covers decisions and actions taken by NDOT for the period between September 5, 2018 and January 25, 2019.

## Purpose and Objective

The purpose of this review is to:

1. Satisfy the requirement of 23 U.S.C. 326 for monitoring NDOT's compliance with the provisions of the MOU.
2. Determine whether NDOT is adequately performing the CE decision making role that, in the absence of the MOU, is carried out by FHWA.
3. Evaluate the State's performance in carrying out the procedures established for the CE assignment and evaluate the effectiveness of those procedures in achieving compliance,
4. Obtain information on the environmental results of the State's assumption of CE and other environmental responsibilities so that FHWA can assess the overall effectiveness of CE assignment.

Considering the review purpose, the Team evaluated the six State Performance Requirements listed in Section IV of the MOU to structure this review:

1. Compliance with governing laws, regulations, Executive Orders, FHWA Policy and the MOU.
2. Processing projects assigned under the MOU: consistency in assessment and documentation standards as outlined in FHWA-accepted NDOT manuals
3. Excluded projects: Determination and documentation of CEs excluded from the CE Assignment Program and retained by FHWA.
4. State resources, qualifications, expertise, standards, and training.
5. State quality control.
6. MOU performance monitoring and quality assurance.

Based on the Purpose and Performance requirements, the Team developed the following objectives for this review:

1. Verify the CE determinations made by NDOT are appropriate, are processed accurately as either a Minor CE, CE1, CE2, or CE3, they are adequately documented, they are accurately categorized per 771.117(c and d), and they are assignable. (Performance Requirements 1, 3, and 6). For more information on NDOTs CE classifications, see Appendix B.
2. Verify the projects comply with the applicable laws, regulations, executive orders, programmatic agreements, and FHWA Policies (Performance Requirement 1).
3. Verify projects are reviewed and documented per the MOU and NDOT documentation requirements and procedures, and that they are factually and legally supportable at the time the decision is made. (Performance Requirement 2)
4. Review the adequacy of NDOT's provision of financial and staff resources and the training programs associated with the CE Assignment Program and verify that staff qualifications and expertise are commensurate with decision- making capacity. (Performance Requirement 4, 5, and 6).
5. Verify tribal coordination is occurring where necessary, coordination is occurring in good faith, has been documented, and complies with the terms of the MOU, Agreements and regulations. (objective 1)
6. Verify NDOT is monitoring their processes relating to project determinations, analysis, project documentation, checking for errors and omissions, corrective actions are taken when needed, a training plan has been developed and training is occurring (Performance Requirements 5, 6).

7. Verify the state is making all reasonable and good faith efforts to identify and resolve conflicts with Federal agencies, state and local agencies, Indian Tribes, and the public during consultation and review process (Performance requirement 1).
8. Review State compliance with re-evaluations as described in the CE MOU (Performance requirement 1).



## Scope and Methodology

This monitoring review was a joint initiative between FHWA Nebraska Division and FHWA Headquarters' Office of Project Development and Environmental Review, with the assistance of Texas Division staff. For a complete listing of Review Team members, see Appendix C. The review was completed through execution of several activities, including review of NDOT process and procedure manuals, interviews with NDOT staff and external agency representatives, and a random selection of project file reviews for CEs approved by NDOT during the assessment period.

For the project review element, the Team focused on CEs and CE reevaluations approved by NDOT from the date of CE assignment, September 5, 2018, through January 25, 2019. This time period was selected to ensure the monitoring event week would occur six months from CE assignment, as specified by the CE MOU.

On January 16, 2019, the Nebraska Division sent a written request to NDOT for a listing of CEs and Section 4(f) approvals issued by NDOT from the date of CE execution to January 25th, 2019. The information was received February 13, 2019. Separately, the Division generated a listing of projects that had advanced to the next FHWA major approval as recorded in FHWA's Financial Management Information System (FMIS). This list was used to check if CE re-evaluations were performed per regulation.

From these two sources of information, the listing of CEs, Section 4(f) reviews, and CE reevaluations subject to this monitoring event was generated. The Team reviewed 42 randomly-selected project files to assess how NDOT is processing environmental reviews assigned under the CE MOU. Of those project files, Section 4(f)-only documentation was reviewed for 4 projects, and NEPA re-evaluation-only documentation was reviewed for eleven of the projects. These additional focused reviews occurred to ensure statistically valid samples for reevaluations and Section 4(f) documentation in addition to the statistically valid sampling of CEs. During the project review phase, NDOT granted permissions for FHWA reviewers to remotely access their system, OnBase, and project files were reviewed remotely and online by the Team.

To streamline FHWA's project review efforts, a review table was developed to track the initial observations from the project review. The table contains 24 standardized "Yes/No" statements that were answered for the projects reviewed. The statements were created based on observations from past reviews, the objectives of this review, and the stipulations outlined in the 2018 CE MOU. The statements in the table were tailored so that if the statement is true for a project, the recorder would place a "Y" in that column, indicating that specific review element was completed correctly for that project. If the statement is not true for the project, the reviewer would place an "N" in that column, indicating a potential issue with that item. A few statements may not have been applicable to the project and, therefore, an "NA" would have been recorded. This review table was used as a communication tool by the FHWA review team to record and gather initial thoughts and observations on the projects reviewed. Moreover, the review table was also used to inform and develop some of the elements recorded in the Observations, Findings, Recommendations, and Successful Practices section of this report. Appendix D contains the statements included in the review table.

Separate from the project review, the Team also interviewed key NDOT staff and representatives from one Federal agency responsible for project permits. To prepare for this effort, the Team gathered questions asked during other process review and monitoring interview activities, both from within

Nebraska and from other states. The Team also generated unique questions based on information gained from project reviews that occurred for this monitoring event, from the review of NDOT process and procedure manuals, and from the 2017 Readiness Assessment. From this large listing of questions, specific questions were identified to ask during the interview phase of this monitoring event. Based on this list of questions, FHWA Division staff then identified key NDOT and resource agency personnel to interview, and the Team designated which interviewees would be asked which questions.

NDOT interviews occurred during monitoring week (March 25, 2019). The Team split into two sub-teams of two FHWA employees each, and each sub-team interviewed NDOT staff individually, using the previously generated list of questions per interviewee. For a listing of NDOT staff interviewed, see Appendix E and for the compiled listing all questions asked during interviews, see Appendix D. Information gained during interviews was used in development of the Observations, Findings, Recommendations, and Successful Practices section of this report.

**OF NOTE:** Just prior to and during the March Monitoring week, the State of Nebraska was severely impacted by an extreme, wide-spread flooding event that significantly damaged the State's transportation network. In response, FHWA offered to shift the monitoring week to a later time, but noting the long-term nature of the flooding response workload, NDOT elected to keep the monitoring week as scheduled. As a result, a few key NDOT staff were not available for interviews during this monitoring event, which left some planned interview questions unanswered. Those questions, although shown in - Appendix E, will be tabled until the next CE monitoring event. In addition, separate flooding events of March and May also significantly impacted the workloads of both FHWA and NDOT, leading to delays in gathering additional information for the review and delays in developing and executing this review report.

## Observations, Findings, Recommendations and Successful Practices

*The following are terms used within this section:*

*Observation:* *The narrative that describes the current status and conditions found during the review compared to criteria, such as law, regulation, policy, standard, or practice.*

*Recommendation:* *Suggested actions to change or improve the conditions described by the observation.*

*Finding:* *A statement of partial or full non-adherence to a statute, regulation, FHWA guidance, FHWA or NDOT policy, NDOT procedures, agreements, and/or or the MOU, and a discussion of changes recommended by FHWA to address the finding.*

*Successful Practice:* *NDOT practices that the Team believes are successful, so that NDOT could consider continuing or expanding those programs in the future.*

### **I. Compliance with governing laws, regulations, Executive Orders, FHWA Policy and the CE MOU.**

- A. **Observation:** Per the CE MOU Stipulation IV.A.7, NDOT agreed—in an effort to minimize the likelihood of an irreconcilable material conflict with applicable Federal law—to “use its best efforts to provide notice to FHWA of proposed new or revised Nebraska laws, and State regulations, guidance, and written internal standard operating procedures that are applicable to the State's performance under this MOU. Furthermore, the State will use its best efforts to provide these materials to FHWA for review and comment before they become final.” Through review efforts it was apparent several changes in NDOT procedures occurred without offering FHWA the opportunity to review or comment on the changes prior to NDOT execution of the changes. In the spirit of partnership, coupled with FHWA’s overall program oversight responsibilities, it is important that NDOT shares changes to guidance with FHWA. FHWA can then inform NDOT when changed procedures may be inefficient or noncompliant. This will also facilitate our joint responsibilities under the MOU and will result in more efficient and effective monitoring reviews.

For example:

- a. NDOT used a new undocumented procedure to conduct environmental review of ROW disposals instead of following the NDOT outlined procedures that FHWA had reviewed prior to CE assignment. Under this new procedure NDOT staff used the NDOT-53 form (probable class of action form) as a CE for small ROW disposals. FHWA was not notified of the change prior to implementation of the alternative, non-documented procedure. With this change, it is unclear whether compliance with other applicable environmental regulations will be achieved in application, and this deviation could also lead to confusion or inconsistency in the practice of ROW disposal environmental reviews.
- b. During the review process, FHWA reviewed the online version of NDOT’s Environmental Procedure Manual Chapter 4 regarding Categorical Exclusions, to

review the NDOT CE approval thresholds. FHWA found changes and substantive discrepancies between the online version of the manual and the version reviewed and accepted by FHWA on July 2, 2018, most notably to Table 4-1. NDOT changed the manual without providing the changes to FHWA for review and comment, as stipulated by the MOU. See Appendix B and F of this report for a comparison of referenced Tables.

**Finding:** Per Stipulation IV.A.7, the State agreed to use its best efforts to notify FHWA of changes in NDOT guidance and written internal standard operating procedures for FHWA review and comment before they become final in an effort to minimize the likelihood of an irreconcilable material conflict with applicable Federal law. This has not occurred in all cases. NDOT's failure to provide FHWA an opportunity to review and comment on these revisions to guidance and written internal standard operating procedures hampered FHWA ability to identify any inconsistencies between the State procedures and Federal requirements. Lack of notifications such as these can lead to potential compliance challenges.

Working with FHWA, NDOT must establish protocols to ensure it provides new or revised state guidance and written internal standard operating procedures to FHWA for review and comment before finalizing these materials to minimize the likelihood of an irreconcilable material conflict with applicable Federal law.

**B. Observation:** The Team found projects that were not properly classified per 23 CFR 771.117. As noted in the MOU, Subsection I.A., the state has assumed the responsibility for determining whether a federal-aid action is one that has been designated as a CE by the US DOT Secretary and meets the definition of a CE under 40 CFR 1508.4 and 23 CFR 771.117 (a) and (b). Furthermore, CE assignment only applies to (c) and (d) listed activities, and the State has the responsibility for ensuring the project being reviewed is properly assigned to the correct (c) or (d) listed activity, as outlined in the regulations.

When reviewing a project, or "batch" of projects, NDOT is responsible for ensuring the federal action fits one of the (c) or (d) listed activities found under 23 CFR 771.117. If it does not fit with one of these activities, the project is not assignable and must come to FHWA for review and approval. Compliance with this stipulation and disclosure of the appropriate activity type is demonstrated by recording the listed category paragraph and activity number within the CE.

During the project review, one CE was found that was issued for three projects (a batched review), because each project on its own was not operationally independent; all three had to be constructed to complete the federal action. For example, earthwork contracting for all the projects was captured in the contracting for only one of the projects. Therefore, the grouping of these projects together into one NEPA review was appropriate, because no one action could be considered a separate and complete project.

These three projects, constructed together, would re-build mainline interstate and interstate ramps, would demolish a rest area, would build a new rest area at a new location away from the previous location, and would reconstruct a road leading from the interstate to a separate destination.

Within the CE for this grouping of projects, the CE category was listed as (d), but the regulatory activity number was left blank. Per procedure, the CE category and activity number must be listed. Within block 22.1 of the CE, there was a note assigning multiple activity

numbers to this grouping of projects, because there was no one activity that covered all the construction activities.

Per Section I.B of the MOU, assignment pertains only to activities listed in 23 CFR 771.117(c) and the example activities listed in 23 CFR 771.117(d). As demonstrated through the CE documentation, this activity did not fit activities listed in subpart (c) of the regulations, and it did not fit any of the example activities listed in subpart (d). Therefore, this CE was not assignable to the state.

**Finding:** The Team found a project whose CE action was not listed as a designated action in 23 CFR 771.117, and therefore NDOT is not in full compliance with Stipulation I of the CE MOU. From the Council of Environmental Quality’s guidance on establishing CEs “Federal agencies must be sure the proposed category captures the entire proposed action. Categorical exclusions should not be established or used for a segment or an interdependent part of a larger proposed action. The actions included in the category of actions described in the categorical exclusion must be standalone actions that have independent utility.”

**Recommendation:** NDOT should amend their CE guidance to clarify how to properly apply CE activity types to projects. Furthermore, NDOT should consider developing written guidance for how to determine whether “batching” of projects is required (e.g., when they lack logical termini or independent utility on their own), and when not required, how to determine whether it makes sense to batch for efficiency. Furthermore, NDOT should update their guidance documents to clarify how to handle projects that do not clearly fit into a (c) list or (d) list CE action.

- C. Observation:** The Team found a group of CE reviews utilizing the limited Federal assistance CE, (c)23, that were batched into one NDOT CE document. It appeared to the review team that each project likely met the CE criteria independently (each had a cost below the threshold required, each had independent utility, and did not have unusual circumstances) but there was no evidence that this evaluation was conducted for each separately (for example, that each individual project in the batch had independent utility). FHWA acknowledges that using one CE documentation to cover multiple projects that qualify for the same CE is an effective way to expedite documentation and reduce paperwork as long it is clear and there is evidence that the CE applies for each project independently, including consideration of logical termini, independent utility, and unusual circumstances requirements.

**Recommendation:** FHWA recommends that, for projects batched for convenience, NDOT’s project record include evidence that the applicable CE requirements were independently applied for each project in the batch. For example, for projects batched in one CE (c)23 documentation, the file needs to include an acknowledgement or evidence that each project individually meets the dollar threshold, has independent utility, and was checked for unusual circumstances.

When NDOT has assigned different project numbers to projects that together comprise one federal action and are therefore “batched” together for one CE review, the file needs to include documentation that the batch of projects together also meet all applicable federal requirements. For example, projects grouped together because they do not individually have independent utility must collectively meet the limited federal assistance CE requirements, if using (C)23).

FHWA recommends that NDOT provide additional guidance on batching practices, and expectations on the considerations of logical termini, independent utility, and unusual circumstances.

- D. Observation:** NDOT has executed a letter called a “Bridging document”, which was attached to the top of each CE reviewed by the Team. According to NDOT interview respondents, the purpose of the bridging document is to identify projects that started the environmental review process prior to the execution of the CE MOU, because the records and forms associated with these projects may not follow the process, procedures, and forms approved in association with the execution of the CE MOU.

**Recommendation:** FHWA recommends establishing a sunset date for the use of the bridging document to avoid confusion and inconsistent application of the applicable requirements to the projects.

- E. Observation:** Just prior to and during the March Monitoring week, the State of Nebraska was severely impacted by an extreme, wide-spread flooding event that significantly damaged the State’s transportation network. In addition, separate flooding events in March and May also significantly impacted the workloads of both FHWA and NDOT, leading to delays in providing timely information to the Review Team, gathering additional information for the review, and delays in developing and executing this review report. As a result, NDOT and FHWA failed to meet deadlines as specified in the CE MOU. Both agencies have noted this issue and it should be the goal of both agencies to take steps to produce more timely information and reports for future monitoring events.

- F. Observation:** The review team relied upon OnBase, the NDOT document repository system, to review project files. This system and its procedures for data entry resulted in state project files that were well organized and easy to navigate. However, the review team found local Federal-aid project files to be less organized and less complete in comparison. Per NDOT interview respondents, LPA project files are getting better as compared to pre-assignment, but more work could be done in this area.

**Recommendation:** NDOT should review the use of OnBase for Local Government federal-aid projects and develop protocols to ensure equivalent document retention and naming conventions as state federal-aid projects.

**Successful Practice:** Overall, a great foundation for efficient document retention has been established using OnBase. The system allowed an easy review/assessment of project files, technical reports, QA/QC documentation, and decision documents.

- G. Observation:** As part of the March 2019 Monitoring interview process, FHWA interviewed one Resource Agency, the U.S. Army Corps of Engineers (USACE). During the interview, the USACE expressed some unease with NDOTs application of non-notifying Nationwide permit #3 (NWP 3) to the Federal-aid program, which pertains to maintenance of existing facilities. In April of 2019, FHWA asked NDOT how they determine when the use of non-notifying NWP 3 is appropriate on a Federal-aid project. In response, NDOT stated that NDOT’s interpretation of the NWP 3 assumes that culvert extensions are minor deviations in the existing structures’ configuration or filled area. Based on conversations with both the USACE and NDOT, it appears the agencies may have different interpretations of when a non-notifying

NWP 3 can be used for items such as culvert extensions. Inappropriate application of non-notifying NWP 3 to federal-aid projects may lead to fiscal ramifications and potential non-compliance.

**Recommendation:** To assure adequate compliance with Section 404 of the Clean Water Act, including Regional and General Nationwide permit conditions, adequate compliance with the CE MOU, and clarity among environmental reviewers of federal-aid projects, NDOT, FHWA, and USACE should coordinate regarding appropriate application of non-notifying NWP 3 to federal-aid projects and reach an understanding of applicability. The understanding should be documented to ensure consistent application of the requirement.

## **II. Processing projects assigned under the MOU: consistency in assessment and documentation standards as outlined in FHWA-accepted NDOT manuals**

**A. Observation:** NDOT has made notable improvement managing project change through the life of project development.

**Successful Practice:** Per interviews, although independent from CE assignment, the Change Control Accountability Meetings and the concept of Super-Teams have helped minimize and manage the timing and number of project changes during and after NEPA. In addition, the use of the Project Description documentation process appears to have helped efficiently communicate project changes when they occur. While improvements have been realized, NDOT should continue to manage project changes as one tool for efficiently delivering CEs.

**B. Observation:** Based on interviews, FHWA learned the Communication Division has a process where they summarize comments received from the public during project comment periods into a table, then assigns specific comments in the table to NDOT subject-matter experts to generate a draft answer to the comment. The Communication Division then compiles these answers, drafts response letters and sends written responses to the original commenters.

**Successful Practice:** The process employed by NDOT of routing public comments received to NDOT subject matter experts for drafting responses to the commenter is a noteworthy process/practice.

**C. Observation:** Comments received from the public were difficult to find within CE documentation, often unmarked and not clearly presented in the CE attachments, without discussion or disclosure in the CE itself, and substantive public comments pointing to potentially concerning impacts were not always clearly assessed in the CEs. Substantive or potentially significant impacts and concerns raised by the public need to be assessed and disclosed within the CE.

Page 28 of the July 2018 CE instructions states: “If the project sponsor is made aware of an issue raised by the public, business owners, emergency services, etc. that is documented as being resolved through continued coordination, the impact would not be considered an unresolved controversy. If a commitment is made as a means to resolve the issue, include the commitment and a description of the outreach in the most appropriate section of the CE”. This instruction does not provide adequate direction to the person completing the CE documentation where to find public comments, how the comments should be assessed, and how this information should be used in the documentation of a CE.

- a. For a batch of projects, the Team found a letter attached to the CE where concerns were raised regarding work on an ancillary highway and the associated impacts to harvest and trucks travelling through the construction zone to reach the grain elevators. Specifically, the commenter stated:

“During this period of time we typically receive one thousand or more trucks into our elevator. Both sides of the highway would be affected and the result would be extremely unfortunate for the area wheat growers and our elevators. Any road work during this period would be very disruptive to the truck traffic in and out along the entire link and would severely slow the harvest.”

This concern was not disclosed or assessed in the CE document. There was a commitment in the mitigation section to keep the facility driveways open from June 15<sup>th</sup> to July 27<sup>th</sup>, but there was no context provided for the mitigation.

The NDOT CE Form instructions require disclosure and assessment of access disruptions within Section 16 of the CE. From block 16.7 CE instructions: “Disclose whether access closures are anticipated, note the location and expected duration of access closures, and assess whether any social or economic impact may result from the closures.” Block 16.7 of the CE is silent regarding the access impacts at the grain elevator. Furthermore, without the additional information called for by the CE instructions, it is difficult to ascertain whether the described mitigation alone would be sufficient in preventing substantive or potentially significant impacts to area farms, the harvest, or farm-to-market activities.

- b. Also on the same batch of projects, one commenter noted the tourism value of the existing Visitor Center, which is to be removed and reconstructed at a new site by these combined projects. From the commenter, who identifies as a seasonal employee of the NE Tourism Commission and a travel counselor:

“This is the first rest area and Visitor Center on East Bound I-80 as people enter the state. I see many stopping to look over the large amount of information displayed on points of interest in Nebraska. With the large room we can provide a place for relaxation, which induce conversation and an opportunity to promote various points of interest to an individual. We also have plenty of storage area for material gathered at our brochure sway every spring which saves on shipping throughout the summer. I’m told that tourism is second to agriculture as a source of revenue in Nebraska. We need to be welcoming to the several thousand visitors who come in to the EB I-80 Travel center.”

There was not sufficient information provided to determine whether there continued to be an unresolved controversy (i.e., a potentially substantial or significant impact to tourism) or whether the controversy had been resolved. The NDOT response letter to the commenter was a short “thank you for the information” letter. The CE does not discuss the resolution of the comment as required by the July 2018 CE instructions.

- c. On another project, there were also comments from the public questioning impact to regional harvest if construction occurred during harvest season, but this concern was not disclosed or addressed in the CE.



**Recommendation:** Clarify manuals and instructions and train staff to ensure social, economic and environmental concerns raised by the public are disclosed and assessed in the CE.

**Recommendation:** Returning to the practice of identifying substantive issues raised by the public and disclosing those, along with the response, within the CE Public Involvement section would greatly minimize the risk of missing potentially significant issues raised by the public.

**D. Observation:** Re-evaluations and Environmental Certifications:

- a. Based on interviews and project file reviews, it is unclear how NDOT verifies technical documents remain valid prior to authorization of the next major federal approval (ROW or construction). For example, the Team heard different answers for the frequency at which the Environmental Justice (EJ) memo should be checked to ensure the analysis is still valid. Most answers were either 1) if the EJ memo is over 3 years old, or 2) if the EJ memo was created before 2015.
- b. Based on interviews and project file reviews, there are opportunities to create efficiencies in the re-evaluation process for local government projects. It appears the NDOT process is to re-evaluate every CE prior to ROW authorization for local projects, regardless of the CE signature date. FHWA found multiple examples of re-evaluations being issued within a week of the CE signature, and one example of a re-evaluation starting the same day as the CE signature, for no reason other than ROW needed to be authorized. While NDOT can choose to continue this practice, there are other options available that would be less labor and time intensive. FHWA is willing to discuss potential programmatic options at the request of NDOT.
- c. Based on interviews and project file reviews, NDOT should be commended for initiating the environmental certification form process for checking the final PS&E plans against the CE, which is the mechanism employed on state projects to comply with 23 CFR 771.113(a). However, a similar process does not exist for the local program. Based on file reviews and interviews, there is not a consistent, documented process followed by NDOT to ensure consistency between the CE (or subsequent reevaluations) and the final plans, nor to ensure applicable permits have been obtained, prior to authorizing a project for construction.
- d. Frequently in CEs, there will be a commitment to re-evaluate the CE if federal funds will be provided to a utility company for relocations or if the contractor will relocate utilities. During interviews, the Team asked how a decision made to federally fund utility relocations after NEPA completion was communicated to the NDOT Environmental Section, to ensure NEPA requirements are met. The interviewees did not know if or how this information was provided to NDOT Environmental. Interviewees did describe methods of transferring information in the event the contractor would be responsible for relocating utilities.

**Finding:** NDOT does not have a system for checking and documenting the consistency of the PS&E package with the final CE for local government federal-aid projects to demonstrate compliance with 23 CFR 771.113(a).

**Finding:** NDOT does not have a process to rechecking NEPA compliance when federal funds are provided to utility companies after NEPA is completed.

**Recommendation:** NDOT should consider developing a strategy for identifying a “shelf life” for technical documents, or a simple method for documenting no change to a technical document prior to authorization for construction. As an option, the environmental certification form could be enhanced to provide a final check/documentation point for verifying and documenting the continued validity of technical documents.

**Recommendation:** NDOT should consider developing a “shelf-life” strategy for CEs, and a simpler method for documenting no change to a CE (when applicable) for local government ROW authorizations.

**Successful practice:** As the Team learned during interviews, NEPA analysts are doing a good job of monitoring the Project Description Form found in OnBase and using that as a tool for determining when a reevaluation may be needed. Also, designers are emailing NEPA Analysts and NEPA PMs when changes are occurring. There are also meetings, such as the ECM meetings and CCAM meetings, where project changes and questions can be communicated amongst the designers and environmental practitioners.

- E. Observation:** Development of Environmental Commitments: Based on interviews, the Team learned the development and scripting of commitments found in CE documents and technical documents is primarily completed by NDOT Environmental staff. Some interviewees suggested it would be helpful to route the drafted commitments through the District and designers to ensure clarity, biddability and enforceability before they are provided to outside agencies (ex, officials with jurisdiction, USFWS, etc) and/or before finalizing in the CE.

During interviews, FHWA heard that some of the environmental commitments issued within CEs are unclear or difficult to implement. Some commitments were written too “softly”, meaning they were either unclear, non-enforceable, or were already covered through a standard specification. Some “soft” commitments, like “keep dust down” or “keep noise low”, can be difficult to implement during construction and may already be covered under the NDOT’s Standard Specifications.

**Recommendation:** NDOT should consider developing a process to provide district and design (or local government) staff the ability to review and provide comments on draft commitments prior to finalization. The review would help ensure commitments are biddable, clear and enforceable.

- F. Observation:** Program Management: Since 2015, FHWA has compared project CE approval dates to the projects Plans, Specifications and Estimates (PS&E) turn-in date (provided by NDOT) as a measure of the health of the CE program. Final design activities start prior to the NDOT-established PS&E turn-in date, and if CEs are not approved prior to the start of final design, it means NEPA is a project critical-path item. In addition, not only is this measure an indicator of the health of the CE program, but by regulation NEPA must be complete prior to the start of final design (23 CFR 771.113(a)) and by FHWA Order 6640.1A. CE approvals occurring after PS&E turn-in are not in compliance with this requirement.

- a.** For this CE monitoring event, the Team compared the CE approval date to the PS&E turn-in date and found 54% of CEs reviewed were approved prior to PS&E turn-in. As

the following chart illustrates, the percent of CEs approved prior to PS&E turn-in decreased 23% from the previous review in January 2018, but still 36% higher than the completion rate from December 2015:

Review Date	Percent of CE's approved prior to PS&E turn-in
March 2019	54%
January 2018	77%
December 2015	18%

The decreased success rate may be attributable to implementation of this new CE assignment program. FHWA will continue to monitor this indicator through future monitoring events.

- b. Importantly, per FHWA Order 6640.1A (October 1, 2010), NDOT and the Division Administrator are required to develop State specific preliminary design policies to clarify activities which are classified as preliminary design versus final design. The Division and NDOT have met several times in the past, but this requirement has yet to be fulfilled. In addition, the need to comply with this Order and associated regulation (23 CFR 771.113(a)) was identified as a priority 1 gap during the readiness assessment of 2017 and it remains an outstanding item. Fulfilling this responsibility will not only satisfy the DOT order and the outstanding Readiness Assessment item, it would also help improve the success of the CE approval vs PS&E indices. In addition, it will help NDOT successfully move more CE activities out of the project delivery critical-path.

**Finding:** In compliance with 23 CFR 771,113(a) and FHWA Order 6640,1A, NDOT must develop an SOP and update NDOT's Project Management and Design Manuals to clarify the timing of NEPA requirements relative to final design. In addition, NDOT must develop procedures sequencing NEPA completion and final design for compliance with FHWA Order 6640.1A [23 CFR 771.113(a)]. FHWA requests NDOT submit a schedule for completing this task and a tentative approach outline within 1 month of receiving this final report.

- G. **Observation:** Natural Resource Conservation Service (NRCS) coordination and farmland conversions: In Nebraska, conversion of farmland to a transportation use is common. By NDOT practice, to determine whether coordination with NRCS is necessary, and to determine whether prime or unique farmland impacts may be of concern, the NRCS -CPA-106 form is partially completed by the project sponsor. The form is a stepped process, with Part IV of the form filled out by the project sponsor. Other portions of the form are under the purview of the NRCS to complete. Part IV of the form asks specific questions, and the project sponsor inserts a number value in response to the questions. These numbers are added together to determine a "score" for this portion of the form. Per NDOT practice, if the compiled score of Part IV is below 60, impacts of concern are assumed to not exist, no coordination occurs with the NRCS, and the remainder of the form is left incomplete.

Based on review of project files, no project scored above the 60 threshold in Part IV of the form, and therefore impacts were assumed to not exist and no coordination occurred with the NRCS. Based on anecdotal evidence and Division observations, projects in Nebraska rarely, if

ever, have scored above 60 using this process. It is unclear how the transportation practitioners are assigning numbers to certain questions within the NRCS -CPA-106 form.

**Recommendation:** NDOT should coordinate with NRCS to verify that NRCS-CPA-106 form is being completed correctly.

#### **H. Other noteworthy Successful Practices:**

- Environmental sheets, or “e” sheets: NDOT is commended for developing and integrating a method for marking sensitive areas on project plans as a way to efficiently communicate avoidance of sensitive areas to the contractor.
- Project Description Forms: The process of recording the original project descriptions for state projects, then recording project description updates within a single form, is a helpful tool for ensuring the entire project team understands the most current description of project activities.

**III. Excluded projects: Determination and documentation of CEs excluded from the CE Assignment Program and retained by FHWA.** The MOU says that any activity that is not listed in 23 CFR 771.117 (c) or (d) as a CE activity is not assigned, nor are listed activities that require the completion of an EA or EIS assignable.

- A. **Observation:** Projects that may not have significant effects and meet the criteria for CE designation, but do not fall into any of the categories of actions listed in the CE regulations, are excluded from assignment. These types of projects must be submitted to FHWA for review and approval.

As noted in Section I.B.b. of this report, a batch of projects were approved as a general (d)-listed activity, with a note in a comment field assigning different activity numbers to this grouping of projects. While it was appropriate to review and approve this group of projects together as one federal action, it was not appropriate to reference different CE activity types to approve this action. It is possible that multiple activity types were referenced because there was no single activity type that would cover the action as a whole. This project could have been treated as an “open-ended” CE, but this would have required FHWA review and approval, because it was not an assignable activity under the CE MOU.

Furthermore, as discussed in Section II.C of this report, it’s unclear whether potential conflicts raised during the public comment process were resolved (impacts to NDOT’s tourism program, impacts to harvest and the grain elevator facility, and impacts to freight during rest area closure). This raises the question as to whether a different classification of CE or whether an EA may have been the appropriate NEPA class of action for the project.

**Finding:** NDOT does not have clear guidance for its specialists on how to deal with actions that are not covered by one single CE activity, but can qualify for a “open-ended” CEs. NDOT does not have clear guidance on how to document the disposition of public comments when no additional action will be pursued or is warranted.

**Recommendation:** Clarify in guidance and through training that CE determinations cannot be a composite or aggregate of multiple CE activities and ensure clarity on how to document the disposition of public comments when no additional action will be pursued or is warranted.

**B. Observation:** The MOU stipulates that NDOT is responsible to conduct re-evaluations of CE projects, including those projects where FHWA was responsible for the CE determination prior to executing the MOU. However, NDOT is not assigned the responsibility to make re-evaluation decisions for excluded projects, including unassignable CEs, EAs, or EIS projects. During the review, FHWA randomly selected a handful of re-evaluations executed post CE Assignment for review.

From that review, one excluded project was identified that had an re-evaluation. This project was originally reviewed and approved by FHWA as an “open-ended” d-listed CE prior to the execution of the 326 CE Assignment MOU (September 5, 2018). After the execution of the MOU, in the fall of 2018, NDOT had reviewed and approved project changes for the subject project through a re-evaluation. Within the same timeframe, FHWA initiated a conversation with NDOT about reevaluations for “open-ended” CEs, because the Division wanted to ensure NDOT understood “open-ended” CE reevaluations were not assignable. This conversation occurred at the conclusion of an unrelated meeting. Later that same day, NDOT staff contacted the Division to self-report they had recently approved an unassignable CE reevaluation. Subsequently, the Division worked with NDOT to correct this error.

**Finding:** NDOT reviewed a re-evaluation that was not assignable because it was on a “open-ended” d-listed CE. The error was subsequently corrected through coordination with the Division.

**Recommendation:** Clarify in guidance and through training that re-evaluations of “open-ended” d-listed CEs made by FHWA are not part of NDOT’s assigned responsibilities.

**IV. Adequate State resources (including provision of financial resources), qualifications, expertise, standards, and training.** NDOT has agreed in the MOU to maintain adequate organizational and staff capability and expertise to effectively carry out the responsibilities assigned to it under this MOU.

**A. Observation:** Based on interviews and a review of the Environmental Section Organizational chart, FHWA learned that four of the six NEPA Specialists on staff at NDOT had one year or less NEPA experience at the time of the review. In addition, at about the time of CE MOU execution in the Fall of 2018, NDOT established and staffed four new positions, titled Environmental Project Managers. While the staff promoted to these positions are well-respected, most of them have a specialized, non-NEPA background. During interviews, several NDOT staff members talked about the need and desire for additional training.

**Recommendation:** NDOT should develop a strong on-boarding and training program to ensure new (existing and future) NDOT environmental staff are suitably equipped and trained to execute an effective and compliant CE MOU program.

**Recommendation:** Financial and staff resources should be allocated to raise staff qualifications and to expand staff experience, especially in NDOT’s approach to NEPA compliance. Both experienced and new staff need time set aside to accommodate training and staff development. The Team encourages NDOT to continue to commit time and financial investments to training for staff competencies and qualifications as well as for efforts to retain trained and qualified staff.

**B. Observation:** Through the interview process, the Team could not determine who at NDOT is responsible for assessing whether NDOT Environmental staff or consultants working for them have the technical expertise to carry out responsibilities NDOT has assumed pursuant to MOU stipulation IV(D)(2).

**Recommendation:** NDOT should clarify how these decisions are made and who at NDOT is responsible for making this determination.

**C. Observation:** The Team remains unclear on NDOT’s approach or plan for training, especially training to support the fulfillment of NDOT’s assumed NEPA responsibilities. FHWA learned from Interviewees that a training plan exists, but when the Team requested a copy during the monitoring week, they were told there was no plan available to provide to FHWA.

**Finding:** In compliance with Section IV.F.4 of the CE MOU, NDOT needs to provide FHWA a copy of their training plan, within the timeframe specified by the MOU. If NDOT does not have an environmental staff training plan, provide FHWA a schedule for development.

**Recommendation:** FHWA is willing and able to provide training on technical and practical aspects of the NEPA process as well as workshops tailored to NDOT’s training needs, at the request of NDOT.

**D. Successful Practice:** Although NDOT still needs to develop their formal training program, informal training occurs in Project Coordination Meetings, and during Environmental Document Unit staff meetings.

## V. State Quality Control and MOU Performance Monitoring and Quality Assurance.

**A. Observation:** MOU stipulation IV(E)(2) requires NDOT to monitor its processes relating to project determinations, environmental analyses, and project file documentation, and check for errors and omissions. NDOT also must take corrective action as needed.

As part of the file review, the Team observed that regular quality control activities as outlined in NDOT’s QA/QC manual and CE Checklist Manual are not consistently being carried out, nor is there evidence that NDOT is monitoring these processes. The Team was also unable to determine if peer reviews were completed by staff experienced to perform QC (See IV.B., of this section of the Monitoring Report). Also, few records of specific QC comments or QC review errors and omissions were found in project files. The majority of CEs reviewed contained substantive errors (more than minor typographical errors or inconsequential omissions) that may have been prevented if the appropriate processes were followed, and/or QC process and oversight were improved. Examples of these errors include but are not limited to the following:

Sample of Issues Observed
CE language indicates there will be a detour for more than 135 working days but the CE mitigation states “The project shall not result in traffic disruptions, requiring detours, temporary roads, or ramp closures that are greater than 30 working days.”. The two statements are inconsistent with each other.

<p>The hazmat section 11.6 states, "NDOT reviewed the project after the project description changes on August 10, 2018 and determined the project description update including the asphalt overlay is minimal in noise and the duration is short. This does not constitute as a disproportionately high and adverse effect. A mitigation measure will be included in the NEPA document to ensure that the contractor is limited to the duration and work stated (see Section 17.5)." This statement is ambiguous and during post-monitoring week coordination with NDOT, they acknowledged the statement was included in the CE in error.</p>
<p>Block 18.2 indicated a change in scope and that nighttime work with lights would be needed. Therefore, the public involvement office was planning to provide additional PI opportunities. This commitment was not carried forward in the commitment section of the CE.</p>
<p>The final plans for the project, as found in OnBase, did not include the sensitive area (historic site) as an avoidance area, as required by the mitigation.</p>
<p>The CE's discussion of Interstate traffic management during construction wasn't understandable and the text contradicted itself. During the Project review process, NDOT acknowledged there was an error in the text and that the plans for handling the traffic during construction changed during the life of the CE review. However, the CE documentation and mitigation were not updated to reflect the changes.</p>
<p>Additional ROW needs were identified December 8, 2017 but the Section 4(f) review occurred July 6, 2017. NDOT indicated they did check for Section 4(f) properties when asked during project reviews. However, there isn't documentation in the file to demonstrate the review occurred.</p>
<p>The Section 106 documentation states the NDOT Professionally Qualified Staff (PQS): "indicated that NDOR would make a commitment in the NEPA document to develop a Memorandum of Understanding (MOU) with the Ponca Tribe of Nebraska to develop such a collaborative project", but there is no commitment in the CE.</p>
<p>Reviewers found empty fields in project CEs, that, based on reading the CE instructions, reviewers expected to find some information (for example, fields 10.3, 10.4 and field 16.7). It is unclear whether this is due to a glitch in the CE SmartForm programming which is allowing CEs to be finalized with incomplete fields, whether human error caused the fields to be left blank, or whether instructions need to be improved to clearly articulate when fields can be left blank.</p>

**Finding:** The majority of CEs reviewed contained substantive errors that should have been captured and prevented through adequate QC protocols.

**Recommendation:** NDOT should improve its Quality Control protocols to ensure CEs are meeting established requirements and procedures. For example, NDOT should maintain detailed records of QC reviews in the project file, including the specific items reviewers noted for correction.

**Recommendation:** NDOT should also review and address the occurrences of empty fields in CEs, and either adjust the SmartForm, update the QC checklist to address empty CE fields, improve CE instructions, or provide training as appropriate. NDOT should also consider whether quality control and/or quality assurance training is needed.

**Recommendation:** The following commitment is commonly used and the language should be tweaked, since it is somewhat contradictory to the CE text when used and can create a scenario in which impacts occur that were not analyzed “This project shall be constructed under traffic with lane closures controlled by approved temporary traffic control. The project shall not result in traffic disruptions, requiring detours, temporary roads or ramp closures that are greater than 30 working days.”

**Successful Practice:** Although improvements can be realized in application, the quality control reviews are occurring at appropriate times in the review process.

- B. Observation:** Through interviews with NDOT staff, Quality Assurance actions have yet to occur, and evidence of NDOT supervisors/managers providing QA of project QC efforts were not found in project files. Multiple NDOT staff stated there has not been adequate time to understand if the guidelines/manuals are working appropriately or efficiently. FHWA will revisit QA during the next Monitoring Event.

**Successful Practice:** Although not formal QA/QC, the weekly Environmental Document Unit Manager meeting with Unit staff to go over project concerns was an effort highly regarded by interviewees as an activity that helps NDOT NEPA Specialists and Managers refine their program understanding and improve consistency in CE approaches. This effort is commended and could be rolled into a Quality Assurance Plan.



## Conclusion

This report describes the results of the first monitoring review of NDOT's performance in terms of the MOU requirements. Through the observations and successful practices presented here, the Team urges NDOT to continue to refine and enhance the effectiveness of their procedures, documentation, and decision making as it relates to their assigned CE responsibilities. This report was prepared for the benefit of NDOT. NDOT has the discretion as to whether to distribute the report to outside parties.

The Team identified approximately a dozen practices NDOT has employed to successfully deliver their program. These practices include the Project Description Forms, the "e" sheets contained within the project plans, and the use of OnBase as the official document repository. In addition, the team identified some process improvements for NDOT's consideration that could, when implemented, enhance program effectiveness, efficiency, and/or transparency. For example, the Team felt efficiencies could be realized by reviewing the frequency by which NDOT conducts reevaluations, particularly for local government federal-aid projects.

An overall observation is that NDOT needs to adhere to all stipulations contained within the CE MOU to ensure satisfactory compliance. For example:

- There have been instances where NDOT has changed procedure without providing the changed guidance to FHWA for review (ex, ROW disposal process).
- NDOT has processed reevaluations and CEs that were not assignable per the MOU.
- FHWA and NDOT should make efforts to improve communications and coordination in sharing process and procedural changes.
- NDOT must be more diligent to make certain adequate quality controls exist to ensure executed CEs are clear, accurate, and compliant with requirements.

Some of the observations made in this review are consistent with early monitoring reviews in other CE assignment states. As with any new program, FHWA recognizes that there can be initial challenges implementing and adjusting to roles, responsibilities, and requirements. FHWA anticipates that NDOT will respond to this review by making necessary program modifications, which FHWA will assess during the next monitoring event. With these program modifications, NDOT will more fully satisfy the requirements of the CE MOU.

FHWA finds that NDOT is compliant with the terms of the MOU, but there are numerous findings that require NDOT action to ensure substantial compliance. FHWA recommends that NDOT prepare an action plan detailing the corrective steps to resolve the findings contained in the report.

In closing, the Team thanks NDOT for the time, effort, and courtesy provided to us during our week-long monitoring review. We look forward to continuing the productive working partnership FHWA has with NDOT.

## APPENDICES

**Appendix A: Executed Memorandum of Understanding for State  
Assumption of Responsibility for Categorical Exclusions**

**MEMORANDUM OF UNDERSTANDING**  
**between**  
**Federal Highway Administration, Nebraska Division and**  
**the Nebraska Department of Transportation**  
**State Assumption of Responsibility for Categorical Exclusions**  
**23 U.S.C. §326**

THIS MEMORANDUM OF UNDERSTANDING ("MOU"), made and entered into this 5th day of September, 2018, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION ("FHWA") and the STATE of NEBRASKA, acting by and through its DEPARTMENT OF TRANSPORTATION ("State"), hereby provides as follows:

WITNESSETH;

**Whereas**, Section 326 of amended Chapter 3 of title 23, United States Code (23 U.S.C. §326) allows the Secretary of the United States Department of Transportation (DOT Secretary), to assign, and a State to assume, responsibility for determining whether certain designated activities are included within classes of action that are categorically excluded from requirements for environmental assessments or environmental impact statements pursuant to regulations promulgated by the Council on Environmental Quality under part 1500 of title 40, Code of Federal Regulations (CFR) (as in effect on October 1, 2003); and

**Whereas**, if a State assumes such responsibility for making categorical exclusion (CE) determinations under the National Environmental Policy Act of 1969, 42 U.S.C. §4321 et seq. (NEPA), the DOT Secretary also may assign and the State may assume all or part of certain Federal responsibilities for environmental review, consultation, or other related actions required; and

**Whereas**, Section 1312 of the Moving Ahead for Progress in the 21st Century Act (P.L. 112-141) amended 23 U.S.C. §326 to preserve the ability of States assuming responsibility to engage in project delivery methods that are otherwise permissible for highway projects, to terminate their participation in the program at any time by providing the DOT Secretary with a notice no later than 90 calendar days before such termination, and to allow States assuming responsibility to use funds apportioned to the State under section 104(b)(2) for reasonable attorney's fees directly attributable to eligible activities associated with the project; and

**Whereas**, on July 16, 2018, FHWA published a notice of the availability of the proposed MOU in the Federal Register and provided a 30-day opportunity for comment; and

**Whereas**, on July 16, 2018, the State published a notice of the availability of the proposed MOU on its website at <https://dot.nebraska.gov/news-media/> and in the Omaha World Herald and provided a 30-day opportunity for comment; and

**Whereas**, the State and FHWA have considered the comments received; and

**Whereas**, the DOT Secretary, acting by and through FHWA, has determined that specific designated activities are CEs and that it will assign specific responsibilities with respect to CEs to the State in accordance with this MOU; and

**Whereas**, the State wishes to assume such Federal agency responsibilities in accordance with this MOU and applicable law; and

**Whereas**, FHWA and the State commit to work together to achieve a successful assignment program through State implementation, including proactively identifying and correcting deficiencies, and FHWA assisting the State through training and by providing program assistance; and

**Now, therefore**, FHWA and the State agree as follows:

## **STIPULATIONS**

### **I. CATEGORICAL EXCLUSION RESPONSIBILITIES ASSIGNED TO THE STATE BY FHWA**

- A. For the projects covered by this MOU, FHWA hereby assigns, and the State hereby assumes, subject to the terms and conditions set forth in 23 U.S.C. §326 and this MOU, the responsibility for determining whether a proposed Federal-aid action is within a category of action that has been designated as a CE by the DOT Secretary, as specified in Stipulation I(B), and meets the definition of a CE as provided in 40 CFR 1508.4 (as in effect on October 1, 2003) and 23 CFR 771.117(a) and (b). This assignment applies only to projects for which the State is the direct recipient of Federal-aid highway program funding or is the project sponsor or cosponsor for a project requiring approval by FHWA – Nebraska Division Office. This assignment does not apply to responsibilities carried out by other modal administrations of the US Department of Transportation (DOT) or the Office of the Secretary.
- B. This assignment pertains **only** to the designated activities described in this Stipulation I(B).
1. The assignment includes the following:
    - a. Activities listed in 23 CFR 771.117(c);
    - b. The example activities listed in 23 CFR 771.117(d); and
  2. Any activities added through FHWA rulemaking to those listed in 23 CFR 771.117(c) or example activities listed in 23 CFR 771.117(d) after the date of the execution of this MOU.
- C. This MOU transfers to the State all responsibility for processing the CEs designated in Stipulation I(B) of this MOU, including any necessary CE approval actions. The State shall process all proposed projects that are CE candidates (CE projects), and any required reevaluations of CEs under 23 CFR 771.129 for all CE projects not completed prior to the date of this MOU, in accordance with the provisions of this MOU. With respect to matters covered by and subject to the terms of this MOU, this MOU supersedes any existing programmatic agreement that is solely between the State and FHWA concerning CEs. Such programmatic agreement remains in effect with respect to matters not covered in this MOU until said programmatic agreement is terminated, or superseded, by subsequent agreement(s) between the State and FHWA or by law. A CE project that is excluded from this MOU, but is within the scope of a programmatic CE agreement between FHWA and the State, may be processed pursuant to such programmatic agreement so long as that agreement remains in effect and does not conflict with the terms of this MOU.
- D. The State, when acting pursuant to 23 U.S.C. §326 and this MOU, holds assigned authority to make environmental decisions and commitments pertaining to only the individual proposed projects and activities within the scope of 23 U.S.C. §326 and this MOU. No action by the State shall bind FHWA to future action of any kind. No determination or agreement made by the State with respect to mitigation or other activities shall constitute a precedent for future determinations, agreements, or actions in the Federal-aid highway program unless FHWA consents, in writing, to such commitment.

### **II. OTHER FHWA RESPONSIBILITIES ASSIGNED TO THE STATE AND RESPONSIBILITIES RESERVED BY FHWA**

- A. For projects covered by this MOU, FHWA hereby assigns, and the State hereby assumes, the following FHWA responsibilities for environmental review, consultation, or other related actions required under Federal laws and Executive Orders applicable to CE projects: See Appendix A. This assignment includes the transfer to the State of the obligation to fulfill the assigned environmental responsibilities associated with any proposed projects meeting the criteria in Stipulation I(B) that were determined to be CEs prior to the effective date of this MOU, but the project has not been completed. Such projects are included in the term "proposed projects" in this MOU.

- B. The FHWA reserves any responsibility for any environmental review, consultation, or other related action that is not expressly assigned under this MOU, including:
1. All government-to-government consultation with Indian tribes as defined in 36 CFR 800.16(m). Notice from the State to an Indian tribe advising the Indian tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If the State adequately resolves any project-specific Indian tribe issues or concerns, then FHWA's role in the environmental process shall be limited to carrying out the government-to-government consultation process. If FHWA determines through consultation with an Indian tribe, or an Indian tribe indicates to FHWA, that the proposed resolution of tribal issues or concerns by the State is not adequate, then Stipulation III(C) applies. This MOU is not intended to abrogate, or prevent future entry into, any written agreement among the State, FHWA, and an Indian tribe under which the Indian tribe agrees to permit the State to administer government-to-government consultation activities for FHWA. However, such agreements are administrative in nature and do not relieve FHWA of its legal responsibility for government-to-government consultation.
  2. Responsibility for the review and approval of individual Section 4(f) evaluations and for making project-level air quality conformity determinations, would be phased in until such time as State staff responsible for approving such evaluations have completed air quality conformity, individual Section 4(f) and legal sufficiency workshop training(s) provided by FHWA, and air quality project-level conformity and Individual Section 4(f) implementation guidance materials and procedures are complete. When such training(s), implementation guidance material and procedures have been completed, FHWA shall notify the State that the responsibility, either for project level conformity determinations or for review and approval of individual Section 4(f) evaluations is assigned; thereafter, assignment will remain with the State and be carried out, monitored and reviewed in accordance with the remaining provisions of this MOU. This modification for assignment after training shall not be deemed an amendment under Stipulation VIII. In addition, the State will not make any determination that an action constitutes a constructive use of a publicly owned park, public recreation areas, wildlife refuge, or historic site under 49 U.S.C. §303/23 U.S.C. §138 (Section 4(f)) without first consulting with FHWA and obtaining FHWA's approval for such determination.
  3. The State and FHWA will develop and document procedures for carrying out FHWA responsibilities retained by FHWA under Stipulation II(B)(2), including how any FHWA decisions will be communicated to the State for inclusion in the State's decision-making under Stipulations I and II(A). The procedures will ensure that:
    - a. The State provides to FHWA any information necessary in order for FHWA to carry out its consultation, evaluation, or decision-making for Stipulation II(B) activities;
    - b. The FHWA provides the State with a documented decision and any related information used for Stipulation II(B) decisions and needed by the State in order for the State to evaluate the project and make its decision whether the project qualifies as a CE; and
    - c. As part of any request for FHWA authorization for funding or other action, the State will provide to FHWA evidence that the CE processing and any other environmental responsibilities assigned under this agreement have been completed in accordance with this MOU.
- C. The State agrees that its execution of environmental review, reevaluation, consultation, and other related responsibilities for CEs assigned under this MOU are subject to the same existing and future procedural and substantive requirements as if those responsibilities were carried out by FHWA. This includes, but is not limited to, the responsibilities of FHWA under interagency agreements such as programmatic agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process for CE projects (see Appendix B). If such interagency agreements are between the State and FHWA only, then the assignment occurs automatically upon the signing of this MOU for projects covered by this MOU. If the interagency agreement involves signatories other than FHWA and the State, then FHWA and the State will work to obtain any necessary consents or amendments. Such actions include:
1. Consulting with the other parties to obtain written consent to the continuation of the

interagency agreement in its existing form, but with the substitution through assignment of the State for FHWA with respect to interagency agreement provisions applicable to CE projects;

2. Negotiating with the other parties to amend the interagency agreement as needed so that the interagency agreement continues but that the State assumes FHWA's responsibilities with respect to CE projects.
  3. If a third party does not agree to the assignment or amendment of the interagency agreement, then to the extent permitted by applicable law and regulation, the State must carry out the assigned environmental review, consultation, or other related activity in accordance with applicable laws and regulations but without the benefit of the provisions of the interagency agreement.
- D. The State shall carry out the assigned consultation, review and coordination activities in a timely and proactive manner. The State shall make all reasonable and good faith efforts to identify and resolve conflicts with Federal agencies, State and local agencies, Indian tribes as defined in 36 CFR 800.16(m), and the public during the consultation and review process.

### III. ACTIONS, CONDITIONS, DETERMINATIONS, OR PROGRAMS THAT EXCLUDE DESIGNATED ACTIVITIES FROM ASSIGNMENT OF RESPONSIBILITIES

- A. Notwithstanding any other provision of this MOU, any activity that does not satisfy the criteria for the CEs categories described in Stipulation I(B) is **excluded** from this assignment. Exclusion also may occur at any time during the environmental process if the State determines that the project fails to meet the CE criteria or falls within Stipulation III(D). The provisions of Stipulation IV(C) apply to such cases.
- B. Because the State assumes responsibility for environmental processing of the CEs designated in this MOU, FHWA no longer will be responsible for conducting the environmental review, consultation or other related actions assigned under this MOU (see Stipulation XI). However, in furtherance of its stewardship and oversight responsibilities, FHWA will evaluate the State's environmental processing of any project if FHWA has any reason to believe that the State's performance with respect to the project does not satisfy the terms and conditions of this MOU. The scope of the evaluation will be commensurate with the potential problem and consistent with the terms of this MOU. If FHWA subsequently determines that the State's performance does not satisfy the terms and conditions of this MOU, then FHWA will take action to resolve the problem. Such action may include action to facilitate the State's compliance with the MOU, or action to exclude the project from assignment under this MOU. The provisions of Stipulation X apply in the event of FHWA-initiated exclusion or partial termination.
- C. If a project-related concern or issue is raised in the coordination of project review with an Indian tribe, as defined in 36 CFR 800.16(m), and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by the State as more specifically set forth in Stipulation II(B)(1), then, FHWA may reassume responsibility for processing the project or an individual responsibility assumed by the State. The FHWA shall notify the State that the project will be excluded from this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.
- D. Other programs that exclude a project from assignment to the State under this MOU are:
1. Federal Lands program of projects administered by the Federal Lands Highway Division which are authorized under 23 U.S.C. §§202, 203, 204, and Section 1123 of the Fixing America's Surface Transportation Act (P.L. 114-94), unless such projects will be designed and constructed by the State.
  2. Programs and projects advanced by direct recipients of Federal-aid Highway Program funds other than the State, including but not limited to:
    - a. Recreational Trails program (23 U.S.C. §206);
    - b. TIGER Discretionary grants;
    - c. Direct recipient tribal project;
    - d. National Significant Freight and Highway Project Program.

#### IV. PERFORMANCE REQUIREMENTS

- A. Compliance with governing laws, regulations and MOU. The State shall make all determinations under this MOU in accordance with 23 CFR 771.117(a) and (b) and succeeding regulations. All actions by the State in carrying out its responsibilities under this MOU shall comply with, and be consistent with, the coordination provisions of Stipulation II and all applicable Federal laws, regulations, Executive Orders, policies, and guidance. The State also shall comply with State and local laws to the extent applicable.
1. Failure to meet the requirements of Stipulation IV(A) is grounds for a decision by FHWA to terminate this MOU pursuant to Stipulation IX(A) if FHWA determines, after good-faith consultation with the State, that there is an irreconcilable material conflict between a provision of State law, regulation, policy, or guidance and applicable Federal law, regulation, policy, or guidance, and FHWA reasonably determines that such conflict is preventing the State from meeting its Stipulation IV(A) obligations. The grounds for such decision may include, but are not limited to, the mere existence of the conflict (i.e., on its face) and/or the effect of the conflict on the State's decision(s) on proposed CE project(s) (i.e., as applied).
  2. Official DOT and FHWA formal guidance and policies relating to environmental review matters are posted online at FHWA's Web site or sent to the State electronically or in hard copy.
  3. FHWA will use its best efforts to notify the State within five business days of any Indian tribe requesting government-to-government consultation and the State shall provide FHWA any information pursuant to stipulation II(B)(3)(a).
  4. After the effective date of this MOU, FHWA will use its best efforts to ensure that any new or revised FHWA policies and guidance that are final and applicable to the State's performance under this MOU are communicated to the State within 10 business days of issuance. Delivery may be accomplished by email, mail, or notification of publication in the *Federal Register*, or by means of a publicly available online posting including at the sites noted above. If communicated to the State by email or mail, such material may be sent either to the party specified in this MOU to receive notices, or to the individual designated by the State.
  5. In the event that a new or revised FHWA policy or guidance is not made available to the State as described in the preceding paragraph, and if the State had no actual knowledge of such policy or guidance, then a failure by the State to comply with such Federal policy or guidance will not be a basis for termination under this MOU.
  6. The State will work with all other appropriate Federal agencies concerning the laws, guidance, and policies relating to any Federal laws that such other agencies administer.
  7. In order to minimize the likelihood of a conflict as described in IV.A.1, after the effective date of this MOU the State will use its best efforts to provide notice to FHWA of proposed new or revised Nebraska laws, and State regulations, guidance, and written internal standard operating procedures that are applicable to the State's performance under this MOU. Furthermore, the State will use its best efforts to provide these materials to FHWA for review and comment before they become final. If the State had no actual advance knowledge of such new or revised Nebraska laws, then a failure by the State to provide FHWA with advanced notice of the proposed new or revised law will not be a basis for termination under this MOU.
  8. Deliveries required by this provision may be accomplished by email, mail, or personal delivery. If communicated to FHWA by email or mail, such material may be sent to the party specified in this MOU to receive notices for FHWA.
  9. At State's request, FHWA may assist the State in evaluating its environmental program to develop or modify its processes or procedures to carry out the responsibilities it has assumed under the MOU, including matters pertaining to emerging national policy issues, and those processes or procedures concerning the State's consultation, coordination, and communication with other federal agencies. Implementation of specific processes or procedures suggested by FHWA resulting from a request for assistance shall be left to the discretion of the State, except where the State's proposed course of action constitutes a violation of Federal law, regulation, policy, guidance, or the MOU.



- B. Processing projects assigned under the MOU: State identification, documentation, and review of effects. For projects and other activities assigned under Stipulations I(A)-(B) that the State determines are included in the classes of CE assigned to the State under this MOU, the State shall:
1. Institute and maintain a process to identify and review the environmental effects of the proposed project;
  2. Carry out the other environmental responsibilities that are assigned under this MOU, as necessary or appropriate for the activity;
  3. Document in the project file the CE findings and completion of all applicable FHWA responsibilities assigned under Stipulations I and II;
  4. For CEs other than those designated in 23 CFR 771.117(c), carry out a review of proposed CE determinations, including consideration of the environmental analysis and project file documentation, prior to the State's approval of the CE determination. The process shall include, at a minimum, review of the documentation and proposed determination by a competent reviewer who is not a preparer of the CE documentation.
  5. Document its approval of the determination using, at a minimum, the printed name, title, and date of the State official approving the determination; and
  6. Include the following determination statement when documenting the CE findings: "The State has determined that this project has no significant impact(s) on the environment and that there are no unusual circumstances as described in 23 CFR 771.117(b). As such, the project is categorically excluded from the requirements to prepare an environmental assessment or environmental impact statement under the NEPA. The State has been assigned, and hereby certifies that it has carried out, the responsibility to make this determination pursuant to 23 U.S.C. §326 and a Memorandum of Understanding dated September 5, 2018, executed between FHWA and the State."
  7. Document in the project file the specific categorically excluded activity, the CE finding, including the determination that the project has no significant impact(s) on the environment, there are no unusual circumstances (23 CFR 771.117(b)), and completion of all applicable FHWA responsibilities assigned under Stipulations I and II.
- C. Excluded projects: determination and documentation. For projects that are candidates for CE classification but that the State determines should be excluded from processing under this assignment, the State shall:
1. Document the exclusion findings in the project file, including the reason for the finding;
  2. Notify FHWA; and
  3. Working with FHWA as the responsible party under NEPA, to proceed with documentation and review of the project under the appropriate NEPA procedures (including those under a programmatic CE agreement, if applicable).
- D. Required State resources, qualifications, expertise, standards, and training.
1. The State must maintain adequate organizational and staff capability and expertise to effectively carry out the responsibilities assigned to it under this MOU. This includes, without limitation:
    - a. Using appropriate technical and managerial expertise to perform the functions required under this MOU and applicable laws, regulations, policy, and guidance;
    - b. Devoting adequate financial and staff resources to carry out the responsibilities assumed by the State; and
    - c. Demonstrating, in a consistent manner, the capacity to perform the State's responsibilities under the MOU and applicable Federal law.
  2. The State agrees that it shall maintain on its staff or through consultant services all of the environmental and other technical expertise needed to carry out its responsibilities under this MOU and 23 U.S.C. §326. Without limiting the foregoing, when carrying out the requirements of Section 106 of the National Historic Preservation Act, as amended, the State shall comply with 36 CFR 800.2(a)(1). All actions that involve the identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meet the Secretary of the Interior's Professional Qualifications Standards (published at 48 FR 44738-44739). The State shall ensure that all documentation required under 36 CFR 800.11 is

reviewed and approved by a staff member or consultant who meets the Professional Qualifications Standards.

E. State quality control.

1. The State agrees to carry out regular quality control activities to ensure that its CE determinations are made in accordance with applicable law and this MOU.
2. At a minimum, the State shall monitor its processes relating to project determinations, environmental analysis, and project file documentation, and check for errors and omissions. The State shall take corrective action as needed. The State shall document its quality control activities and any needed corrective actions taken.
3. If the State implements training to meet the capability requirements of this MOU or as a corrective action, the State shall be responsible for the training. The State shall provide notice of formal training to FHWA.

F. MOU performance monitoring and quality assurance. The FHWA and the State shall cooperate in monitoring performance under this MOU as set forth herein and each party shall modify its practices as needed to assure quality performance by the State and FHWA. Monitoring will include consideration of the technical competency and organizational capacity of the State, as well as the State's performance of its CE processing functions. Performance considerations will include, without limitation, the quality and consistency of the State's project determinations, adequacy and capability of the resources applied by the State, and the quality and consistency of the State's administration of its responsibilities under this MOU. In support of the monitoring efforts:

1. The State shall submit to FHWA a list of the CE determinations and Section 4(f) determinations that the State approved during the previous 6 months (with the start based on the execution date of this MOU) within 15 business days after the end of each reporting period. Reporting shall be every six months unless reduced by FHWA. Reduction in reporting frequency and any revocation of such reduction by FHWA, shall not be deemed an amendment under Stipulation VIII. For each report, the State shall include the following information: 1) Control Number, 2) Project Number 3) Project Name, 4) CE Level, 5) CFR Action Class, 6) STIP/TIP project description and 7) Approval Date. For projects with Section 4(f) determinations, the following information would also be included: 1) Property name, 2) property type, 3) determination (including determinations made under 23 CFR 774.13), 4) approval date, and 5) legal sufficiency review date (individual Section 4(f) only).
2. With the exception of the initial 6-month period after the execution of this agreement, the State shall submit to FHWA (via electronic copy) a self-assessment report summarizing its performance under this MOU at least 30 days prior to a scheduled monitoring review by FHWA under Stipulation IV(F)(3). The report will identify any areas where improvement is needed and what measures the State is taking to undertake those improvements. The report will include actions taken by the State as part of its quality control efforts under Stipulation IV.
3. The FHWA periodically shall review the State's records and may conduct onsite interviews of State staff to evaluate the State's performance under this MOU. FHWA shall conduct one review within 6 months of the execution of this agreement. Thereafter, monitoring reviews should be coordinated within the review of the State's report under Stipulation IV(F)(2). The FHWA shall provide notice 90 days prior to scheduling on site monitoring review interviews, during which parties will discuss the self-assessment report, the State's performance of the MOU, and FHWA's monitoring activities. Following the conclusion of a monitoring review, FHWA will provide the State with a draft written report summarizing the findings of the monitoring review. No monitoring review shall be scheduled for a date less than 6 months from the date NDOT receives the draft written report from the previous monitoring review. The FHWA anticipates that under normal circumstances, its evaluation of the State's performance will be based on a modified version of a typical FHWA CE process review (to view FHWA guidance on how monitoring should occur visit <http://www.fhwa.dot.gov/hep/6004stateassumpt.htm>). Modifications to the CE process review will include incorporation of measures specific to the responsibilities assigned to the State pursuant to 23 U.S.C. §326, and will include performance measurements of compliance and timeliness. However, FHWA reserves the right to determine in its sole discretion the frequency, scope, and procedures used for monitoring activities. The State,

by its execution of this MOU acknowledges that it is familiar with FHWA CE Process Review procedures and with the expected modifications that will be adopted for the purpose of monitoring the State's MOU performance.

4. The State shall maintain project and administrative records pertaining to its MOU responsibilities and the projects processed hereunder as set forth in the State's record retention schedules approved by the Nebraska Secretary of State. The State will ensure that such records are reasonably available for inspection by FHWA at any time during normal business hours. The State shall provide FHWA with copies of any documents FHWA may request within 5 business days. The State shall retain those records, including all letters and comments received from governmental agencies, the public, and others about the performance of activities assigned under this MOU, for a period of no less than 3 years after completion of project construction. This 3-year retention provision does not relieve the State of its project or program recordkeeping responsibilities under 2 CFR 200.333 or any other applicable laws, regulations, or policies.
5. The State shall ensure that project records are available to the public consistent with requirements applicable to Federal agencies under 5 U.S.C. §552 (the Freedom of Information Act (FOIA), as amended in 2002) and NEPA.
6. Nothing in this Stipulation shall prevent FHWA from undertaking other monitoring actions, including audits, with respect to the State's performance of the MOU.
7. The FHWA, in its sole discretion, may require the State to perform such other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with this MOU, 23 U.S.C. §326, and other applicable Federal laws and regulations. Such requirement shall not be deemed an amendment under Stipulation VIII.
8. The State and FHWA agree to cooperate in all quality assurance activities.

G. State liability. The State agrees that it is solely responsible and solely liable for complying with and carrying out this MOU, for the performance of all assigned responsibilities as provided by applicable law and for any decisions, actions, or approvals by the State. The FHWA shall have no responsibility or liability for the performance of responsibilities assigned to the State, including without limitation any decision or approval made by the State. Where the State exercises any assigned authority on a proposed project which FHWA determined to be a CE prior to the execution of this MOU, the State assumes sole environmental review responsibility and liability for any subsequent substantive environmental review action it takes on that project.

H. Litigation.

1. Nothing in this MOU affects the United States Department of Justice's (hereinafter "DOJ") authority to litigate claims, including the authority to approve a settlement on behalf of the United States if either FHWA or another agency of the United States is named in such litigation. In the event FHWA or any other Federal agency is named in litigation related to matters under this MOU, the State agrees to coordinate with DOJ in the defense of that action.
2. The State shall defend all claims brought in connection with its discharge of any responsibility assigned to the State. In the event of litigation, the State shall provide qualified and competent legal counsel, including outside counsel if necessary. The defense shall be provided at the State's own expense, except as provided in 23 U.S.C. §326(f). The State shall be responsible for opposing party's attorney's fees and court costs if a court awards those costs to an opposing party, or in the event those costs are part of a settlement agreement.
3. The State shall notify FHWA Nebraska Division Office and USDOJ Assistant Attorney General for the Environment and Natural Resources Division within seven (7) calendar days of the State's receipt of service of process of any complaint, concerning discharge of any responsibility assumed under this MOU. The State's notification to the FHWA and USDOJ shall be made prior to its response to the complaint. In addition, the State shall notify FHWA Nebraska Division Office within seven (7) calendar days of receipt of any notice of intent to sue concerning its discharge of any responsibility assumed under this MOU. The State will provide FHWA Nebraska Division Office and DOJ copies of any motions, pleadings, briefs, or other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. The State will provide such copies to the FHWA and DOJ within seven (7) calendar days of service of any document, or in the

case of any documents filed by or on behalf of the State, within seven (7) calendar days of the date of filing.

4. The State will notify the FHWA Nebraska Division Office and DOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and DOJ with a reasonable amount of time of at least ten (10) calendar days, to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. The State will not execute any settlement agreement until: (1) FHWA and DOJ have provided comments on the proposed settlement; (2) FHWA and DOJ have indicated that they will not provide comments on the proposed settlement; or (3) the ten-day or otherwise agreed upon review period has expired, whichever occurs first.
  5. Within seven (7) calendar days of receipt by the State, the State will provide notice to FHWA Nebraska Division Office and DOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities the State has assumed under this MOU. The State shall notify FHWA's Nebraska Division Office and DOJ within five (5) days of filing a notice of appeal of a court decision. The State shall confer with FHWA and DOJ regarding the appeal at least forty-five (45) days before filing an appeal brief in the case.
  6. The State's notification to FHWA and DOJ in Stipulations IV(H)(3), (5), and (6) shall be made by electronic mail to [FHWA\\_assignment\\_lit@dot.gov](mailto:FHWA_assignment_lit@dot.gov), [FHWA.NE@dot.gov](mailto:FHWA.NE@dot.gov), and [NRS DOT.enrd@doj.gov](mailto:NRS DOT.enrd@doj.gov), unless otherwise specified by FHWA and DOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in Stipulation IV(H)(3) the State may opt to either send the materials to the email addresses identified above, send hardcopies to the mail address below, or add to the distribution list in the court's electronic filing system (e.g., PACER) the following two email addresses: [FHWA\\_assignment\\_lit@dot.gov](mailto:FHWA_assignment_lit@dot.gov) and [efile\\_nrs.enrd@usdoj.gov](mailto:efile_nrs.enrd@usdoj.gov). FHWA and DOJ's comments under Stipulation IV(H)(3) shall be made by electronic mail to [NDOT.OfficialNEPA@nebraska.gov](mailto:NDOT.OfficialNEPA@nebraska.gov) unless otherwise specified by the State. In the event that regular mail is determined necessary, mail should be sent by overnight mail service to:  
For DOJ: Assistant Attorney General for the Environment and Natural Resources Division at 950 Pennsylvania Avenue, NW, Room 2143, Washington, DC, 20530.  
For FHWA: Division Administrator, FHWA Nebraska Division, 100 Centennial Mall North Room 220, Lincoln, NE 68508-3803
- J. Federal Register. While the MOU is in effect, if any CE project or program documents are required to be published in the *Federal Register*, such as a Notice of Final Agency Action under 23 U.S.C. §139(l), the State shall transmit such document to the FHWA's Division Office and FHWA will publish such document in the *Federal Register* on behalf of the State. The State is responsible for the expenses associated with the publishing of such documents in the *Federal Register*, in accordance with guidance issued by FHWA.
- K. Participation in Resource Agency Reports. The State agrees to provide data and information requested by the FHWA Office of Project Development and Environmental Review and resource agencies for the preparation of national reports to the extent that the information relates to determinations, findings, and proceedings associated with projects processed under this MOU. Such reports include but are not limited to:
1. Archeology Report requested by the National Park Service;
  2. Endangered Species Act Expenditure Reports requested by the United States Fish and Wildlife Service and the National Marine Fisheries Service;
  3. NEPA Litigation Reports requested by the Council on Environmental Quality; and
  4. Environmental Conflict Resolution reports requested by the Council on Environmental Quality.
- V. **STATE CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION**
- A. The State hereby certifies that it has the necessary legal authority and the capacity to:
1. Accept the assignment under this MOU;
  2. Carry out all of the responsibilities assigned to the State; and
  3. Agree to and perform all terms and conditions of the assignment as contained in this MOU and in 23 U.S.C. §326.

- B. The State consents to and accepts the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the DOT Secretary that the State assumes under this MOU and 23 U.S.C. §326. The State understands and agrees that this consent constitutes a waiver of the State's immunity under the 11th Amendment to the United States Constitution for the limited purposes of addressing the compliance, discharge, and enforcement of the DOT Secretary's responsibilities that that State assumes pursuant to this MOU and 23 U.S.C. §326. This consent to Federal court jurisdiction shall remain valid after termination of the MOU, or re-assumption of the DOT Secretary's responsibilities by FHWA, for any act or omission by the State relating to its compliance, discharge, or enforcement of any responsibility under this MOU or 23 U.S.C. §326. A valid, binding, and sufficient waiver of the State's sovereign immunity must be in effect at all times that the State acts under the authority of this MOU.
- C. In accordance with 23 U.S.C. §326(e), the State agrees that it shall be deemed to be a Federal agency for the purposes of the Federal law(s) under which the State exercises any responsibilities pursuant to this MOU and 23 U.S.C. §326.
- D. The State may not assign or delegate its rights or responsibilities under this MOU to any other agency, political subdivision, or entity, or to any private individual or entity. Without limiting the foregoing, the State understands and agrees that it must retain the environmental decision-making responsibilities assigned to it under this MOU and may not assign or delegate such decision-making responsibilities to consultants or others.
- E. With respect to the public availability of any document or record under the terms of this MOU or the State's open records law, Neb. Rev. Stat. §84-712 et. seq., the State certifies that the laws of the State provide that any decision regarding the release or public availability of a document or record may be legally challenged or reviewed in the courts of the State.
- F. The State certifies that the person signing this MOU is duly authorized to do so and has the legal authority to:
  1. Waive the State's 11th Amendment rights pursuant to the authority in Neb. Rev. Stat. §39-1306.03;
  2. Consent to Federal court jurisdiction as specified above;
  3. Enter into this MOU on behalf of the State;
  4. Make the certifications set forth in this MOU; and
  5. Bind the State to the terms and conditions contained in this MOU.

The State's Attorney General, by issuing an opinion letter that is addressed to the FHWA Administrator and attached to this MOU, certifies that the foregoing is true and that upon execution of this MOU the certifications, terms, and conditions of the MOU will be legally binding and enforceable obligations of the State.

**VI. PUBLIC NOTICE AND COMMENT**

- A. The execution of this MOU, and of any amendment or renewal, requires prior public notice and an opportunity for comment.
- B. The State shall publish notice, of the availability of the MOU, and any proposed amendment or renewal, for public review and comment in a newspaper of general circulation and upon the State's website.
- C. The FHWA Division Office shall publish in the *Federal Register* a notice of availability of the proposed MOU, and any proposed amendment or renewal, for public review and a 30-day comment period. The notice will expressly request comments on any proposed additional designation of activities as CEs, including any types of activities described in a MOU Appendix pursuant to Stipulation I(B)(3). The notice also must advise the public about how to learn about FHWA's final decision on the proposed MOU, including how to obtain a copy of any resulting final MOU. The FHWA will establish a docket in the Federal Docket Management System at [www.regulations.gov](http://www.regulations.gov) to receive comments.
- D. The State and FHWA shall consider comments provided by the respondents to the notices before finalizing the MOU, or any proposed amendment or renewal agreement. Upon completion of the process, FHWA shall place in the Federal Docket Management System a brief summary of the results of the process and the availability of any final MOU executed by the State and

- FHWA, whether initial, amended, or renewed.
- E. The State agrees that at all times that this MOU is in effect, the State will post on its Website ([www.dot.nebraska.gov](http://www.dot.nebraska.gov)) and make available to the public upon request, copies of the State's annual reports of the CE determinations under Stipulation IV(F)(1), the State's performance reports under Stipulation IV(F)(2), and FHWA performance monitoring reports pursuant to Stipulation IV(F)(3). The FHWA will arrange for the posting of a similar notice on the FHWA's Web site or create a link from the FHWA's Web site to the State's Web site.

VII. **INITIAL TERM AND RENEWAL**

- A. This MOU shall have an initial term of 3 years, beginning on the date of the last signature.
- B. This MOU is renewable for additional terms of 3 years each if the State requests renewal and FHWA determines that the State has satisfactorily carried out the provisions of this MOU. In considering any renewal of this MOU, FHWA will evaluate the effectiveness of the MOU and its overall impact on the environmental review process. The FHWA may decide not to renew the MOU if FHWA determines that the operation of the MOU has substantial adverse effects on the environmental review process. Such evaluation may include consideration of any effects from the assumption by the State of only some, but less than all, of FHWA's environmental review, consultation, or other related responsibilities as listed in Stipulation II. **At least 6 months prior** to the end of the initial term and of any renewed term of this MOU, the State and FHWA shall meet to discuss the results of the monitoring and consider any amendments to this MOU. This meeting may be combined with a meeting to discuss performance under the monitoring provisions in Stipulation IV(F)(3) of this MOU.
- C. If the parties do not renew the MOU, then it shall expire at the end of the term then in effect. The provisions of Stipulation X(A)(4), and X(C)-(E) shall apply.

VIII. **AMENDMENTS**

- A. Any party to this MOU may request that it be amended or administratively modified to reflect non-substantive changes, whereupon the parties shall consult to consider such an amendment. Public notice and comment is not required for the parties to agree to a technical non-substantive change.
- B. If, after the required public notice and comment, the parties agree to amend the MOU, then FHWA and the State may execute an amendment with new signatures and dates of the signatures. The term of the MOU shall remain unchanged unless otherwise expressly stated in the amended MOU. Any amendment that extends the term of the MOU shall be treated as a renewal and FHWA must make the determinations required for a renewal under Stipulation VII.

IX. **TERMINATION OF THE PROGRAM**

- A. Termination by the FHWA
1. As provided at 23 U.S.C. §326(d)(1), FHWA may terminate the State's participation in the Program, in whole, at any time subject to the procedural requirements in 23 U.S.C. §326 and Stipulation IX(A)(2) below, if:
    - a. FHWA determines that the State is not adequately carrying out the responsibilities assigned to the State under this MOU;
    - b. FHWA provides to the State a written notification of its determination;
    - c. FHWA provides the State a period of at least one-hundred twenty (120) calendar days to take corrective action to comply with this MOU;
    - d. If requested by the Governor of the State, FHWA provides a detailed description of each responsibility in need of corrective action regarding any inadequacy identified by FHWA; and
    - e. After the notification and after the expiration of the 120-day period provided under this provision, the State fails to take satisfactory corrective action as determined by FHWA.
  2. Failure to adequately carry out the responsibilities may include, but not be limited to:
    - a. Persistent neglect of, or noncompliance with, any Federal laws, regulations, and policies;
    - b. Failure to cooperate with FHWA in conducting an audit or any oversight or monitoring activity;
    - c. Failure to secure or maintain adequate personnel and financial resources to carry out the responsibilities assumed;

- d. Substantial noncompliance with this MOU; or
  - e. Persistent failure to adequately consult, coordinate, and/or take the concerns of other Federal agencies, as well as SHPOs/THPOs, into account in carrying out the responsibilities assumed.
3. If FHWA terminates the State's responsibilities under this MOU in accordance with 23 U.S.C. §326, FHWA shall provide written notice of that termination to the State, and such notice that specify the date on which the termination becomes effective. Upon that effective date, the program responsibilities that have been assumed by the State of this MOU will transfer to FHWA.

**B. Termination by the State**

- 1. The State may terminate its participation in the Program at any time by providing to FHWA a notice at least ninety (90) calendar days prior to the date that the State seeks to terminate its participation in this Program, and subject to such terms and conditions as FHWA may provide.
- 2. The Nebraska Legislature and Governor may, at any time, terminate the State's authority granted to participate in this Program. In the event, FHWA and the State will develop a plan to transition the responsibilities that the State has assumed back to FHWA so as to minimize disruption to projects, minimize confusion to the public, and minimize burdens to other affected Federal, State, and local agencies. The plan will be approved by both FHWA and the State.
- 3. In the event of termination of the program, the State and FHWA agree to cooperate to make the transfer of responsibilities back to FHWA effective in as orderly and administratively efficient manner as possible. The State promptly will provide to FHWA any documents, records and other project-related material needed for FHWA to proceed with processing any affected project. Appropriate NEPA procedures, including those under any applicable programmatic CE agreement, shall apply to the subsequent processing of projects.
- 4. Validity of the State Actions
  - a. Any environmental approvals made by the State pursuant to the responsibilities the State has assumed under this MOU will remain valid after termination of the State's participation in the MOU or withdrawal of assignment by FHWA. As among the USDOT Secretary, FHWA and the State, the State will remain solely liable and solely responsible for any environmental approvals it makes pursuant to any of the responsibilities it has assumed while participating in the Program.

**X. PROCEDURES FOR TERMINATION OF SPECIFIC RESPONSIBILITIES OR FHWA-INITIATED PROJECT EXCLUSIONS**

- A. The process for the partial termination of one or more specific responsibilities or the exclusion of a project by FHWA under Stipulation III(B)-III(C), is as follows:
- 1. The party wishing to exercise the partial termination or FHWA-initiated exclusion shall provide to the other party a written notice of intent. The notice should identify the proposed action and explain the reason(s) for the proposed action.
  - 2. Following the notice, the parties shall have a 30 calendar-day period during which FHWA and the state shall consult on amendments or other actions that would avoid partial termination or exclusion. By agreement, the parties may extend this consultation period, provided that such extension may not exceed the term of the MOU.
  - 3. Effective date.
    - a. Partial terminations shall be effective either 30 days after the date of the State's receipt of a FHWA notice of partial termination or 90 days after the date of FHWA's receipt of the State's partial termination notice. By agreement, the parties may modify the partial termination effective date, provided that no modification may exceed the term of the MOU.
    - b. Project exclusions shall be effective 30 days following the date of either execution of a post consultation agreement between the State and FHWA, or the date of the State's receipt of a FHWA notice of final determination of exclusion.
    - c. All responsibilities covered by the partial termination or exclusion shall revert to FHWA as of the effective date of either the partial termination or exclusion notice.

4. In the event of partial termination or exclusion, the State and FHWA agree to cooperate to make the transfer of responsibilities back to FHWA effective in as orderly and administratively efficient manner as possible. The State promptly will provide to FHWA any documents, records and other project-related material needed for FHWA to proceed with processing any affected project. Appropriate NEPA procedures, including those under any applicable programmatic CE agreement, shall apply to the subsequent processing of projects.
- B. The FHWA, in its sole discretion, may exclude a project from this MOU pursuant to Stipulation III(B)-III(C), without the 30-day consultation or final notice periods if FHWA determines that:
    1. The State is not performing in accordance with this assignment; and
    2. Extreme circumstances exist that require immediate exclusion or termination and transfer back to FHWA of the responsibilities covered by the exclusion or termination.
 In such cases, FHWA shall notify the State in writing of its determination and action, and specify the reasons for the action.
  - C. The State's liability for its acts and omissions under this MOU, and the provisions of Stipulation V, shall survive the MOU. This survival clause includes, without limitation, the provisions of Stipulations IV(G)-IV(H) relating to liability and litigation.
  - D. Partial termination and exclusion actions, and any decision not to renew, do not require public notice and comment.
  - E. Partial termination or other action by FHWA in accordance with the provisions of this MOU does not limit or otherwise affect FHWA's ability to seek any other remedy or to take action under other provisions of applicable law, including without limitation any appropriate remedies as provided in 23 CFR §1.36.

**XI. STATE EXECUTION OF ASSIGNED RESPONSIBILITIES WITHOUT FHWA INVOLVEMENT**

- A. The FHWA will not provide any project-level assistance to the State in carrying out any of the responsibilities assigned under this MOU. "Project-level assistance" includes advice, consultation, or document review with respect to the discharge of such responsibility for a particular highway project. However, project-level assistance does not include discussions concerning issues addressed in prior projects, legal interpretations of any applicable law contained in titles 23 or 49 of the United States Code, legal interpretations of any FHWA or DOT regulation, or interpretations of FHWA or DOT policies or guidance. If a need for project-level assistance is identified as a result of the government-to-government consultation process described in Stipulation II(B)(1), then FHWA may reassume responsibility for the project as provided in Stipulation III(C).
- B. The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving the State's consultation or coordination with another Federal, State, or local agency with respect to the State's discharge of any of the responsibilities the State has assumed under this MOU for any particular highway project. However, FHWA holds both monitoring and quality assurance obligations under this MOU and general oversight and stewardship obligations under the Federal-aid highway program. In furtherance of those obligations, FHWA occasionally may elect to attend meetings between the State and other Federal agencies, and will notify the state of FHWA's attendance. Based on its observations, FHWA may submit comments to the State and the other Federal agency in the following extraordinary circumstances:
  1. The FHWA reasonably believes that the State is not in compliance with this MOU; or
  2. The FHWA determines that an issue between the State and the other Federal agency has broad or unique policy implications for the administration of the national Federal-aid Highway Program.



**XII. NOTICES**

Any notice required by this MOU may be given electronically so long as a paper original of the notice also is delivered to the party. The effective date of the notice shall be the date of delivery of the paper original. Paper notices shall be delivered as follows:

**State of Nebraska:**

Nebraska Dept. of Transportation  
ATTN: Project Development Engineer  
PO Box 94759  
Lincoln, NE 68509-4759

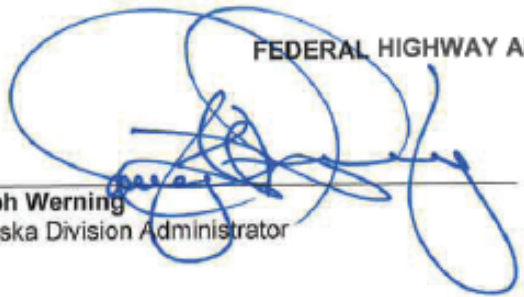
**Federal Highway Administration:**

Federal Highway Administration  
Nebraska Division  
100 Centennial Mall North  
Room 220  
Lincoln, NE 68508-3803

**Department of Justice:**

U.S. Department of Justice:  
Office of the Assistant Attorney General  
Environment and Natural Resources Division  
950 Pennsylvania Avenue, NW  
Room 2143  
Washington, D.C. 20530

Execution of this MOU and implementation of its terms by the State formally evidence that the parties have reviewed this MOU and determined that it complies with the laws, regulations and policies applicable to FHWA and the State. Accordingly, this MOU is approved and is effective upon the date of the last signature below.



FEDERAL HIGHWAY ADMINISTRATION

Joseph Werning  
Nebraska Division Administrator

9-5-2018  
Date

STATE OF NEBRASKA



Kyle Schneeweis  
Director, Nebraska Department of Transportation

9/5/18  
Date

**Appendix A**  
**List of FHWA Responsibilities Assigned**

**Air Quality**

- Clean Air Act (CAA), 42 U.S.C. §§7401–7671q. *Including determinations for project-level conformity if required for the project*<sup>1</sup>

**Noise**

- Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918
- Compliance with the noise regulations in 23 CFR Part 772 (except approval of the State noise policy in accordance with 23 CFR 772.7)

**Wildlife**

- Section 7 of the Endangered Species Act of 1973, 16 U.S.C. §§1531–1544, and 1536
- Fish and Wildlife Coordination Act, 16 U.S.C. §§661–667d
- Migratory Bird Treaty Act, 16 U.S.C. §§703–712
- Bald and Golden Eagle Treaty Act, as amended, 16 U.S.C. §§668 – 668c

**Historic and Cultural Resources**

- Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. §306108<sup>2</sup>
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm
- Title 54, Chapter 3125—Preservation of Historical and Archeological Data, 54 U.S.C. §§312501-312508
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§3001–3013; 18 U.S.C. §1170
- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. §138 and 49 U.S.C. §303; 23 CFR Part 774<sup>1</sup>

**Social and Economic Impacts**

- American Indian Religious Freedom Act, 42 U.S.C. §1996<sup>2</sup>
- Farmland Protection Policy Act (FPPA), 7 U.S.C. §§4201–4209

**Water Resources and Wetlands**

- Clean Water Act, 33 U.S.C. §§1251–1377
  - Section 404
  - Section 401
  - Section 319
- Rivers and Harbors Act of 1899, 33 U.S.C. §403
- Wild and Scenic Rivers Act, 16 U.S.C. §§1271–1287
- Emergency Wetlands Resources Act, 16 U.S.C. §§3921, 3931
- Wetlands Mitigation, 23 U.S.C §§103(b)(6)(m), 133(b)(3)
- FHWA wetland and natural habitat mitigation regulations, 23 CFR Part 777
- Flood Disaster Protection Act, 42 U.S.C. §§4001–4128
- Safe Drinking Water Act (SDWA), 42 U.S.C. §§300f–300j–6

### **Parklands**

- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. §138 and 49 U.S.C. §303; and 23 CFR Part 774<sup>1</sup>
- Land and Water Conservation Fund (LWCF) Act, Pub. L. 88-578, 78 Stat. 897 (known as Section 6(f))

### **Hazardous Materials**

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601–9675
- Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§9671 – 9675
- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901–6992k

### **Land**

- Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C. §319

### **Executive Orders Relating to Highway Projects**

- E.O. 11990, Protection of Wetlands
- E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 C.F.R. 650.113 and 650.115)
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 11593, Protection and Enhancement of Cultural Resources<sup>2</sup>
- E.O. 13007, Indian Sacred Sites<sup>2</sup>
- E.O. 13175 Consultation and Coordination with Indian Tribal Governments<sup>2</sup>
- E.O. 13122 and E.O. 13751, Invasive Species

### **FHWA-Specific**

- Planning and Environmental Linkages, 23 U.S.C. §168, except for those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135
- Programmatic Mitigation Plans, 23 U.S.C. §169 except for those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135

### **Notes:**

1. Except as specified in Stipulation II.B.2 of this MOU
2. Under these laws and Executive Orders, FHWA will retain responsibility for conducting formal government-to-government consultations with federally recognized Indian tribes. The State will continue to handle routine consultations with the tribes and understands that a tribe has the right to direct consultation with FHWA upon request. The State may also assist FHWA with formal consultations, with the consent of a tribe, but FHWA remains responsible that this consultation occurs. Except as specified in Stipulation II.B.1 of this MOU.

**Appendix B**  
**List of NDOT Programmatic Agreements/Memoranda of Understanding**  
**Statewide Agreements**

Programmatic Agreement Among the Federal Highway Administration, US Fish and Wildlife Service, Nebraska Department of Roads (Transportation) and Nebraska Game and Parks Commission for the Determination of Effects to State and Federally Listed Species from the Federal-Aid Transportation Program.

**Signatories:** FHWA, USFWS, NDOT, NGPC  
**Effective Date:** January, 2017

Nebraska Game and Parks Commission and Nebraska Department of Roads (Transportation), Guidelines for the Environmental Pre-Review Process

**Signatories:** NDOT, NGPC  
**Effective Date:** May, 2006

Nebraska Game and Parks Commission and Nebraska Department of Roads (Transportation), Endangered and Threatened Species Pre-Review Process for Material Source Sites, Plant Sites and Stockpile Sites

**Signatories:** NDOT, NGPC  
**Effective Date:** July 29, 2015

Nebraska Local Operating Procedures for Integrating NEPA/404  
**Signatories:** USACE, USEPA USFWS FHWA NDOT, NGPC, NDEQ  
**Effective Date:** March 28, 2001

Programmatic Agreement Among the Federal Highway Administration, the Nebraska State Historic Preservation Officer, the Advisory Council on Historic Preservation and the Nebraska Department of Roads to Satisfy the Requirements of Section 106 for the Federal-Aid Highway Program in the State of Nebraska

**Signatories:** FHWA, NSHS (now History Nebraska), ACHP, NDOT  
**Effective Date:** July 31, 2015

Nebraska Department of Roads (Transportation) Noise Analysis and Abatement Policy

**Signatories:** FHWA, NDOT  
**Effective Date:** July 13, 2011 (as amended, March 10, 2014))

Memorandum of Understanding, Air Quality Analysis for Environmental Documents

**Signatories:** NDOT, NDEQ  
**Effective Date:** Signed April 20, 2018 to become effective upon execution of the FHWA/NDOT 23 U.S.C. §326 MOU.

Final Statewide Umbrella Mitigation Banking Agreement

**Signatories:** USACE, USFWS, USDA- NRCS, FHWA, NGPC, NDEQ, NDOT  
**Effective Date:** February 24, 2017

Memorandum of Agreement Between the Nebraska Department of Roads (Transportation), United States Army Corps of Engineers, and Federal Highway Administration Relative to Interagency Funding for the Department of the Army Permit Process on the Nebraska Transportation Program

**Signatories:** USACE, FHWA, NDOT  
**Effective Date:** December 17, 2014 (*Termination of this agreement will occur in September 2018*).

Memorandum of Understanding Among the Nebraska Department of Roads (Transportation) and the U.S. Department of the Interior Fish and Wildlife Service Relative to Priority Nebraska Transportation Project Reviews by the U.S. Fish and Wildlife Service in Nebraska.

**Signatories:** USFWS, NDOT  
**Effective Date:** October, 2014

State of Nebraska - Historical Society, Statewide (Highway Archeology Program)  
**Signatories:** NDOT, NSHS (now History Nebraska)  
**Effective Date:** November 17, 2014

University of Nebraska, Statewide (Highway Paleontology Program)  
**Signatories:** NDOT, NDEQ  
**Effective Date:** October 23, 2014

## Appendix B: NDOT EPM Table 4-1, as accepted by FHWA July 2, 2018

pg 4-5 through pg 4-7:

Projects that meet or exceed any Level 1 impact threshold (see Table 4-1) are not eligible for processing as a CE Level 1 action. At a minimum, a CE Level 2 action must be evaluated. Projects that meet or exceed any Level 2 impact threshold (see Table 4-1) are not eligible for processing as a CE Level 1 or CE Level 2 action. At a minimum, a CE Level 3 action must be evaluated, and the NDOT EDU Manager or Environmental Section Manager will be consulted to determine if an EA or EIS is required.

Table 4-1. Categorical Exclusion Impact Thresholds

Resource	Level 1 Impact Threshold <sup>a</sup>	Level 2 Impact Threshold <sup>b</sup>
<b>Right-of-Way (ROW) and Property Impacts</b>		
ROW and property	Any acquisition of new, permanent ROW	Acquisition of 4 acres per linear mile
		Any removal of major property improvements
		Any residential or nonresidential displacement
Section 4(f)	“Use” that is either <i>de minimis</i> or covered by a programmatic evaluation	Individual Section 4(f) Evaluation
	Any exception	
Section 6(f)	Any conversion	Not Applicable (N/A)
<b>Water and Ecological Resources</b>		
Wild and Scenic Rivers and National Recreational Rivers	Certain 23 CFR 771.117(c) activities (1–25) that occur in, across, or adjacent to a protected river with a finding of no impact	Certain 23 CFR 771.117(c) activities (26, 27, or 28) that occur in, across, or adjacent to a protected river, regardless of impact finding
		Any activity that is considered an impact on a protected river by the agency of jurisdiction, regardless of category
Floodplain and floodway	N/A	Greater than a 1 foot rise in the base flood elevation
		Any rise that potentially affects an adjacent structure
		Any rise in a floodway
		Certain 23 CFR 771.117(c) activities (26, 27 or -28) that result in a floodplain encroachment other than functionally dependent uses or actions that facilitate open space use
Wetlands and waters of the U.S.	Greater than 0.5 acre of permanent wetland impact	Clean Water Act Section 404 Individual Permit
	Clean Water Act Section 404 Nationwide Permit Pre-Construction Notification	Rivers and Harbors Act Section 10 Permit
		Rivers and Harbors Act Section 9 Coast Guard Permit or Bridge Permit
Threatened and endangered species	“May affect” determination that requires further consultation with resource agencies (in accordance with the NDOT Matrix)	“May affect, likely to adversely affect” determination for threatened and endangered species or critical habitat
<b>Human and Social Resources</b>		
Historic properties	Finding of “no adverse effect”	Finding of “adverse effect”

Resource	Level 1 Impact Threshold <sup>a</sup>	Level 2 Impact Threshold <sup>b</sup>
Hazardous materials	Medium potential for encountering hazardous materials during construction	High potential for encountering hazardous materials during construction
		Soil disturbance below or beyond pre-existing roadway fill in an active Superfund site
Traffic noise	N/A	Type I project under NDOT's Noise Policy
Air quality	N/A	Mobile Source Air Toxics Level III effects
		Regionally significant in a designated non-attainment area
Roadway	N/A	Addition of through-lane capacity greater than 1 mile in length
Traffic disruption	Minor traffic disruptions requiring detours, temporary roads, or ramp closures that are greater than 30 working days	Major traffic disruptions requiring detours, temporary roads, or ramp closures that are greater than 135 working days
		Associated temporary roads, detours, or ramp closures result in a substantial change to the environmental consequences of the action
		Out-of-direction travel greater than 10 miles in urban areas or 30 miles in rural areas
		Temporary or permanent interference with known local special events or festivals
		Temporary or permanent adverse effect on through-traffic dependent business
		Permanent traffic pattern changes or disruptions
Access disruption	Complete closure to residential properties for greater than 5 working days	Complete closure to residential properties for greater than 10 working days
		Closure of business access during operational hours
		Access restrictions to emergency service facilities or providers
		Change in the functionality of adjacent properties
Environmental justice	Adverse impact on minority or low income populations per NDOT's Environmental Justice Policy	Disproportionately high and adverse impacts on minority or low income populations <sup>c</sup>
Public involvement	Known public or agency controversy on human, natural, or economic grounds (CE level or elevated NEPA classification to be determined by NDOT)	

<sup>a</sup> Projects that meet or exceed any resource consideration listed in this column are not eligible for processing as a CE Level 1 action. At a minimum, a CE Level 2 action must be evaluated.

<sup>b</sup> Projects that meet or exceed any resource consideration listed in this column are not eligible for processing as a CE Level 1 or CE Level 2 action. At a minimum, a CE Level 3 action must be evaluated.

<sup>c</sup> Projects that result in disproportionately high and adverse impacts on minority or low income populations may necessitate an EA or an EIS.



## **Appendix C: Monitoring Review Participants**

### NDOT Interviewees:

Brandie Neeman, Jeff Soula, Jason Jurgens, Jon Barber, Dillon Dittmer, Stacy Stupka, Kyle Liebig, Kimberly Baker, Christina Bavougia, Jacob Smith, Scott Rupe, John Buhrman, Sara Soula, Chris Hassler

### Other Interviewees:

John Moeschen, Phil Rezac, Adam Norbert – US Army Corps of Engineers

### CE Monitoring Review TEAM MEMBERS:

Joe Werning, FHWA Nebraska Division Administrator. Review Champion, monitored review progress, editor of the review report.

Melissa Maiefski, FHWA Nebraska Division Program Delivery Team Leader. Served as Review Team Leader; prepared work plan; interviewer; project file reviewer; lead for developing project review questions; assisted with developing interview questions; developed observations, recommendations and findings; and principal author/editor of the review report.

Owen Lindauer, FHWA HEPE Environmental Protection Specialist. Served as Assignment technical advisor; project file reviewer; interviewer; reviewed project review questions; developed interview questions; helped develop observations, recommendations and findings; and editor/contributor to the review report.

Scott Stapp, FHWA Nebraska Division Environmental Specialist. Conducted project file reviews; Gap assessment reviewer; lead for developing interview questions; assisted with developing project file review questions; developed observations, recommendations and findings; and editor of the review report.

Justin Luther, FHWA Nebraska Division Planning and Realty specialist. Interviewer; developed observations, recommendations and findings; and editor of the review report.

Justin Ham, FHWA Texas Division Area Engineer. Served as project file reviewer; interviewer; commented on interview and project review questions; developed observations, recommendations and findings; and editor of the review report.

Jomar Maldonado, HEPE Lead Environmental Protection Specialist. Report reviewer, editor

Gloria Shepherd, Associate Administrator for Planning, Environment, and Realty. Report reviewer

Doug Atkin, FHWA Delaware Division Administrator. Reviewed workplan.

James Lockwood, FHWA Finance Manager. Editor of first review report.

## Appendix D: 2019 File Review Data Collected

Project data collected per project:	Information reviewed per project (table records a yes, no or NA. "no" and "NA" responses are explained further under comments)		Additional information collected
C.N.	1. Is the CE in file, signed, filled out completely, with attachments	13. Is there documentation in the file showing WOUS were delineated during the CE phase, did the delineation adequately cover the scope of work, and were commitments appropriate?	% of questions answered yes (i.e., no issues), per PROJECT
Project #	2. Are there logical termini and independent utility, considering action and projects in program book?	14. Was the EJ assessment in the project file, was the analysis adequate, and were the commitments and assessment adequately and accurately carried forward to the CE?	% of questions answered yes (i.e., no issues), per informational element reviewed (the color-block questions to the left)
Project Name	3. Was the CE determination classified accurately as either a Minor CE, CE1, CE2, or CE3; classified accurately per 771.117(c and d); and was it assignable.	15. If the project occurs within the boundary of tribal lands, or within an area of tribal interest, is there evidence in the file consultation/coordination occurred, was it completed in good faith (adequate information provided, substantive response to questions/concerns, and no unresolved issues) and in compliance with laws, regulations, and agreements?	General project review comments and observations (per project)
CE Level	4. Was the CE issued prior to project moving to PS&E?	16. If the project required consultation, concurrence, or permits from a resource or land managing agency (i.e., SHPO, NPS, DEQ, EPA, USACE, etc.), is there evidence in the file showing appropriate coordination occurred, was it completed in good faith (adequate information provided, substantive response to questions/concerns, and no unresolved issues) and in compliance with laws, regulations, and agreements?	follow-up questions to ask NDOT based on observations
CFR Action Class	5. is there evidence in the file that QC occurred on the CE prior to approval and that the QC efforts were adequate?	17. If the project required public outreach or local government coordination per the approved PI 2015 policy, Section 4(f) procedures, or Section 106 procedures is there evidence in the file appropriate outreach occurred, was it completed in good faith (adequate information provided, substantive response to questions/concerns, and no unresolved issues) and in compliance with the 106 PA and NDOT procedures?	
Date CE signed	6. Is planning consistency demonstrated within the CE?	18. Are commitments within the CE accurately listed in the commitments section, and are commitments written in an enforceable manner, with identification of responsible parties and clear language used?	
PS&E Turn-in Date	7. Do the latest tech reviews match the CE scope, assessment information and mitigation?	19. Based on evidence in the project record, does it appear the project is in compliance with applicable environmental laws, regulations, executive orders, programmatic agreements, and FHWA Policies?	
Authorization date	8. Section 4(f): Is the Initial Assessment form in the file, is it adequately completed/assessed? If there is a use, was the use properly determined and adequately assessed, was their proper outreach, and is the proper form in the file?	20. Based on the project record, is there evidence the project is in compliance with NDOTs written policies and procedures?	
NEPA date in FMIS	9. Were road closures, detours, and access restrictions adequately assessed, and were appropriate commitments included? (reminder, this affects the CE level)	21. For projects not selected for a reevaluation review: mark "Note" here if you have a comment pertaining to reevals in the comment field.	
Final Green Sheet date	10. Was substantial controversy and unusual circumstances adequately considered and assessed in the CE?	22. Reevaluations: Is there documentation showing a review for environmental compliance prior to authorization for ROW or Construction?	
CE Cert date	11. Historic properties: If a "No Potential" determination was used, was the project accurately classified according to Appendix C of the 106 PA? For all others, was the APE documented, were properties within the APE considered for eligibility and was this documented, were property boundaries adequately identified, and were affect determinations documented? If consultation was required, is it documented?	23. Reevaluations: Was the reevaluation necessary at the time it was done?	
reeval date(s)	12. Is the BA in the file and completed per the terms of the PA?	24. Reevaluations: Does it appear process was followed and did NDOT consider any project changes, unusual circumstances, and validate the CE prior to approval ?	
State or local project?			

## Appendix E: Interview questions

#	Question	Core Area
1	How long have you worked at your agency/NDOT?	Standard/ Icebreaker
2	How long have you worked in your position?	Standard/ Icebreaker
3	Please briefly explain your general job responsibilities, particularly as it relates the CE Assignment program.	Standard/ Icebreaker
4	In terms of the CE assignment program, what do you think is working well, and what do you think needs improvement?	Standard/ Icebreaker
5	How do you believe CE Assignment has been working since the execution of the MOU?	
6	Have you or your staff discovered any issues, concerns or deficiencies within this period of review? If yes, what corrective action has been taken?	
7	How has your role and responsibilities changed since CE assignment? Have you developed any new processes since CE assignment?	Program Management
8	From the FHWA perspective, it appears that most of the NEPA specialists are relatively new. Do you have any concerns with hiring and retaining qualified staff?	
9	What are you doing to ensure that NDOT maintains qualified staff per the MOU requirements?	
10	Are you aware of any policies and procedures that were developed by NDOT post assignment that have not been shared with FHWA for review and comment, per MOU requirements?	
11	Has CE Assignment helped NDOT get NEPA out of the critical path in project development? If so, how? If not, why not?	
12	From your perspective, how have local governments and their consultant handled CE Assignment? Has it been a success? Have any issues been encountered?	
13	From a management perspective, how are NDOT managers ensuring that appropriately qualified staff are preparing, reviewing, and approving Cues at a level commensurate with the staff's level of experience/expertise?	
14	How does NDOT decide the class of action for a project? For example, how do you know a project or action is a CE1 versus a CE2? CE3 or EA?	Documentation; Program Mgnt; QA/QC; Training

15	Gap 3c related to NDOT's training plan and its implementation. Please describe NDOT's implementation of its training plan in the 6 months since the execution of the 326 MOU (priority 2).	Training;#Quality Assurance/Quality Control
16	Does NDOT reach out to you to determine its training needs? Would you let NDOT know if there was a need for training?	Training
17	How are your training needs assessed and how do you know what training is available? How do you decide what training you need to take? Have you had any training since CE assignment?	Training
18	What methods or protocol do you use to stay informed of project changes in development? Are these methods or protocols adequate to ensure proper environmental reviews and compliance for projects? (Superteams?)	Program Management
19	Have any QA reviews occurred yet? If QA reviews identify deficiencies, what steps have or will be taken to correct deficiencies? ( <i>for John B, re-phrase in terms of training program</i> )	Program Management
20	What does government-to-government consultation mean to you? How would FHWA learn of a tribal request for government-to-government consultation?	Program Management
21	How do you determine what mitigation measures or project commitments are appropriate for a particular project? (best case/worse case - construction under traffic, but mitigation allows closure up to 30 days - isn't this contradictory?)	Program Management;Quality Assurance/Quality Control
22	Please explain the process for tracking training. Who is responsible for providing and maintaining a list of all training and training participants? How is the training data used within NDOT?	Training
23	Who is responsible for ensuring that the environmental project file is complete? Is this checked by anyone? Where are training records and public involvement records housed and how will FHWA gain access to these records during reviews or records requests?	Quality Assurance/Quality Control
24	What environmental streamlining activities have been implemented since CE Assignment? (e.g., Superteams? How is that working?)	Program Management
25	How do you determine if a project meets planning consistency between NEPA and planning documents? Does this differ with the class of action?	Documentation
26	How do you determine that a NEPA Specialist is sufficiently experienced and qualified to complete a level one CE? Level 2? Level 3?	Program Management
27	How familiar are you with the CE guidelines, Section 4(f) guidelines, Public Involvement Procedure, EJ guidelines, etc.? Do they appear adequate? Do you ever submit comments/questions on the guidelines?	Program Management

28	If, after the CE is completed, it is determined federal funds will be used for utility relocation, how is a re-evaluation triggered and how is this documented?	Program Management; #Documentation
29	It appears from the NDOT project files, that a nonresponse from CLGs and Tribes is considered a concurrence. Is this the case and if yes, what is the basis for the practice?	Program Management, Documentation
30	What happens when you don't receive a timely response to a request from an agency or tribe? For Example: NPS consultation on a Wild and Scenic River.	Documentation
31	How do you know that a civil rights memo is still current? Is there a shelf-life or trigger by which the analysis should be revisited?	Program Management
32	According to the MOU, "...the State will use its best efforts to provide notice to FHWA of proposed new or revised Nebraska laws, and State regulations, guidance, and written internal standard operating procedures that are applicable to the State's performance under this MOU. Furthermore, the State will use its best efforts to provide these materials to FHWA for review and comment before they become final." It appears that changes have been made to several guidance documents/forms and that these changes were not offered to FHWA for comment prior to the changes. What changes will be made to ensure that the documents are first provided to FHWA?	Documentation
33	Gap 3a related to updating NDOT's forms. The update of the smart form based on word versions was to occur within the first 6 months after MOU execution. Please describe what updates have occurred.	Program Management, Documentation
34	NDOT assumed the responsibility for making project level air quality conformity determinations for CE projects. Gap 31 is that NDOT would develop a SOP and guidance for satisfying this conformity responsibility. Please provide the current status for the SOP, manual, and or guidance.	Program Management
36	What is the status of the SOP, manual, or guidance for "reasonable assurance" [23 CFR 771.119(g)] to approve a CE (Gap 73)?	Program Management
37	How do you know when to reevaluate a project? Who makes that determination? Who is responsible for monitoring the project through development to identify reevaluation needs? What information is evaluated in a re-evaluation? How do you determine if public involvement is required for a re-evaluation?	Program Management
38	When there is a disagreement between a resource agency or tribe and NDOT, what steps are taken to resolve the disagreement? Have any of these situations arisen since assignment?	

39	Since September 2018, has the quality of the Section 106, ESA, and CE materials sent to your office in association with pre-construction notifications and IP's improved, stayed the same, or decreased?	
40	Since September 2018, have the CE's and technical documents submitted by NDOT met your needs for processing NWP 23s?	
41	Thinking back to the CE's processed since September of 2018, were there any instances where you thought there should have been public outreach for a project where there wasn't, or where the outreach that was conducted should have been more robust? As a follow-up, do you think proper consideration was afforded the feedback that was received?	
42	Please walk us through how you review the PS&E package and environmental files to verify the environmental review remains valid and authorization of the project for construction is appropriate.	
43	Since September 2018, have you reviewed the PS&E package and environmental file for a project or projects and determined the environmental review needed to be updated? If yes, how often has this occurred? Please walk through the process you use when this happens, or would use if it hasn't occurred.	
44	Since September 2018, would you say the communication of project information has improved, stayed the same or decreased between the (District, LPS, design team) and the Environmental Section? (Have Superteams helped?)	
45	How much input do you have on the clarity and enforceability of environmental commitments? For example, is there (District, design, LPS) input during NEPA, to ensure commitments are workable in construction? Do you find yourself trying to change commitments later?	
46	Based on your perspective and experience, is there training that would be beneficial to the Environmental Section pertaining to project development or construction? Is there training that would be beneficial to (District, LPS, design) staff pertaining to environmental requirements?	
47	What do you think of the public involvement program for CEs? Do you think it's working well? Are we reaching the proper audience, and is adequate consideration of impacts to the public during construction being considered prior to the start of construction? Any suggestions?	
48	Do you have any questions for the Interview team, or anything else you'd like to share?	Standard/Icebreaker

# Appendix F: NDOT-Amended CE classification levels (Excerpt from Ch 4 of NDOT online Environmental Program Manual) December 2018

The Smartform is divided into eight primary sections, identified on tabs near the top of the form. Most primary sections document project impacts on specific resources, while other sections document administrative or general project information. Some of the primary sections contain resource-specific subsections and associated questions. See the [Nebraska Categorical Exclusion Guidance](#) for additional information.

### 4.4.3 PQS Memos and Other Attachments

NDOT staff prepare PQS memos to document the technical resource analysis performed during NEPA coordination (see [Chapter 8. Technical Resource Analysis](#)). These PQS memos, along with additional, supporting information, must be attached to the CE or retained in the project file. In addition to PQS memos, CE attachments may include maps, figures, permits, and agency correspondence. The [Nebraska Categorical Exclusion Guidance](#) provides detailed information on CE attachments and other documentation that is retained in the project file.

### 4.4.4 CE Level Determination and Impact Criteria

NDOT uses three levels of CE based on activity type and project impact criteria. The level of analysis, documentation, and review increases with CE level, which correlates with the complexity of the project and the context and intensity of potential impacts.

For projects that do not qualify for a Minor CE and that do not involve unusual circumstances, NDOT uses three levels of CE based on activity type and project impact criteria. Impact criteria for CE Levels 1, 2, and 3 are presented by resource in Table 4-1. The level of analysis, documentation, and review increases with CE level, which correlates with the complexity of the project and the context and intensity of potential impacts, as follows:

- **CE Level 1 actions:** CE Level 1 projects include (c) list actions ([23 CFR 771.117\(c\)](#)) and may not exceed Level 1 impact criteria (see Table 4-1).
- **CE Level 2 actions:** CE Level 2 projects include (c) list actions that exceed Level 1 impact criteria. Level 2 impact criteria may not be exceeded for any CE Level 2 project (see Table 4-1).
- **CE Level 3 actions:** CE Level 3 projects include (c) list actions that exceed a Level 2 impact criteria. CE Level 3 projects also include (d) list actions ([23 CFR 771.117\(d\)](#)).

In addition to having elevated review and approval requirements (see Section 4.5), CE Level 2 and CE Level 3 require consideration of farmland conversion analysis in accordance with the Farmland Protection Policy Act and air quality analysis; see the [Nebraska Categorical Exclusion Guidance](#) for further detail. Such analysis is not performed for CE Level 1 actions because such actions do not involve ROW acquisition (or associated farmland conversion) or the potential to adversely affect air quality. All other resources are analyzed and documented regardless of CE level.

Projects that meet or exceed any Level 1 impact criterion (see Table 4-1) are not eligible for processing as a CE Level 1 action. At a minimum, a CE Level 2 action must be evaluated. Projects that meet or exceed any Level 2 impact criterion (see Table 4-1) are not eligible for processing as a CE Level 1 or CE Level 2 action. At a minimum, a CE Level 3 action must be evaluated, and the NDOT EDU Manager or Environmental Section Manager will be consulted to determine if an EA or EIS is required.

The context and intensity of potential impacts should always be considered when determining appropriate level of documentation.

**Table 4-1. Categorical Exclusion Impact Criteria**

Resource	Level 1 Criteria (qualifies as a CE Level 1 if none of the below criteria are exceeded)	Level 2 Criteria (meeting any of the criteria below would require a CE Level 2)	Level 3 Criteria (meeting any of the criteria below would require a CE Level 3)
<p><b>Right-of-Way (ROW) and Property Impacts</b>  <i>NOTE – Environmental impacts associated with temporary easement may elevate the CE level.</i></p>			
ROW and property	No acquisition of permanent easement or ROW	Any acquisition of permanent easement or ROW	Acquisition of greater than 4 acres per linear mile
			Any removal of major property improvements
			Any residential or nonresidential displacement
Section 4(f)	No "use" or exception to "use" of property protected under Section 4(f)	"Use" that is either <i>de minimis</i> or covered by a programmatic evaluation Any exception	Individual Section 4(f) Evaluation
Section 6(f)	No conversion	Any conversion; coordinate with EDU Manager	
<p><b>Water and Ecological Resources</b></p>			
Wild and Scenic Rivers and National Recreational Rivers	Certain <a href="#">23 CFR 771.117(c)</a> activities (1–25) that occur in, across, or adjacent to a protected river with a finding of no impact	N/A	Certain <a href="#">23 CFR 771.117(c)</a> activities (26, 27, or 28) that occur in, across, or adjacent to a protected river, regardless of impact finding
	Not considered an impact on a protected river by the agency with jurisdiction, regardless of category		Any activity that is considered an impact on a protected river by the agency of jurisdiction, regardless of category
Floodplain and floodway	A rise in the base flood elevation of less than 1 foot	N/A	A greater than 1 foot rise in the base flood elevation
	No rise in a floodway		Any rise in a floodway
	No <a href="#">23 CFR 771.117(c)</a> activities (26, 27 or 28) that result in a floodplain encroachment other than functionally dependent uses or actions that facilitate open space use		Certain <a href="#">23 CFR 771.117(c)</a> activities (26, 27 or 28) that result in a floodplain encroachment other than functionally dependent uses or actions that facilitate open space use



<b>Resource</b>	<b>Level 1 Criteria</b> (qualifies as a CE Level 1 if none of the below criteria are exceeded)	<b>Level 2 Criteria</b> (meeting any of the criteria below would require a CE Level 2)	<b>Level 3 Criteria</b> (meeting any of the criteria below would require a CE Level 3)
Wetlands and waters of the U.S.	0.5 acre or less of permanent wetland impact	Greater than 0.5 acre of permanent wetland impact	N/A
	Clean Water Act Section 404 Non-notifying Nationwide Permit	Clean Water Act Section 404 Nationwide Permit Pre-Construction Notification	Clean Water Act Section 404 Individual Permit
	No Rivers and Harbors Act Section 10 Permit	No Rivers and Harbors Act Section 10 Permit	Rivers and Harbors Act Section 10 Permit
	No Rivers and Harbors Act Section 9 Coast Guard Permit	No Rivers and Harbors Act Section 9 Coast Guard Permit	Rivers and Harbors Act Section 9 Coast Guard Permit
Threatened and endangered species	"No effect" determination or "may affect" determination that does not require further consultation with resource agencies (in accordance with the NDOT Matrix)	"May affect" determination that requires further consultation with resource agencies (in accordance with the NDOT Matrix)	"May affect, likely to adversely affect" determination for threatened and endangered species or critical habitat
<b>Human and Social Resources</b>			
Historic properties	No historic properties present or finding of "no adverse effect"	Finding of "no adverse effect"	Finding of "adverse effect"
Hazardous materials	Low potential for encountering hazardous materials during construction	Medium potential for encountering hazardous materials during construction	High potential for encountering hazardous materials during construction
	No soil disturbance below or beyond pre-existing roadway fill in an active Superfund site	No soil disturbance below or beyond pre-existing roadway fill in an active Superfund site	Soil disturbance below or beyond pre-existing roadway fill in an active Superfund site
Traffic noise	Not a Type I project under NDOT's Noise Policy	N/A	Type I project under NDOT's Noise Policy
Air quality	No Mobile Source Air Toxics Level III effects	N/A	Mobile Source Air Toxics Level III effects
	Project not regionally significant in a designated non-attainment area		Project is regionally significant in a designated non-attainment area
Roadway	Addition of through-lane capacity less than 1 mile in length	N/A	Addition of through-lane capacity 1 mile or more in length

Resource	Level 1 Criteria (qualifies as a OE Level 1 if none of the below criteria are exceeded)	Level 2 Criteria (meeting any of the criteria below would require a OE Level 2)	Level 3 Criteria (meeting any of the criteria below would require a OE Level 3)
Traffic disruption	No traffic disruption or minor traffic disruptions requiring detours, temporary roads, or ramp closures that are greater than 30 working days	Minor traffic disruptions requiring detours, temporary roads, or ramp closures that are greater than 30 working days and up to 135 working days	Major traffic disruptions requiring detours, temporary roads, or ramp closures that are greater than 135 working days
	No associated temporary roads, detours, or ramp closures result in a substantial change to the environmental consequences of the action	N/A	Associated temporary roads, detours, or ramp closures result in a substantial change to the environmental consequences of the action
	Out-of-direction travel 10 miles or less in urban areas or 30 miles or less in rural areas		Out-of-direction travel greater than 10 miles in urban areas or greater than 30 miles in rural areas
	No temporary or permanent interference with known local special events or festivals		Temporary or permanent interference with known local special events or festivals
	No temporary or permanent adverse effect on through-traffic dependent business		Temporary or permanent adverse effect on through-traffic dependent business
	No permanent traffic pattern changes or disruptions		Permanent traffic pattern changes or disruptions
Access disruption	Complete closure of access to residential properties for greater than 5 working days		Complete closure of access to residential properties for greater than 5 working days and up to 10 working days
	No closure of business access during operational hours	N/A	Closure of business access during operational hours
	No access restrictions to emergency service facilities or providers		Access restrictions to emergency service facilities or providers
	No change in the functionality of adjacent properties		Change in the functionality of adjacent properties
Environmental justice	No environmental justice populations present, or no impact on environmental justice populations per NDOT's Environmental Justice Policy		Adverse impact on environmental justice populations per NDOT's Environmental Justice Policy
Unresolved controversy	No known public or agency controversy on human, natural, or economic grounds	Known public or agency controversy on human, natural, or economic grounds (OE level or elevated NEPA classification to be determined by NDOT)	

Note: N/A means that there are no specific OE criteria to elevate to this level.

<sup>a</sup> Projects that result in disproportionately high and adverse impacts on environmental justice populations may necessitate an EA or an EIS.

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