



U.S. Department  
of Transportation

**Federal Highway  
Administration**

# 23 U.S.C. § 326 Monitoring Report



Federal Highway Administration  
Nebraska Division, HDA-NE  
100 Centennial Mall North  
Room 220  
Lincoln, NE 68508  
Phone: (402)742-8460

## **A 2020 Monitoring Report on the Performance and Quality of the Nebraska Department of Transportation's Categorical Exclusion Assumption Program under 23 USC 326**

**November 2020**

**Final Report**

CONTENTS

<b>Executive Summary</b> .....	2
<b>Background</b> .....	4
<b>Scope and Methodology</b> .....	7
<b>Observations, Findings, Recommendations and Successful Practices</b> .....	9
<b>Conclusion</b> .....	25

## 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 1508.1(d) 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).<sup>1</sup> The review considers NDOT's 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, findings, recommendations, and successful practices.

The review was completed through execution of several activities, including review of NDOT process and procedure manuals, review of findings and recommendations from the 2019 Monitoring report and NDOT's response, review of NDOT's self-assessment, 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 six-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. The Team began the review efforts on October 1<sup>st</sup>, 2020 which culminated in a "monitoring week" the week of November 16, 2020. During monitoring week, the Team conducted remote 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 Stipulation 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 several practices NDOT has employed to successfully deliver their program, and is commended for their Section 106 program, which includes efficient procedures, solid documentation practices, and is staffed with dedicated, knowledgeable subject-matter experts. NDOT is also commended for their efforts to remove CEs from the critical path in terms of on-time project lettings for construction.

---

<sup>1</sup> The 2018 MOU expired in September 2021, prior to the issuance of this final monitoring report, and a renewal MOU was executed later that same month. This review focused on compliance with the 2018 MOU and the conditions in place at the time of the November 2020 review. A verbal summary of the findings of this report were provided to NDOT on several occasions, including more formally in November 2020 and March 2021. Findings contained in this report influenced the content of the renewal MOU.

In addition, the team identified recommended process improvements for NDOT's consideration that could, when implemented, improve program effectiveness, efficiency, and/or transparency and could increase efficiencies in process and review timing, such as a recommendation to canvass staff to determine internal coordination and documented procedural needs.

This report also makes several findings regarding NDOT's adherence to the CE MOU. For example:

- This monitoring report documents a lack of NDOT cooperation with FHWA's Stewardship, Oversight, and monitoring requirements as outlined in the MOU, including a lack of responsiveness to the 2019 Monitoring Report, which led to the addition of new Stipulations within the 2021 Section 326 CE MOU renewal.
- The monitoring review found errors, omissions, and noncompliant practices associated with the environmental reviews for ER projects, which led to the exclusion of the ER program in the 2021 Section 326 CE MOU renewal.
- The 2020 monitoring review identified a continued lack of sufficient quality assurance and quality control mechanisms to prevent errors and omissions in project files and CE documentation.

This Executive Summary does not contain a complete listing of all the Findings, Recommendations or Successful practices identified during the review. For more information and detailing of the review results, see the Observations Section, starting on page 9 of this report.

In an effort to streamline, condense and improve the overall readability of the 2020 Monitoring Report, FHWA placed many supporting details and documentation in a separate, stand-alone companion document, entitled The 2020 Section 326 Nebraska Monitoring Supplemental Documentation Report (herein referred to as the 2020 Supplemental Report). In doing so, the 2020 Supplemental Report preserves the supporting documentation for reference and facilitates continuous process improvement of Nebraska's 326 Program. A copy of the 2020 Supplemental Report was provided to NDOT and is available by contacting either NDOT or the FHWA Nebraska Division.

In summary, and in conjunction with adjustments made to the 2021 Section 326 MOU renewal, FHWA finds that NDOT is generally meeting terms of the MOU, but there are numerous findings that require NDOT corrective action to ensure substantial compliance. FHWA requires that NDOT prepare an action plan detailing the corrective steps NDOT will take to resolve each of the findings contained within this report, with a copy of the action plan provided to FHWA within 120 days of the final 2020 Monitoring Report. Furthermore, FHWA recommends NDOT meet with FHWA within 30 days of issuance of the final 2020 Monitoring Report to discuss the findings and to answer any questions NDOT may have regarding the action plan.

FHWA will monitor the development and implementation of the action plan, in alignment with the stipulations of the September 2021 MOU renewal. With 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.

## Background

### General background:

Pursuant to 23 U.S.C. 326, on September 5, 2018 the FHWA and NDOT executed a CE 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 1508.1(d) and whether the action is specifically listed as a CE within subsections (c) and (d) of 23 CFR 771.117. In addition, NDOT 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 Stipulation II(A) of the MOU for the CE determinations they make.

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 available upon request to FHWA.

As stipulated in 23 USC 326(c)(5), the Secretary of Transportation, subsequently delegated to FHWA, is required to monitor an assignment states' compliance with the terms of an executed 326 MOU. From the statute: *"MONITORING – The Secretary shall – (A) monitor compliance by the State with the memorandum of understanding and the provision by the State of financial resources to carry out the memorandum of understanding; and (B) take into account the performance by the State when considering renewal of the memorandum of understanding."*

MOU stipulation IV(F)(3) further establishes that FHWA shall conduct reviews of the State's performance:

*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 such 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 consistently comply with those requirements and, in doing so, prepare 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. However, at the time of CE assignment, several identified process and procedures remained outstanding (incomplete, undescribed, and/or unwritten). Therefore, the agencies reached an understanding at the time as to the priority and timing to complete the outstanding process and procedures. The priority and timing of several of those identified process and procedures has passed and the items remain outstanding.

Furthermore, some of the findings and recommendations in this report were originally identified as findings or recommendations in the 2019 CE Monitoring Report. Had NDOT addressed the findings and recommendations from the 2019 report, some of the findings and recommendations identified during the 2020 review could have been avoided.<sup>2</sup>

This monitoring review covers program elements considered during the review and project actions taken by NDOT for the period between January 25, 2019 and September 4, 2020. Importantly, the 2018 MOU expired in September 2021, prior to the issuance of this final monitoring report, and a renewal MOU was executed later that same month. This review focused on compliance with the 2018 MOU and the conditions in place at the time of the November 2020 review. A verbal summary of the findings of this report were provided to NDOT on several occasions, including more formally in November 2020 and March 2021. Findings contained in this report influenced the content of the renewal MOU.

In an effort to streamline, condense and improve the overall readability of the 2020 Monitoring Report, FHWA placed many supporting details and documentation in a separate, stand-alone companion document, entitled The 2020 Section 326 Nebraska Monitoring Supplemental Documentation Report (herein referred to as the 2020 Supplemental Report). In doing so, the 2020 Supplemental Report preserves the supporting documentation for reference and facilitates continuous process improvement of Nebraska's 326 Program. A copy of the 2020 Supplemental Report was provided to NDOT and is available by contacting either NDOT or the FHWA Nebraska Division.

---

<sup>2</sup> In both the 2019 Monitoring Report and its cover letter, FHWA requested that NDOT prepare an action plan detailing the corrective steps necessary to resolve the findings contained in the report and provide a response to the recommendations outlined in the report. In July 2020, FHWA received a reply and approach from NDOT regarding one finding from the 2019 report (compliance with Order 6640.1A) and NDOT continued coordination with FHWA to address another finding (submittal and coordination with FHWA for new and amended procedure manuals). However, NDOT remained silent on the other findings and recommendations from the 2019 Monitoring Report. In preparation of the 2020 monitoring event, FHWA contacted NDOT to obtain a status update of the 2019 findings and recommendations. That coordination and NDOT's response is outlined in more detail in Section I.2 in the Observations, Findings, Recommendations and Successful Practices section of this report, and its associated appendices.

## 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 Review Team evaluated the six State Performance Requirements listed in Stipulation IV of the MOU which provides structure for 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 Review 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 and that they are accurately categorized per 771.117(c) and (d) and are assignable. (Performance Requirements 1, 3, and 6).
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. (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; verify that staff qualifications and expertise are commensurate with decision-making capacity. (Performance Requirements 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. (Performance Requirement 1)
6. Verify NDOT is monitoring their processes relating to project determinations, analysis, project documentation, and checking for errors and omissions. Verify corrective actions are taken when needed, there is a training plan, and training is occurring (Performance Requirements 5 and 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 several FHWA Offices, including staff from the Nebraska Division, Headquarters' Office of Project Development and Environmental Review, the Resource Center and the Texas Division. For a complete listing of Review Team members, see the 2020 Supplemental Report. 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 statistically valid random selection of project file reviews for CEs approved by NDOT during the assessment period.

For the project review element, the Review Team focused on CEs approved by NDOT from January 25, 2019 through September 4, 2020. The pool of projects to consider for review was 442 projects, roughly half of which were CEs executed in response to the March and May 2019 Nebraska flooding events<sup>3</sup>. FHWA obtained the total project listings from NDOT. Using a 90% confidence level and 10% margin of error, FHWA determined a sample size of 59 projects for the review, which was stratified to reflect the ratio of Emergency Relief (ER) to non-ER projects (i.e. regular Federal-aid projects).

At the time of the review, FHWA was informed the ER project records were not contained in the official NDOT document repository, and therefore FHWA could not access the project files. The only way for FHWA to review records for the ER projects would be for NDOT to electronically send individual records to FHWA via email or large file transfers. Therefore, FHWA had to identify a small subset of ER projects for NDOT to supply records for, then FHWA randomly selected the appropriate number of ER projects to review from that subset. This still allowed for a statistically valid random sample.

To streamline FHWA's project review efforts, the Review Team developed a review table to track the initial observations from the project review. The table contains 20 standardized "Yes/No" statements that were answered for all the projects reviewed. 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. Likewise, "N" was used for a negative finding and "NA" used when the question was not applicable to the project. The completed review table was used as a Review team internal communication tool, and to help inform and develop a basis for some of the elements recorded in the Observations, Findings, Recommendations, and Successful Practices section of this report. The 2020 Supplemental Report contains the statements included in the review table.

Separate from the project review, the Review Team also interviewed key NDOT staff and representatives from two Federal agencies, the US Army Corps of Engineers (USACE) and US Fish and Wildlife Service (USFWS), responsible for project permits and concurrences<sup>4</sup>. Prior to interviews, FHWA developed a list of interview questions, tailored to each person being interviewed. NDOT interviews occurred during the week of November 16, 2020. The Review Team split into sub-teams of two FHWA employees each. Each sub-team interviewed NDOT staff individually, using the previously generated list of questions per interviewee. For a listing of personnel interviewed and a listing of all questions asked during the interviews, refer to the 2020 Supplemental Report. Information gathered during interviews was used in development of the Observations, Findings, Recommendations, and Successful Practices section of this report.

**OF NOTE:** Due to the COVID-19 pandemic, the U.S. Department of Transportation mandated maximum telework for non-essential personnel and restricted all non-essential travel. These telework and travel policies were in place during the 2020 CE monitoring review period; therefore, all aspects of this monitoring effort occurred virtually. This required the FHWA Review Team to develop and implement new approaches to completing the monitoring review remotely – introducing some delays in the overall monitoring review process.

---

<sup>3</sup> In 2019, the state of Nebraska was subject to a historic, widespread flooding event.

<sup>4</sup> The US Fish and Wildlife Service was unable to participate in a verbal interview but did complete a written questionnaire for the review.





# Observations, Findings, Recommendations and Successful Practices

## Introduction

*This section of the report captures the results of the review and is subdivided into sections based on the six State Performance Requirements listed in Stipulation IV of the MOU. Under each Performance Requirement subsection, the applicable observations found during the review are listed, followed by the resulting findings and recommendations of that specific observation. To this end, 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-compliance 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, expanding and/or sharing those practices in the future. In some instances, with notification to NDOT, best practices identified during the review may be shared with other assignment states.*

## **I. Compliance with Governing Laws, Regulations, Executive Orders, FHWA Policy and the CE MOU.**

### **1. Observation: CEs as the critical path in project development.**

Since 2015, FHWA has compared project CE approval dates to the project Plans, Specifications and Estimates (PS&E) turn-in date (provided by NDOT) as one measure of the health of the CE program. In some cases, final design activities start prior to the NDOT-established PS&E turn-in date. As such, if CEs are not approved prior to the start of final design, it indicates that NEPA is a project critical-path item (i.e., an item driving whether the project delivery schedule will be achieved). CEs in the critical path can result in rework as well as contribute to delays in project development.

Importantly, not only is this measure an indicator of the health of the CE program, but by regulation (23 CFR 771.113(a)) and FHWA Order 6640.1A, NEPA must be complete prior to the start of final design. CE approvals occurring after PS&E turn-in are not in compliance with this requirement.

For this CE monitoring event, excluding the 2019 ER event projects, the Review Team compared the regular Federal-aid project CE approval date to the PS&E turn-in date. In doing so, the Review Team found 81% 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 substantially improved since the previous review in March 2019:

Review Date	Percent of CE's approved prior to PS&E turn-in
November 2020	81%
March 2019	54%
January 2018	77%
December 2015	18%

**Successful practice:** NDOT is commended for improving their delivery rate of CEs prior to the PS&E turn-in date.

**2. Observation: The level of cooperation afforded by NDOT in implementing the program and responding to FHWA requests for information and materials.**

Within the MOU, there are multiple stipulations pertaining to FHWA and NDOT cooperation, including: *“The FHWA and 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.”* In addition, *“The State and FHWA agree to cooperate in all quality assurance activities.”* Within Stipulation IX of the MOU, *“Failure to cooperate with FHWA in conducting an audit or any oversight or monitoring activity”* is provided as an example for terminating the MOU.

Also, from Stipulation IV.4 of the MOU:

*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.*

a. The findings and recommendations of the 2019 Monitoring Report.

In the 2019 Nebraska CE Monitoring Report and associated cover letter, FHWA requested that NDOT prepare an action plan detailing the corrective steps they would take to resolve the findings contained in the report and provide FHWA a copy of the action plan. Although on multiple occasions FHWA requested the action plan or some level of response to the findings and recommendations in the report, NDOT did not respond, except to provide an action plan for one finding.

At the onset of the 2020 Monitoring effort, FHWA requested NDOT provide a response to the findings and recommendations contained in the 2019 report. FHWA noted the information was needed to effectively implement the 2020 monitoring event. On October 23, 2020, the NDOT Program Delivery Engineer replied, reiterating their understanding that the action plan was a recommendation, and *“suggest[ed] that, with the [2020] monitoring event right around the corner, FHWA plan to utilize the event to ask any remaining questions about [NDOT's] consideration of FHWA findings from the last reporting period”*.

The issue was escalated to the FHWA and NDOT Leadership. As a result, NDOT provided a letter response in November 2020, providing their position statement regarding the 2019 findings, but no response to the recommendations. In an effort to close out FHWA's 2019 Stewardship and Oversight responsibilities and to inform the 2020 review observations for this report, through April 2021 FHWA continued attempts to gain meaningful information from NDOT regarding the 2019 findings and recommendations. To date, NDOT has not provided the requested information. For more detailed information on this observation, see the 2020 Supplemental Report.

**Finding:** In accordance with the Section 326 2018 MOU and as cited in the observation, NDOT has not fully cooperated with FHWA in responding to the 2019 Monitoring Report and has not fully implemented corrective actions in response to the 2019 Monitoring Report findings. Despite several attempts, the review team has not been able to evaluate that NDOT has implemented corrective actions that adequately address FHWA's 2019 Findings. The 2021 Section 326 MOU stipulation IX(A) requirements outline NDOT's responsibilities for maintaining a Section 326 agreement, which FHWA will continue to monitor.

*NOTE: The Nebraska 2018 326 MOU expired prior to the issuance of this final report. The 2021 Section 326 MOU renewal agreement included additional stipulations regarding responsiveness to Monitoring Reviews*

- b. FHWA requests for information or project records during the period of review subject to this monitoring event.

During the 2020 monitoring review period, there were several instances where FHWA requested information or project records that were either never provided, provided late or required multiple requests from FHWA before information was provided. FHWA understands there may be instances outside the control of NDOT where providing requested information within five working days may not be practical or achievable, However, in these instances, proactively and promptly notifying FHWA of the delay and an expected delivery date for the material is preferable. Simply not responding does not meet the spirit and intent of the MOU.

**Finding:** During the 2020 monitoring review period, there were several instances where FHWA requested information or project records that were either never provided or were provided later than the 5 business days stated in MOU Stipulation IV(F)(4). Moving forward, this stipulation must be met.

### 3. **Observation: Implementation of program agreement commitments.**

With the implementation of program agreements (i.e., the 326 MOU and programmatic agreements (PAs) with other agencies), NDOT gains program flexibilities and efficiencies through the delegation of responsibilities, In turn; however, these agreements contain program-level or specific responsibilities (i.e., periodic reviews and reporting) that must be met by NDOT. During the reporting period, several instances were identified where NDOT failed to meet the program-level commitments outlined within certain MOUs and PAs.

- a. CE MOU Reporting: From the 326 MOU, IV.F.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.”*

NDOT did not provide these reports until FHWA’s request on September 16, 2020. Subsequently, the reports were provided by NDOT on September 22, 2020. The reports included those CE and Section 4(f) determinations for a two-year period – dating September 5, 2018 through September 4, 2020. NDOT should have submitted the required determinations every six months, as stipulated in the MOU.

In addition, and per the CE MOU, *“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.”* Many of the ER projects reviewed during the CE monitoring event listed the description as “not available” and, thereby, did not meet this stipulation.

During the 2020 monitoring event, the Review Team also identified several instances whereby a few projects were reported to have NEPA CE determinations that were non-federal-aid projects. While we respect NDOT’s discretion to apply federal-aid to whatever projects they choose, the reporting list must only contain projects that received federal-aid or where a federal action was taken under the jurisdiction of FHWA.

**Finding:** NDOT did not meet the stipulations of IV.F.1 of the MOU. The CE determinations list is due to FHWA every 6 months. The list must include only federal-aid projects and must include a project description. Moving forward, this stipulation must be met.

b. Commitments contained within other Programmatic Agreements:

From the 326 MOU, Stipulation II.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.”*

From the 326 MOU, Stipulation II.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”*

- i. Per the Programmatic Agreement Among the Federal Highway Administration, US Fish and Wildlife Service, Nebraska Department of Roads (NDOR), and Nebraska Game and Parks Commission (NGPC) for the Determination of Effects to State and Federally Listed Species From the Federal-aid Highway Program (Matrix PA) there are stipulations pertaining to program monitoring requirements. From the Matrix PA, Stipulation IV.D, Monitoring: *“Biennially, a random sample of projects will be reviewed for assurance that the program is properly functioning. The size of the sample will be determined by the signatories prior to the review. Any findings or recommendations that arise from the review shall be documented, and an action plan shall be developed (if necessary), with deliverables and timelines, to address any issues.”*

During the 2020 CE monitoring event, specifically in November 2020, the required Matrix monitoring event was just starting, thereby making it past due per the PA. The previous review had occurred three years prior (Fall 2017). FHWA reminded NDOT of this requirement in the Spring 2020.

- ii. There are programmatic stipulations outlined in the Nebraska Section 106 PA. From this PA: *“The first process review will occur within two (2) months of the initial report submittal, and the second review to occur within two (2) months after the first full fiscal year report submittal. For subsequent years, reviews will occur annually, within two (2) months of the annual report being issued, unless the FHWA, NDOR, and NESHPO<sup>5</sup> all agree in writing that a review that year would be unnecessary. If all parties agree that a review of a fiscal year is not necessary, a review will be held the following year (not to surpass 2 full years without a review).”*

Since the beginning of CE Assignment in September 2018, a program review per the Section 106 PA has not occurred. The last PA review was conducted in 2017 with a summary report issued in June 2018. At the time of this monitoring event, the review remains outstanding. However, at the time of issuance of this report, the Section 106 PA review is tentatively scheduled to begin December 2021.

- iii. The Section 106 PA states: *“Six months prior to the conclusion of the initial five-year period, NDOR shall notify all signatories in writing and will facilitate an interim review. All signatories must agree in writing that the Agreement shall remain in effect for another five years. If any party objects in writing to extending the Agreement, or proposes amendments, NDOR and FHWA will consult with the parties to consider amendments or other actions to avoid termination.”*

---

<sup>5</sup> Nebraska State Historic Preservation Officer.

Neither the offer for the interim review nor the actual review occurred. A final interim report was submitted in April 21, 2020 - three months prior to the July 31, 2020 expiration of the PA. FHWA began reminding NDOT of this requirement in November 2019; however, NDOT did not initiate the review, as required by the PA.

**Finding:** NDOT is not adequately implementing the program oversight commitments made in programmatic agreement documents and is therefore not meeting Stipulations II.C. and II.D. of the 326 MOU. NDOT must take action to comply with these agreements and, moving forward, compliance with programmatic agreement oversight commitments must be maintained.

**4. Observation: Management, implementation, procedures, and project-level documentation of the environmental review process for Emergency Relief (ER) projects.**

FHWA has discussed with NDOT the need for environmental/NEPA ER procedures for over a decade. The 2017 Readiness Assessment also identified the need for ER procedures. Per the Readiness Assessment and a mutual understanding between FHWA and NDOT, environment ER procedures were to be developed prior to CE MOU execution in September 2018. However, NDOT did not develop such procedures by the time the CE MOU was executed. Upon request by NDOT in the Fall 2018, a six-month extension -- from the date of CE MOU execution -- was granted for the development of the ER procedures with the mutual understanding that interim procedures would be developed. No interim or final procedures were provided within the given six-month extension or thereafter.

In March 2019, there was a massive ER event (flooding) in Nebraska, followed by a separate May 2019 flooding event. At the time of the event and for 5 months following the initial event, there were no ER environmental procedures or environmental review documentation procedures in place for the ER program.

During the 2020 monitoring review, FHWA reviewed a statistically valid sample of 2019 ER project records and identified numerous issues. A few examples that were identified include:

- Any repairs conducted prior to NDOT's development of interim environmental ER procedures (5 months following the event) should have followed the standard environmental review procedures. However, evidence of this was not found. While procedures were eventually developed, they lacked sufficient detail to ensure adequate, consistent and compliant reviews for all environmental resources under the NEPA umbrella of laws, regulations, and executive orders.
- Some of the procedures developed by NDOT created two pathways for review -- one for projects that had been constructed prior to environmental review and one for projects where construction had yet to start. When FHWA inquired about this, NDOT stated they had no method by which to determine when projects started construction. Therefore, it is unclear how NDOT complied with their stated two-pathway process.
- NDOT did not store their ER project records in their official project documentation system, OnBase, leading to inefficiencies and difficulties obtaining ER project documentation for the monitoring review.
- Based on the developed ER procedures and project records available, there was evidence that approaches to some technical reviews were missing, were arbitrary in nature, or otherwise did not conform to agreements made with other agencies.
- Some of the ER reviews sampled cited an invalid CE category from the regulations as the basis for the NDOT CE determination, environmental review certifications were not issued for ER projects, and QC efforts for the ER environmental reviews appeared inadequate.

For more information and supporting documentation for the ER Observations, Findings and Recommendations from this report, see the 2020 Supplemental Report.

**Successful Practices:**

- a. The FHWA monitoring review team recognize that the magnitude of the flooding events required NDOT staff to quickly mobilize and develop strategies to manage the increasing demands made upon their normal workloads as well as revise approaches to project environmental reviews in order to mitigate the effects of this major disaster. That recognition also came out in our interviews of NDOT environmental program leadership in recognizing that NDOT Environmental program staff applied creativity and hard work in performing their best to respond to this event.
- b. For ER reviews, NDOT developed a GIS application within a few months after the flooding events, to perform screening and assessments of possible environmental resources that could be affected by repair projects. While we commend the development of the GIS tool as a successful practice for screening purposes, we observed through the project file reviews and interviews that it was not a successful substitute for a fuller assessment nor for meeting documentation requirements.
- c. Through the ER project file reviews, FHWA observed thorough assessments and documentation for the Section 106 of the National Historic Preservation Act (NHPA) and floodplain reviews. NDOT staff who developed these approaches and applied them at the project-level are commended for their efforts.

**Summary ER Finding:** The Emergency Relief environmental review program is not compliant with the stipulations of the MOU or FHWA’s implementing regulations. The non-compliant actions were discovered in the missing documentation in project reviews, incomplete and inconsistent procedures based on review of NDOT’s review procedures and confirmed through staff interviews. Based on the efforts of the review team, we could not determine whether NEPA and technical reviews were completed consistently or in a timely manner. NDOT did not comply with stipulations contained in IV.F. of the CE MOU or their document retention procedures for the 2019 ER project records, did not follow NDOT review procedure for project certification or Green Sheets, did not follow established protocols as set forth in the Matrix PA, and misclassified some of the CE determinations as compliant with 23 CFR 771.117(c)(9).

*NOTE: The Nebraska 2018 Section 326 MOU expired prior to the issuance of this final report. The 2021 Section 326 MOU renewal MOU excluded the ER program from assignment until such time as the stipulations within the 2021 326 MOU are satisfied. Furthermore, interim coordination procedures between FHWA and NDOT for ER events were developed by FHWA and captured in Appendix B of the Nebraska Division Risk-Based Stewardship and Oversight Touch-Point Guide (Fall 2021).*

**5. Observation: Delegation of authorities.**

During the 2020 monitoring event, the review team learned that NDOT was certifying local government projects where NDOT was acting in “responsible charge,” and that NDOT was allowing local governments within the planning area boundaries of a Transportation Management Area (TMA) Metropolitan Planning Organization (MPO) to self-certify their own environmental reviews. The requirement for a certification of a project’s adequacy of review and compliance is a decision that cannot be delegated by NDOT to a third party according to Stipulation V.D. of the MOU.

**Finding:** NDOT has delegated items to sub-recipients that cannot be delegated, which does not comply with Stipulation V.D of the MOU. Moving forward, this Stipulation must be met.

**6. Observation: Agency Coordination.**

From Stipulation II.D. of the 326 MOU: *“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”*

From Stipulation IV.F.4. of the 326 MOU: *“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.”*

- a. Coordination with the U.S. Army Corps of Engineers
  - i. During both the 2019 CE Monitoring interview and 2020 interview, the USACE expressed concern with NDOT’s application of non-notifying Nationwide Permit #3 for maintenance (NWP 3) as it pertains to the federal-aid program.

As noted in the 2019 Monitoring Report, FHWA recommended that NDOT establish a meeting between our three agencies regarding application on non-notifying NWP3.

During the 2020 monitoring interviews, FHWA asked the USACE if NDOT had reached out to them to discuss the use of non-notifying NWP 3. The USACE said they had not. Furthermore, the USACE indicated they had expressed verbal concern within the past year to NDOT regarding their use of non-notifying permits. FHWA also asked NDOT during a monitoring interview if they had complied with FHWA’s 2019 coordination recommendation, to which they said they had not. NDOT informed FHWA that they had not, because *“the USACE Nebraska Regulatory office has consistently stated that they will not review, comment or approve NDOT process/procedures”* (November 3, 2020 NDOT email).

- ii. The project files do not fully document project coordination with the USACE. Although Professionally Qualified Staff (PQS) memos, delineations and waterway data sheets were commonly found in the regular federal-aid project files, records documenting coordination and communication with the USACE, including permitting applications, were mostly absent. Because of the missing records, it was difficult to determine what coordination occurred with the USACE for the projects reviewed. Based on interviews, FHWA learned there is another filing system in place where project records are stored that is not available to FHWA during reviews; some of this information may be within that system.
  - iii. Based upon interviews during the 2020 monitoring event, the Review Team learned that a high percentage of Pre-Construction Notifications and Individual Permit applications are deemed incomplete by the USACE upon submittal by NDOT. The Review Team did not investigate the cause of the incomplete determinations. However, this has been an ongoing (pre NEPA Assignment) programmatic issue, hindering the efficient and timely delivery of the federal-aid program.

**Finding:** Based on a lack of coordination records in project files and information shared during interviews, NDOT does not appear to comply with Stipulation II.D Stipulation IV.F.4. of the 326 MOU as it pertains to the USACE. NDOT is expected to provide a plan for retaining coordination records within their official document repository as well as a plan for addressing reasonable and good faith efforts to identify and resolve conflicts with the USACE.

**Recommendation:** Upon request, FHWA can facilitate discussions between NDOT and USACE regarding NWP #3 and other notifying permits, including the issue of what constitutes a “complete” application.

- b. Coordination with the State Historic Preservation Office (SHPO), U.S. Fish and Wildlife Service, and Nebraska Game and Parks Commission.



The 2020 monitoring review has shown that NDOT has an excellent working relationship with the SHPO. Although the SHPO was not interviewed during this monitoring event, evidence exists in the project files, through interviews, documented procedures and anecdotally from FHWA staff experiences that demonstrates a solid partnership exists between NDOT and SHPO.

The 2020 monitoring review has also shown that NDOT has an excellent working relationship with the USFWS and the NGPC. Both agencies were informally interviewed through email communications during this monitoring event. Through the years, notably through the successful implementation of the Matrix Process, NDOT has fostered a level of trust, cooperation and communication with these agencies.

**Successful practice:** NDOT's staff is commended for fostering such a positive relationship with the SHPO, USFWS and the NGPC. This level of trust, cooperation and communication has a beneficial impact on the timely, efficient, and compliant delivery of the Federal-aid program in Nebraska

## 7. **Observation: Tribal coordination.**

From Stipulation II.D. of the 326 MOU: *"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"*

From Stipulation IV.F.4. of the 326 MOU: *"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."*

- a. Based on file reviews, review of procedure manuals and interviews with NDOT staff, it is apparent that NDOT is effectively identifying and contacting tribes for consultation under their Section 106 program. NDOT's documentation demonstrates that accurate project description information is provided to tribes during section 106 consultations as well as information pertaining to identified historic resources within the area of potential affect for the project. However, it was also noted through file reviews that NDOT appears to assume concurrence -- in some occasions -- if a response is not received from the tribe within 30 days of issuance of a consultation letter.

**Successful practice:** NDOT's Historic Preservation staff should be commended for their efforts to effectively provide project and historic property information to the tribes.

**Recommendation:** NDOT should refine their procedures to clarify steps to take when a tribe has not responded to a consultation letter within 30 days of its issuance.

- b. For one project occurring on tribal lands, NDOT either did not provide adequate time for the Tribe to respond to the materials provided prior to finalizing documents and decisions (i.e., the NEPA document) or there was no documentation in the file demonstrating consultation/coordination with the Tribe occurred at necessary coordination points.

For the project in question, the record shows the Tribe requested review of the project's CE, but based on the project records, the CE was submitted to the Tribe for their review the same day NDOT approved the CE. Although the CE included a commitment to reevaluate the CE if the Tribe expressed concerns, a reply from the Tribe and documentation of follow-up coordination

could not be found in the file. Importantly, approving the CE on the same day it was sent to the Tribe for their consideration is not a good-faith consultation and precludes the ability to consider tribal concerns before rendering the NEPA decision.

For the same project, the biology documentation notes that the Tribe and Bureau of Indian Affairs (BIA) were provided the Biological Assessment documentation for review, but neither the consultation package submittal from NDOT to the Tribe nor responses from the Tribe could be found in the file.

In addition, for this project there was a commitment for NDOT to coordinate with the Tribe during the right-of-way acquisition phase regarding fencing a buffalo pasture. However, there is no record of this commitment being provided to NDOT Right-of-Way Division and there is no record demonstrating the coordination occurred. There was also a commitment to provide the project's seed mix to the Tribe for review and approval, but there is no documentation in the file demonstrating the information was provided to the Tribe or that the Tribe approved the seed mix.

**Finding:** Based on a lack of coordination records in project files, NDOT did not comply with Stipulation II.D or Stipulation IV.F.4. of the 326 MOU as it pertains to tribal consultation (excluding Section 106 reviews). NDOT is expected to provide a plan for retaining coordination records within their official document repository as well as a plan for addressing reasonable and good faith effort requirements for tribal consultation.

## **II. Processing assigned CE reviews: consistency in assessment and documentation standards as outlined in FHWA-accepted NDOT manuals and as stipulated in Stipulation IV.B. of the MOU.**

### **1. Observation: Completeness of process and procedures.**

During 2020 monitoring interviews, NDOT staff spoke of the benefits of the completed process and procedure manuals and guides. They also indicated that additional guides and/or manuals would be helpful for implementing the program. For example, a couple staff members noted that outlining internal coordination procedures to ensure effective multi-disciplinary communications within NDOT would be helpful.

**Recommendation:** FHWA encourages NDOT management to canvass staff regarding procedural and coordination needs and should consider developing supporting guides, as needed.

### **2. Observation: Impaired water considerations during NEPA.**

- a. Regarding the presence of Category 5 impaired waters within 0.5 miles of the project, the Nebraska Categorical Exclusion Guidance (October 2018)<sup>6</sup> states: "*The NDOT Roadside Development and Compliance Unit will provide a PQS memo including this information along with mitigation measures or strategies.*" A PQS memo pertaining to impaired waters was not located in any of the project files reviewed by the 2020 Monitoring Review Team.

On December 23, 2020, FHWA sent NDOT a list of follow-up questions and reminders based on FHWA's Monitoring Event project reviews and interviews with NDOT staff. The December 23rd inquiry noted the above statement from the CE Guidance and requested NDOT provide the impaired water PQS memo for two specific projects.

---

<sup>6</sup> The October 2018 version of the Nebraska Categorical Exclusion Guidance was current during, and used for, the 2020 CE monitoring effort, including development of this report; therefore, any reference to the CE guidance or guidelines refers to the October 2018 version.

NDOT replied that the PQS memo process and template was still under development and, that in the interim, the NEPA specialist checks whether impaired waters are present within 0.5 miles of the project. If present, the NEPA specialist includes a commitment for the impaired water. As such, NDOT noted that the NEPA specialist's review of impaired waters for the requested projects can be found in the CEs.

**Finding:** NDOT is not complying with their project review procedures (CE Guidance) regarding PQS memos for impaired waters. Moving forward, NDOT must comply with their project review procedures.

- b. For two CEs reviewed by the review team, impaired waters are identified as being within the study area, but there was inadequate analysis of the project impacts to impaired waters. Specifically, one CE does not indicate whether impacts are anticipated, while the other indicates impacts are not anticipated but does not provide rationale for this finding.

In general, the procedures for identifying project-specific impacts to, and mitigations for, impaired waters are unclear and appear to lean on the standard mitigation. Standard mitigation generally calls for review and, if needed, the development of best management practices (BMPs) during the erosion control review process. Additionally, the informal process referenced by NDOT in "II.2.a." above indicates that the NEPA specialist only identifies an impaired water and includes a BMP mitigation if one is present without evaluating project impacts to the impaired water during the NEPA phase. Per the CE Guidance; however, there should be a brief discussion within the CE of potential water quality impacts resulting from the project.

**Finding:** NDOT is not complying with their project review procedures (CE Guidance) regarding impaired water analysis during NEPA by sometimes excluding a summary of said analysis provided in the CE document. Moving forward, NDOT must comply with their project review procedures.

### 3. **Observation: Floodplain considerations during NEPA.**

Location hydraulic studies were not performed for all floodplain encroachments, as required by 23 CFR 650.111 and in accordance with NDOT's Floodplain Policy (January 2019). Only 19% of the non-ER projects reviewed in 2020 contained floodplain PQS memos. The finalization of NDOT's Floodplain Policy and PQS memo process in January 2019 appears to account for some of the inconsistencies in documentation and the lack of location hydraulic studies seen during this monitoring event, as the floodplain reviews for some projects occurred prior to January 2019.

However, these projects do not appear to have been revisited upon enactment of the 2019 Floodplain Policy. In addition, there were at least two projects where the floodplain review (e.g. certification and permit application) was dated after January 2019, but PQS memos were not developed. When FHWA requested the floodplain PQS memos for those two projects in December 2020, as part of the review follow-up for missing information, NDOT was forthcoming and acknowledged PQS memos were not prepared for those projects and proceeded to create the PQS memos after-the-fact.

Second, NDOT's CE Guidance states "*The Floodplain PQS will identify the requirement for a 23 CFR 650.111 analysis and provide it with the Floodplain PQS Memo.*" 23 CFR 650.111(e) states that the "*studies required by §650.111 (c) and (d) shall be summarized in environmental review documents prepared pursuant to 23 CFR part 771.*" As most of the projects did not contain a PQS memo, neither was the requirement for a 23 CFR 650.111 analysis identified for most projects. Regardless of the status of PQS memo procedure, the need for a 650.111 analysis should have been identified for all projects reviewed during this monitoring period. Additionally, at least two of the projects reviewed had a location hydraulic study performed, but the study was not summarized in the CE as required by the CE Guidance and 23 CFR 650.

**Finding:** NDOT’s CE Guidance is inconsistent with the current NDOT Floodplain Policy and must be corrected. In addition, the existing CE guidance is not consistently complied with by practitioners. As a result, the floodplain regulations found in 23 CFR 650 have not been complied with consistently on assigned projects.

**Recommendation:** The CE guidance should more clearly define that location hydraulic studies (23 CFR 650.111) are required for all projects with floodplain encroachments not just those projects classified as CEs under 23 CFR 771.117 (c)(26-28). Note that these studies must be attached to any CE when they are performed.

### **III. Excluded projects: Determination and documentation of CEs excluded from the CE Assignment Program and retained by FHWA as stipulated in Stipulation IV.C. of the MOU.**

Per Stipulation I.B of the 326 MOU: *“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.”*

#### **1. Observation: Approval of an unassignable project.**

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.

During the quality control efforts of the 2020 monitoring activities, which occurred after the initial report-out meeting with NDOT in November 2020, one of the projects from the review sample was identified as unassignable; however, it was processed by NDOT. The project was approved as a CE level 3, which means a manager approved the document, using 23 CFR 771.117(d)(13) as the approval category. From that regulation, this categorical exclusion is reserved for *“Actions described in paragraphs (c)(26), (c)(27), and (c)(28) of this section that do not meet the constraints in paragraph (e) of this section”*. Like the project identified as unassignable during the 2019 CE Monitoring review, this project was also a grouping of multiple projects, that together, constitute one federal action and was therefore, reviewed under one CE. Like the 2019 unassigned project, the individual projects batched together would reconstruct interstate mainline and demolish and reconstruct a rest area. Importantly, this one federal action does not qualify under any single listed CE category in 23 CFR 771 and, while it may still qualify as a CE, it is an unassignable project according to the terms of the MOU.

Importantly, NDOT self-identified this project as unassignable prior to the issuance of this report. Although NDOT did not disclose to FHWA that they had previously made a CE determination for this project, NDOT did coordinate with FHWA in 2021 regarding the environmental reviews and to work through another similar CE.

**Finding:** Although identified and corrected by NDOT prior to project authorization for construction, NDOT assessed and issued a CE determination for an unassigned project, in violation of Stipulation I.B. of the Section 326 MOU. NDOT does not appear to have the sufficient controls in place to prevent approval of unassigned projects in all cases, counter to Stipulation IV.E. of the 326 MOU.

#### **2. Observation: Use of an invalid CE certified as NEPA-compliant when requesting project authorization.**

There was a project determined as unassignable during the 2019 monitoring event that NDOT submitted for FMIS construction authorization during the 2020 monitoring period that incorrectly included the invalid CE as proof of NEPA compliance. The NDOT request for construction authorization using the invalid CE was submitted to FHWA approximately three weeks after execution of the final 2019 Monitoring Report. This was a substantial oversight in program management that should not have occurred. However, this error was caught by FHWA during the project’s PS&E review phase, as the project was identified as a Project of Division Interest (PoDI). FHWA worked with NDOT to update the CE for FHWA review and approval prior to authorization in FMIS, thereby maintaining the project’s federal-aid eligibility.

**Finding:** Although identified by FHWA upon NDOT’s request for project construction authorization and subsequently corrected prior to authorization, NDOT continued to advance a project using a NEPA document identified as unassignable and, therefore, invalid as part of the 2019 Monitoring Review and in violation of Stipulation I.B. of the Section 326 MOU. NDOT does not appear to have the sufficient controls in place to prevent approval of unassigned projects in all cases, counter to Stipulation I.B. of the 326 MOU.

**3. Observation: Outstanding 2019 Monitoring Findings and Recommendations associated with unassigned projects.**

Section I.2.a of this report summarizes the difficulty FHWA had obtaining a response from NDOT regarding the 2019 Monitoring Event findings and recommendations in general. Specific to the issue of assignability, 2019 Monitoring Report contained the following findings and recommendations:

2019 FINDINGS	2019 RECOMMENDATIONS
<p><i>“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.”</i></p>	<p><i>“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.”</i></p>
<p><i>“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.”</i></p>	<p><i>“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.”</i></p>

NDOT did not reply to the 2019 recommendations, but provided the following November 3, 2020 response to FHWA’s multiple requests regarding the 2019 findings:

*“NDOT Corrective Action (5)(a): This issue was discussed with FHWA on May 7, 2020 (draft monitoring response meeting), and during this meeting Mr. Maldonado indicated that FHWA Division offices have received internal guidance on this subject. It was acknowledged, however, that NDOT had not been provided this guidance (see CE MOU Section IV.A.5). NDOT requested this information, but to date has not received the internal guidance. Upon receipt, NDOT will review its CE guidance to see if modifications are necessary. In the interim, the EDU Manager [Environmental Documents Unit Manager] has trained staff regarding this topic during regular staff meetings held by the EDU Manager. In addition, NDOT included this item as part of its Self-Assessment review and found no instances of use of more than one CE activity in CE Documentation during the most recent monitoring period.”*

The Section 326 MOU spells out what is assigned within Stipulation I.B., noting that only listed example activities are assignable (i.e., not “open-ended” d-list activities). Regarding NDOT’s request

for internal FHWA email communications, that conversation was regarding “batching” actions that together comprise one federal action into one CE and the inability to apply multiple CE categories to environmentally approve/certify that one action (i.e., the entire action must satisfy the criteria of one CE c-list or d-list example in the regulations, and if it cannot it is either an open-ended d-list activity or an EA or EIS, which are not assignable). Since the time of the noted May 7, 2020 meeting, FHWA provided written guidance regarding this issue to NDOT within the final 2019 Monitoring Report itself.

**Finding:** NDOT continues to have internal implementation and oversight errors, leading to the issuance of NEPA approvals for unassigned projects which is in violation of Stipulation I.B. of the Section 326 MOU. NDOT has not clearly implemented corrective actions that adequately address FHWA’s 2019 Findings, including findings addressing this issue.

**Recommendation:** FHWA recommends NDOT implement additional training to its staff regarding CE categories and “batching”.

#### **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. From IV.D. of the MOU: *“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.”*

##### **1. Observation: Documented training program and training needs**

During the 2019 monitoring review, FHWA noted several NDOT environmental staff were new and that several NDOT staff members interviewed discussed their need for additional training. The Review Team also heard from NDOT staff that there was a draft training plan developed; however, NDOT management told FHWA no such training plan existed. FHWA had asked for a copy of a training plan within the 2019 Monitoring Report, but it was not received.

During interviews conducted for the 2020 monitoring event, the Review Team again asked NDOT environmental management staff about NDOT’s training plan, including their program for monitoring the training needs and qualifications of staff. NDOT Environment program managers indicated that training has been occurring, and that NDOT has developed a training program outline and a simple excel spreadsheet method is being considered for monitoring staff training needs and qualifications. The Review Team asked NDOT Environmental management to provide copies of their outlined training program and spreadsheet approach to FHWA, and they verbally agreed to do so. Although FHWA sent a reminder request for the material in December 2020, as of the date of this report, the materials have not been received. However, NDOT did provide a verbal summary of their plans for developing a training program during a monthly environmental coordination meeting on July 20, 2021.

As part of the 2020 monitoring event, the Review Team reviewed NDOT’s latest organizational chart and observed NDOT had again experienced substantial turnover in staff, including a complete turnover of their threatened and endangered species biologist staff. During resource agency interviews in 2020, both the USFWS and USACE indicated NDOT staff could benefit from additional training in areas such as natural resource laws, regulations and implementation strategies. When asked during interviews, NDOT staff themselves (particularly the newer staff) acknowledged their need and desire for additional training.

While it is apparent NDOT does conduct informal training of their staff, mostly through reoccurring staff meetings, the lack of an established and documented training program could hinder the long-term success of the program. A strong training program may help NDOT achieve greater program efficiencies, minimize quality control issues, improve the application of environmental regulations in a consistent and compliant manner and improve the quality of project files.

**Recommendation:** NDOT should consider canvassing staff and external customers regarding training needs and then develop a plan and schedule to implement identified training needs. To assist, FHWA is willing and able to provide training upon request on technical and practical aspects of the environmental review process as well as workshops tailored to NDOT's specific training needs.

2. **Observation: NDOT staff attitude toward assignment and environmental reviews.**

It was clear from FHWA interviews that NDOT NEPA and technical specialists have tremendous pride in their program. Staff members interviewed appeared to be interested in correctly implementing the program and interested in continuing to improve their technical skills.

**Successful practices:** NDOT staff were open and gave candid responses during the monitoring event interviews, which was greatly appreciated by the review team. The staff appeared to be integrated into project development and had a sense of ownership in the results of the program.

**V. State Quality Control & MOU Performance Monitoring and Quality Assurance.**<sup>7</sup>

1. **Observation: Quality Control (QC) and Quality Assurance (QA) of NDOT project files for assigned actions.**

From NDOT's Documentation Plan (June 2018), page 1: *"As part of fulfilling NEPA responsibilities, NDOT must retain project and general administrative files. To that end, every decision-making document must be included in the project files within NDOT's document management system, OnBase. The Federal Highway Administration (FHWA) will perform a monitoring review on NEPA actions and project files to ensure all required documentation is present."*

Also noted in NDOT's June 2018 Documentation plan *"Final documentation, NEPA documentation, technical resource reviews and determinations, and other decision-making documents (including those captured in email correspondence) are uploaded to and maintained in the project file..."* Appendix B of NDOT's Documentation Plan includes a listing of OnBase Document types. However, the listing is missing important document types that would be required for maintaining a complete record. Page 3-12 of NDOT's Environmental Procedure Manual (February 2019) contains another listing of material to retain in the project files, including references to materials the Review Team could not find in individual project files.

While Subsection I of this report outlined missing project file documentation for the 2019 ER projects, many records for the regular federal-aid program were also missing from OnBase. Some examples of documentation routinely missing from the regular project files include species survey records/forms; PQS memos; correspondence/coordination with agencies or tribes, including copies of letters or consultation packages sent to agencies/tribes; and 404 commitment completion forms.

Based on interviews, NDOT staff were not entirely clear as to what is required to be stored in OnBase. Based on interviews and a review of procedure documentation, the Review Team could not determine if there is an NDOT responsible party designated to maintain or oversee the official project files.

---

<sup>7</sup> While these items are separate performance requirements, they were evaluated together within this section of the report.

In addition, through multiple interviews, the Review Team learned there are separate environmental project files, aside from OnBase, that contain deliberative materials, coordination with agencies and assessment materials that are not accessible to FHWA and are not duplicated in OnBase. This is counter to NDOT written procedures and counter to MOU requirements.

**Finding:** Counter to NDOT written procedures and the MOU, material important to the decision-making process and/or documenting coordination with agencies and tribes was frequently missing from the project files and was unavailable to FHWA during the 2020 review. Furthermore, FHWA could not identify a written QA/QC protocol or a responsible NDOT party for maintaining and/or overseeing the completeness of the official project file. From MOU Stipulation E.2., pertaining to quality control: “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.” Moving forward, this stipulation must be met.

**2. Observation: Procedures for checking technical reviews prior to CE approval or the next major federal approval.**

At times, an issue or matter learned from one technical review can influence the results of another resource review. As a 2020 monitoring review example, pertinent information from the Hazardous Materials (HazMat) review for a project on tribal land did not appear to factor into the Environmental Justice (EJ) analysis for the project, likely because the EJ analysis occurred prior to the HazMat review. During the monitoring review, no documentation could be found to demonstrate the HazMat information was provided to the EJ subject matter expert or that the information was incorporated into the EJ review.

Although NDOT has noted they use the Environmental Certification form to verify all technical reviews are still valid prior to final project approval, the form alone appears to be an insufficient tool for identifying and correcting deficient technical environmental reviews, including EJ reviews. This is a repeat observation from 2019.

**Finding:** As required under Stipulation IV. E. of the MOU, NDOT process is insufficient to ensure technical environmental reviews, including EJ reviews, are not deficient due to changes or new project information at the time of final project approvals.

**3. Observation: Quality Control of categorical exclusion documentation.**

During the 2019 monitoring event, problems with QC were identified. From the 2019 Monitoring Report: *“The majority of CEs reviewed contained substantive errors that should have been captured and prevented through adequate QC process.”* Within the 2019 monitoring report, FHWA recommended that *“NDOT should improve its QC 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”*

On November 3, 2020, NDOT replied to this finding via letter with the following: *“NDOT continues to be committed to accuracy in our CE Documentation and included a review of QA/QC as part of our Self-Assessment. As identified in our Self-Assessment Report, NDOT was mindful of the examples provided in the Report and identified minor errors and inconsistencies. NDOT will continue to address the importance of accuracy with staff during ongoing Environmental Section and Unit meetings.”*

During the 2020 monitoring event, the Review Team again identified QC issues. Most 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, and as mentioned, project files were missing required documentation. The Review Team was unable to determine if peer reviews were completed by staff experienced to perform QC and could not find evidence of NDOT management providing QC of peer reviews, specific QC comments



or what QC review details were provided by peer reviewers regarding errors and omissions. For more details regarding the QC issues identified, refer to the 2020 Supplemental Report.

Based on review findings, it is noteworthy that the most complex CEs (level 3s) had the fewest noted errors. Importantly, Level 3 CEs go through a more robust QC review which includes an NDOT manager level review and approval. Most errors/omissions identified during the review were CEs that received less stringent review and had no manager review or approval demonstrated within the file documentation

In the categories of document review QC errors, errors in assessment, and missing file material, there is not a single category that stands out as being the primary source of the QC issues, with errors found in all three categories at a similar rate. For more information on the scope of what NDOT has approved for review under CE Levels 1, 2, and 3, and NDOT's delegation of staff approval authority for each CE level, please see the 2020 Supplemental Report.

Importantly, through interviews with NDOT staff, FHWA learned program-level Quality Assurance actions only occur as part of the MOU-required self-assessment report. Through the life of the 2018 MOU, only one self-assessment report had been generated (October 2020). Additionally, based upon the 2020 monitoring review, NDOT does not appear to have an overall process to identify and capture QC trends at the project level, which could then inform QA improvements.

**Recommendation:** NDOT should consider whether the review and approval authorities designated as CE level 1, 2, and 3 by NDOT are appropriate for achieving the necessary quality control needed under the assignment program, in particular in light of the frequency of environmental staff turnover (see Observation IV.1).

**Finding:** As required by Stipulation IV.F.2 of the MOU, FHWA and NDOT shall cooperate in monitoring performance of the MOU, and monitoring "Performance considerations will include, without limitation, the quality and consistency of the State's project determinations..." As demonstrated by this observation and the parallel observation from the 2019 Monitoring Report, the quality and consistency of the State's project determinations must improve. Furthermore, NDOT is not fully adhering to MOU Stipulation IV.E, including subpart 2, which states "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."

As Stipulated under IV.F.7. of the MOU, "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 USC 326, and other applicable Federal laws and regulations." To that end, FHWA requests that NDOT establish a written, documented QA procedure for quarterly program QA oversight by NDOT with a goal of decreasing project file and CE documentation and assessment errors and omissions. FHWA requests a copy of the quarterly QA procedure be provided within 90 days of issuance of the 2020 Monitoring final report, with implementation of the first quarterly NDOT review within 180 days of issuance of the final 2020 Monitoring report. A written summary of each quarterly QA effort, including a summary of any program adjustments made in response to the quarterly QA review, will be provided to FHWA prior to the next quarter. This requirement will be adjusted, as needed, based on the results of the next FHWA Section 326 Monitoring effort.

## Conclusion

This report describes the results of the second monitoring review of NDOT's performance in terms of the MOU requirements. Through the observations presented here, the FHWA 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.

The Team identified several practices NDOT has employed to successfully deliver their program, and is commended for their Section 106 program, which includes efficient procedures, solid documentation practices, and is staffed with dedicated, knowledgeable subject-matter experts. NDOT is also commended for their efforts to remove CEs from the critical path in terms of on-time project lettings for construction.

In addition, the team identified recommended process improvements for NDOT's consideration that could, when implemented, improve program effectiveness, efficiency, and/or transparency and could increase efficiencies in process and review timing, such as a recommendation to canvass staff to determine internal coordination and documented procedural needs.

This report also makes several findings regarding NDOT's adherence to the CE MOU. For example:

- This monitoring report documents a lack of NDOT cooperation with FHWA's Stewardship, Oversight, and monitoring requirements as outlined in the MOU, including a lack of responsiveness to the 2019 Monitoring Report, which led to the addition of new Stipulations within the 2021 Section 326 CE MOU renewal.
- The monitoring review found errors, omissions, and noncompliant practices associated with the environmental reviews for ER projects, which led to the exclusion of the ER program in the 2021 Section 326 CE MOU renewal.
- The 2020 monitoring review identified a continued lack of sufficient quality assurance and quality control mechanisms to prevent errors and omissions in project files and CE documentation.

This Executive Summary does not contain a complete listing of all the Findings, Recommendations or Successful practices identified during the review. For more information and a full detailing of the review results, see the Observations Section, starting on page 9 of this report.

In summary, and in conjunction with adjustments made to the 2021 Section 326 MOU renewal, FHWA finds that NDOT is generally meeting terms of the MOU, but there are numerous findings that require NDOT corrective action to ensure substantial compliance. FHWA requires that NDOT prepare an action plan detailing the corrective steps NDOT will take to resolve each of the findings contained within this report, with a copy of the action plan provided to FHWA within 120 days of the final 2020 Monitoring Report. Furthermore, FHWA recommends NDOT meet with FHWA within 30 days of issuance of the final 2020 Monitoring Report to discuss the findings and to answer any questions NDOT may have regarding the action plan.

FHWA will monitor the development and implementation of the action plan, in alignment with the stipulations of the September 2021 MOU renewal. With 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.

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

***For Additional Questions, please contact:***

Melissa Maiefski  
Program Delivery Team Lead  
Federal Highway Administration  
100 Centennial Mall North, Rm 220  
Lincoln, Nebraska 68508  
Phone: (402)742-8473





U.S. Department  
of Transportation

**Federal Highway  
Administration**

**Federal Highway Administration**  
Nebraska Division, HDA-NE  
100 Centennial Mall North  
Room 220  
Lincoln, NE 68508  
Phone: (402)742-8460

# 23 U.S.C. § 326 Monitoring



## **The 2020 Section 326 Nebraska Monitoring Supplemental Documentation Report**

**November 2020**

**Final Supplemental Report**

*\* This is a supplemental companion report containing additional documentation to support the Nebraska 2020 Monitoring Report on the Performance and Quality of the Nebraska Department of Transportation's Categorical Exclusion Assumption Program under 23 USC 326.*

# CONTENTS

<b>Summary and Explanation</b> .....	3
<b>Supporting Information: Background</b> .....	4
<b>Supporting Information: Scope and Methodology</b> .....	4
<b>1. Monitoring Review Participants</b> .....	4
<b>2. 2020 Project File Data Collected</b> .....	6
<b>3. Listing of Interview Questions</b> .....	7
<b>Supporting Information: Observations, Findings and Recommendations (OFR)</b> .....	10
<b>OFR Subpart I: Compliance with Governing Laws, Regulations Executive Orders, FHWA Policy, and the CE MOU Supporting Information.</b> .....	10
<b>1. Observation: CEs as the critical path in project development</b> .....	10
<b>2. Observation: The level of cooperation afforded by NDOT in implementing the program and responding to FHWA requests for information and materials</b> .....	10
<b>a.Lack of NDOT responsiveness to the 2019 Monitoring Report.</b> .....	10
<b>b.FHWA requests for additional information or project records during the period of review subject to this monitoring event</b> .....	11
<b>3.Observation: Implementation of program agreement commitments</b> .....	11
<b>4.Observation: Management, implementation, procedures, and project-level documentation of the environmental review process for Emergency Relief (ER) projects</b> .....	11
<b>5.Observation: Delegation of authorities.</b> .....	16
<b>6.Observation: Agency Coordination</b> .....	16
<b>7.Observation: Agency Coordination</b> .....	16
<b>OFR Subpart II: Processing assigned CE reviews: consistency in assessment and documentation standards as outlined in FHWA-accepted NDOT manuals and as stipulated in Stipulation IV.B. of the MOU.</b> .....	17
<b>OFR Subpart III: Excluded projects; Determination and documentation of CEs excluded from the CE Assignment Program and retained by FHWA as stipulated in Stipulation IV.C. of the MOU</b> .....	17
<b>OFR Subpart IV: Adequate State resources (including provision of financial resources), qualifications, expertise, standards, and training.</b> .....	17
<b>OFR Subpart V: State Quality Control &amp; MOU Performance Monitoring and Quality Assurance</b> .....	17
<b>1. Observation: Quality Control (QC) and Quality Assurance (QA) of NDOT project files for assigned actions</b> .....	17
<b>2. Observation: Procedures for checking technical reviews prior to CE approval or the next major federal approval.</b> .....	17
<b>3. Observation: Quality Control of categorical exclusion documentation.</b> .....	17
<b>Conclusion</b> .....	21

**Appendix A: FHWA 2019 Monitoring Review Cover Letter .....22**  
**Appendix B: Email: Request for 2019 findings and recommendations response.....24**  
**Appendix C: NDOT November 2020 response letter.....29**  
**Appendix D: August 2019 correspondence--2019 ERCE .....34**  
**Appendix E: “NDOT March 2019 Emergency Relief Actions, Summary of Approach” as applied to projects (from NDOT ERCE Batch 4, approved 10/24/19).....41**  
**Appendix F: NDOT 2019 ER Project-Level QC Documentation .....46**  
**Appendix G: NDOT CE Approval Levels .....49**

## Summary and Explanation

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 1508.1(d) and whether the action is specifically listed as a CE within subsections (c) and (d) of 23 CFR 771.117.

Per the MOU, FHWA is required to periodically monitor the NDOT's implementation of this program. To this end in the fall of 2020, FHWA initiated a monitoring event, culminating in what is referred to as "monitoring week", where FHWA interviewed NDOT staff and then provided preliminary review findings to NDOT at the end of that week.

The results of that review, including the methodology, observations, findings, and recommendations can be found in the FHWA report titled, "*A 2020 Monitoring Report on the Performance and Quality of the Nebraska Department of Transportation's Categorical Exclusion Assumption Program under 23 USC 326*" (herein referred to as the 2020 Monitoring Report). This report serves as a companion to the 2020 Monitoring Report.

During the internal review, editing and finalization phases of the draft 2020 Monitoring Report, FHWA elected to move portions of the supporting documentation and details from the 2020 Monitoring Report to a stand-alone companion document, which is this report (herein referred to as the 2020 Supplemental Report). This was done to improve the conciseness and readability of the 2020 Monitoring Report, while maintaining the availability of the pertinent supporting documentation.

The structure of this reports mirrors the 2020 Monitoring Report.

## Supporting Information: Background

*Additional information regarding the background of the review, beyond what is found in the 2020 Monitoring Report, existing guidance, statute, regulations, or internal working files, was not warranted, and therefore was not included in this supplemental report.*

## Supporting Information: Scope and Methodology

*Additional information regarding scope and methodology for the review, specifically information on the participants, the type of data collected as part of the random sample project file review, and a listing of questions used during the interview process can be found within this section.*

### 1. Monitoring Review Participants

*The following is a complete listing of participants in the 2020 monitoring review process:*

#### NDOT Interviewees:

Brandie Neemann, Jeff Soula, Jason Jurgens, Jon Barber, Dillon Dittmer, Stacy Stupka, Kyle Liebig, Kimberly Baker, Christina Bavougian, Jacob Smith, Scott Rupe, John Buhrmann,

#### Other Interviewees:

John Moeschen, Phil Rezac, Adam Nebel – US Army Corps of Engineers  
Brooke Stansberry – US Fish and Wildlife Service (questionnaire interview only, due to schedule constraints)

#### 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.

Zach Kresl, 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.

Tom Bruechert, FHWA Texas Division Environmental Team Leader. Served as project file reviewer; interviewer; commented on interview and project review questions; developed observations, recommendations and findings; and editor of the review report.



Stephanie Perez-Arrieta, HEPE Project Development Team Lead, Report reviewer

Emily Biondi, Director of the Office of Project Development and Environmental Review (HEPE), report reviewer

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

James Simerl, Deputy Division Administrator, report reviewer.

FHWA Midwest Legal Services Team, report reviewer.

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

## 2. 2020 Project File Data Collected

The following is a listing of questions answered for each project reviewed as part of the random sample project review component of the monitoring event:

Project Data Collected Per Project	Information Reviewed Per Project (Responses recorded are Yes, No, or NA <sup>^</sup> . "No" and "NA" responses were explained under comments)		Additional Information Collected
Project Name	1. If the project was authorized for construction, is there a CE certification in the file?	2. If authorized for construction, is the CE certification date prior to construction authorization date?	% of questions answered yes per project
CE Level	3. Is the CE approval date prior to the PS&E turn-in date?	4. Is the CE and supporting documentation in OnBase?	% of question answered yes (i.e. no issues) per informational element reviewed (i.e. the color-block questions to the left)
CFR Action Class	5. For ER projects not in OnBase, have sufficient and complete Environmental records been provided by NDOT?	6. Does the documentation in the file demonstrate reasonable and sufficient effort to identify and document wetlands and other WOUS in the study area?	General project review comments and observations (per project)
Date CE signed	7. Does the documentation in the file demonstrate reasonable and sufficient effort to identify and document impacts to wetlands and other WOUS in the study area? Do avoidance and minimization efforts appear reasonable and documented? If compensatory mitigation is required, is it included?	8. Does the documentation in the file support the expected 404/408 permitting requirements applied to the project, or disclosed in the CE?	Follow-up questions to as NDOT based on observations.
PS&E Turn-in Date	9. Check the HazMat report and/or PQS memo compared to the scope of work for the project. Do they align? If listed as exempt, does the scope of the CE match the exempt list?	10. Is the biology information in the file, does it align with the Matrix requirements (and if it's an emergency ER project, does it align with the PA between NDOT, USFWS, and NGPC for 2019 emergency ER repairs)	General trends across all projects, related to the color-block questions to the left
Authorized for construction date	11. What wetlands documents are in the project file (list)? ** ^	12. 404 Permit needed? If Y, indicate NWP Number. ** ^	
Emergency project? (enter E for emergency ER, IP for permanent ER, UP for urgent-permanent, NA for non-ER projects)	13. If species surveys were required, is survey documentation in the file? ** ^	14. Is a floodplains PQS memo in the CE and/or project file? ** ^	
ER Construction start date	15. Was a 650 analysis conducted? ** ^	16. If a 650 analysis was not conducted, should have one been? ** ^	
State or local project?	17. Section 4(f): Was the proper eligibility and use determination made, were commitments to the OWJ and other 4(f) commitments repeated in the CE?	18. Are the appropriate 4(f) forms in the file? ** ^	
	19. Are the 4(f) forms properly filled-out? ** ^	20. Is the 4(f) information consistent between the 4(f) form(s) and CE? ** ^	
	21. Were road closures, detours, and access restrictions adequately assessed, and were appropriate commitments included?	22. If there was public outreach for the project, were substantive comments adequately considered and addressed?	
	23. If the project occurs within the boundary of tribal or federal lands, is there evidence in the file consultation occurred, was it completed in good faith and in compliance with laws, regulations, and agreements?	24. Are there any quality control issues with the document?	
	25. Are commitments written in an enforceable manner, with identification of responsible parties and clear language used?	26. Is the CE signed, filled out completely, with attachments?	
	27. 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.	28. 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?	
	29. Based on the project record, is there evidence the project is in compliance with NDOTs written policies and procedures?		
^ Exceptions to the standard Y/N/NA only response are indicated by **			
** Responses to these questions did not follow the standard Y/N/NA only response.			
** Only reviewed for standard, non-ER projects			

### 3. Listing of Interview Questions

*The following is a listing of questions asked during the interview component of the review. Not all questions were asked of all interviewees, but all were asked of at least one interviewee.*

#	Question
1	How long have you worked at NDOT and how long have you been in your current position?
2	Please briefly explain your job responsibilities.
3	Please briefly explain your job responsibilities and how they relate to the NDOT environmental program
4	Please briefly explain your job responsibilities as the Environmental Training Manager.
5	In terms of the CE assignment program, what do you think is working well, and what do you think could be improved?
6	How does NDOT decide whether a project should be classified as an EA or EIS? Who is consulted, and how is the decision documented?
7	When reviewing a project that does not clearly fall within the (c) list or (d) list of CE activities within FHWA's CE regulations (23 CFR 771), what do you do? Is there written guidance, and if yes, where can it be found?
8	What tools or techniques are used to ensure that appropriately qualified staff are preparing, reviewing, and approving CEs and/or technical documents at a level commensurate with the staff's level of experience/expertise?
9	What training is the environmental staff required to have to prepare, review, and approve technical environmental documents (ex, apply the matrix, complete Section 4(f) analysis, etc.)?
10	How many environmental training events have you attended in the past year? What were they?
11	How does NDOT monitor, track, and assess the training needs of Environmental Section employees?
12	Who is responsible for providing and maintaining a list/records of all training and training participants? Can you provide training records? How is the training data used within NDOT?
13	Is there a documented training plan for NDOT Environmental Staff? If yes, please provide a copy.
14	The Self-Assessment notes that new NDOT environment staff have completed "NDOT Environmental Section Onboarding training." Please describe what this training consists of, who has completed it, who provides it, and the duration. Also, is this training content documented?
15	The CE MOU Self-Assessment notes that "Both NEPA Assignment attorney designees have completed MOU required legal sufficiency and individual 4(f)," What required training has been completed by each NEPA assignment attorney and who provided this training?
16	Regarding project quality control, NDOT's Self-Assessment states that "Issues are discussed in weekly unit staff meetings..." Does your unit hold weekly meetings, and if yes, how are the issues discussed and decisions made at these meetings documented?
17	We understand that weekly staff meetings are held. Do you attend these meetings? What kind of information is shared during these meetings? How are issues that are discussed and decisions that are made documented?
18	Have the results of the 326 MOU Assignment Self-assessment Performance Report been shared with you? [If interviewer responded "Yes," then the following was also asked:] The self-assessment identified areas for improvement. Do you know if NDOT has a plan to address these areas for improvement, or how do you plan to address these on a project-by-project basis?
19	How often do you reference the NDOT environmental procedure manuals and resource analysis guidance? How do you ensure compliance with those manuals on a per project basis? Do you have suggestions for improvements or see anything missing in the manuals?
20	How often do you reference the NDOT environmental procedure manuals and resource analysis guidance, including the wetlands procedure document? How do you ensure compliance with those manuals on a per project basis? Do you have suggestions for improvements or see anything missing in the manuals?
21	How often do you reference the NDOT environmental procedure manuals and resource analysis guidance, including the Matrix PA and associated material? How do you ensure compliance with those manuals and the matrix on a per project basis? Do you have suggestions for improvements or see anything missing in the manuals?

#	Question
22	Quality Assurance, or QA, is an overarching effort of systematic monitoring and evaluation of a program, including a program of projects, to ensure the standards of quality are met. What QA efforts have you seen or been personally involved with in the past year?
23	Quality Assurance, or QA, is an overarching effort of systematic monitoring and evaluation of a program, including a program of projects, to ensure the standards of quality are met. Describe NDOTs QA program, specifically describe the QA efforts completed in the last year, and what the findings were. Second, were the QA efforts documented?
24	Quality control pertains to review of specific products to ensure standards are met and quality is achieved for that product. Please describe the QC process employed by NDOT for wetland delineations, PCNs, permit applications, and mitigation strategies.
25	According to the self-assessment, "The Quality Assurance Review has been conducted by the NEPA Assignment Manager." Please describe what was reviewed, who participated, and what was found. In addition, was this review documented? Please provide documentation.
26	The self-assessment identifies "areas for improvement where NDOT will be focusing its efforts on in the next reporting period." Describe how NDOT plans to address these areas for improvements.
27	When does coordination/communication occur with the USACE for projects? Do you think coordination should occur more or less often, or stay the same?
28	Explain how mitigations sites are selected, when they are selected, and how their construction is overseen for compliance with the mitigation plan and plan sheets.
29	What is NDOT's process following notification of an incomplete permit application? For example, what is NDOT's timeframe to resubmit, and how do you ensure USACE's comments are addressed so the resubmittal isn't deemed incomplete?
30	Some projects include commitments that require long-term monitoring, or an agreement to complete something later in time. How do you ensure commitments made to complete something in the future are met?
31	Program-level agreements, such as the Section 106 PA or Matrix PA, some project-level agreements, such as process or letter agreements with agencies, and permitting conditions often require long-term monitoring and reporting requirements. How do you ensure commitments made to complete something in the future are met?
32	Permitting for projects often require long-term monitoring and reporting requirements. How do you ensure commitments made to complete something in the future are met?
33	Specific to the disciplines you manage (106, ESA, permitting, etc.), who is responsible for ensuring that the environmental project file in OnBase is complete? What types of documentation are needed to make a complete project file for delineations and permitting? For matrix reviews and ESA/NESCA
34	When you have a project on tribal land, describe the outreach and touch points that occur with the tribe during the environmental review process.
35	When a project is on tribal land, describe the outreach and touch points that occur with the tribe during the ESA/NESCA review process.
36	What happens when a response to a request from an agency or tribe is not received? For example, NPS consultation on a Wild and Scenic River.
37	How is it determined whether a civil rights/EJ memo, or any other PQS memo, is still valid?
38	If there is a change in scope after NEPA is complete, such as the addition or change of a detour route, are you informed? What do you do in response?
39	If, after the CE is completed, it is determined federal funds will be used for utility relocation, what happens? How do you know that federal funds will be used for utility relocations?
40	After NEPA is complete on a local government project, is there a check of the PS&E package compared to the environmental documentation for consistency prior to construction authorization? Who performs this check, and is this review documented?
41	Who is responsible for ensuring that the environmental project file in OnBase is complete? What types of documentation are needed to make a complete project file?

#	Question
42	Specific to water resources, who is responsible for ensuring that the environmental project file is complete in OnBase? What types of documentation for your program area are needed to make a complete project file?
43	Who is responsible for ensuring that the environmental project file in OnBase is complete for ESA/NESCA, Bald and Golden Eagle Protection Act, Fish and Wildlife Coordination Act, etc.? What types of documentation for your program area are needed to make a complete project file?
44	Is there an overarching process for monitoring the quality of the environmental files? Is this process written?
45	Is there an overarching process for monitoring the quality of the environmental files? Is this process written? Are all project files, including permitting records and communications with external agencies and tribes, housed in On-Base?
46	What is used as the official PS&E turn in date? What is the source of PS&E turn-in date information and where can this be found?
47	How do you balance the pressures of meeting schedules and minimizing costs with the need to comply with laws, regulation, and NDOT's procedure manuals?
48	According to the MOU, "The state shall make all reasonable and good faith efforts to identify and resolve conflicts with Federal agencies, State and local agencies, and Indian tribes..., and the public during the consultation and review process." How does NDOT interpret this stipulation, and what steps does NDOT employ to comply with it?
49	When there is a disagreement between the NDOT and resource agencies, what steps are taken by NDOT to resolve the disagreement? Also, what proactive steps have you taken, or others that work for you, to enhance relationships with other agencies, including the USACE?
50	Has there been a time within the past year or so when there has been disagreement between NDOT and an external agency regarding an environmental matter for a project you were working on? If yes, please describe the issue and how it was resolved.
51	When disagreements between USACE and NDOT occur, what steps are taken by NDOT to resolve the disagreement? Have disagreements occurred since the last CE monitoring event (February-March 2019)?
52	For the 2019 ER event, there was an agreement from 7/17/20 that NDOT would review each DDIR site where construction was not yet complete, and for any project that was within 2 miles of an airport or 5 miles for a bridge project, NDOT would coordinate with the aeronautics Division. Do you know how this was implemented and documented on a per site basis? Please provide the documentation if you have it.
53	During the 2019 flood event, did you have clear direction on how to proceed with your work, including documentation requirements? Please briefly describe the direction that was given.
54	What do you think worked well in response to the 2019 ER event within the environmental program, and what do you think could have been improved?
55	When reviewing ER projects, was the review based on the DDIR? Was there a monitoring process or some procedure in place to monitor the DDIR or project for changes after the CE was executed?
56	Please explain NDOT's approach to wetland delineations, permitting, ESA/NESCA compliance, bald and golden eagle protection act compliance, etc. in response to the 2019 ER event? What do you think worked well or could have been improved?
57	Please describe your approach to wetland reviews and permitting for the 2019 emergency and incidental permanent flood event repairs. Also, how were your individual reviews documented?
58	Please walk us through how you made "no affect" determinations for ER projects, and how those determinations were documented? (follow-up: Did the USFWS and NGPC concur with your approach to no affect determinations?)
59	How did you approach the Migratory Bird Treaty Act, Bald and Golden Eagle Protection Act, and Fish and Wildlife Coordination Act for the ER program? How were methods documented, and project-level determinations documented?
60	Have any disagreements between USFWS, NGPC, or the USACE and NDOT occurred since last the last CE monitoring event (February-March 2019) for the program areas you work within? If yes, what steps are taken by NDOT to resolve the disagreement?
61	There is a reputation of strained relationships between the USACE and NDOT. In your opinion, what could be contributing to this strain? Do you have suggestions to help improve the relationship?
62	Do you have any questions for the Interview team, or anything else you'd like to share?

# Supporting Information: Observations, Findings and Recommendations (OFR)

## Introduction

*This section of the report captures the supplemental documentation and results of the 2020 Nebraska CE monitoring review and is subdivided into sections based on the six State Performance Requirements listed in Stipulation IV of the MOU. Under each Performance Requirement subsection, additional documentation for the observations, recommendations, and findings identified as part of the review and in the 2020 Monitoring Report is provided where warranted. To this end, 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-compliance 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, expanding and/or sharing those practices in the future. In some instances, with notification to NDOT, best practices identified during the review may be shared with other assignment states.*

## **OFR Subpart I: Compliance with Governing Laws, Regulations Executive Orders, FHWA Policy, and the CE MOU Supporting Information.**

### **1. Observation: CEs as the critical path in project development**

*Additional documentation, beyond what is found in the 2020 Monitoring Report or working files, was not warranted.*

### **2. Observation: The level of cooperation afforded by NDOT in implementing the program and responding to FHWA requests for information and materials.**

#### **a. The findings and recommendations of the 2019 Monitoring Report.**

In the 2019 CE Monitoring Report and report cover letter (See Attachment A), FHWA requested that NDOT prepare an action plan detailing the corrective steps to resolve the findings contained in the report and provide a copy to FHWA upon finalization. NDOT provided an action plan for one finding in the 2019 Monitoring Report – the delivery of DOT Order 6640.1A policies and procedures in July 2020.

FHWA sent an email to NDOT on October 7, 2020 requesting a status update for providing an action plan for the remaining items from the 2019 Monitoring Report. FHWA started the project review activities for the 2020 monitoring event the week prior (October 1<sup>st</sup>) and information pertaining to the disposition of the 2019 findings and recommendations was needed to help inform the 2020 CE monitoring project review process.

On October 8, 2020, NDOT replied that they felt the action plan was “a recommendation with no specific timeframe or requirement for completion,” and as such, they prioritized other items to improve the CE assignment program ahead of the action plan. On October 19, 2020, FHWA requested some level of response to the findings and recommendations contained in the 2019 report in order to effectively implement the 2020 monitoring event. On October 23, 2020, the NDOT Program Delivery Engineer replied, reiterating their understanding that the action plan was a recommendation, and “suggest[ed] that,

with the [2020] monitoring event right around the corner, FHWA plan to utilize the event to ask any remaining questions about [NDOT's] consideration of FHWA findings from the last reporting period” (See Attachment B).

Subsequently, this issue was elevated, and the Nebraska Division Administrator contacted NDOT's Deputy Director on October 29, 2020 to discuss FHWA's concerns. On November 3, 2020, NDOT issued a letter formally responding to FHWA. The response only included a general NDOT position statement on each of the findings, without mention of the recommendations, corrective actions to be taken, or an action plan (See Attachment C).

On March 4, 2021, FHWA and NDOT held a required 326 Renewal Kickoff Meeting with NDOT, which is required per the MOU to discuss the States performance prior to initiating a renewal. On March 3, FHWA sent NDOT a table containing the findings and recommendations from the 2019 monitoring for use during the renewal kickoff meeting. Although on the agenda, these items were not discussed as NDOT questioned the definition of the term “recommendation”, which took up most of the meeting. The term “recommendation” has been used since 2017, was defined in a September 2018 letter from the FHWA Nebraska Division Administrator to NDOT and was again reiterated in the document submittal coordination guide jointly developed by NDOT and FHWA. Importantly, FHWA reiterated during the meeting that there was no requirement to *implement* recommendations, but FHWA was seeking a response to the recommendations, even if it is a brief statement (e.g., did not implement). FHWA reiterated we were seeking finding and recommendation information in part so we could close out our Stewardship and Oversight efforts from the 2019 review, and so we could develop our 2020 monitoring report. Since it was not discussed during the meeting, FHWA requested NDOT provide a response to the 2019 findings and recommendations table, whether it be through verbal coordination, an email, or some other communication.

Since no response was received, on March 18, 2021, FHWA asked NDOT to add the 2019 findings and recommendations status to the March 24<sup>th</sup> Monthly Environmental Meeting agenda for discussion. During the meeting, FHWA again asked the status of the 2019 findings and recommendations, and again NDOT focused on what the definition of “recommendation” is, without replying to the findings or recommendations. FHWA again reiterated there is no requirement to *implement* recommendations and FHWA is only seeking a *response* to the recommendations in order to inform the 2020 monitoring review and to close out our 2019 Stewardship and oversight efforts. Since NDOT chose to not verbally respond during the meeting to the findings and recommendations, FHWA asked that NDOT provide a written response so that FHWA could close out its efforts and work to finalize the 2020 Monitoring Report. As of the date of this report, no response had been received.

**b. FHWA requests for additional information or project records during the period of review subject to this monitoring event.**

*Additional documentation, beyond what is found in the 2020 Monitoring Report or working files, was not warranted.*

**3. Observation: Implementation of program agreement commitments.**

*Additional documentation, beyond what is found in the 2020 Monitoring Report or working files, was not warranted.*

**4. Observation: Management, implementation, procedures, and project-level documentation of the environmental review process for Emergency Relief (ER) projects.**

FHWA has discussed with NDOT the need for environmental/NEPA ER procedures for over a decade. The 2017 Readiness Assessment also identified the need for ER procedures. Per the Readiness Assessment and a mutual understanding between FHWA and NDOT, environment ER procedures were to be developed prior to

CE MOU execution in September 2018. However, NDOT did not develop such procedures by the time the CE MOU was executed. Upon request by NDOT in the Fall 2018, a six-month extension -- from the date of CE MOU execution -- was granted for the development of the ER procedures with the mutual understanding that interim procedures would be developed. No interim or final procedures were provided within the given six-month extension or thereafter.

In March 2019, there was a massive ER event (flooding) in Nebraska, followed by a separate May 2019 flooding event. At the time of the event and for 5 months following the initial event, there were no ER environmental procedures or environmental review documentation procedures in place for the ER program. Starting in June 2019, NDOT did coordinate with FHWA to develop an ER CE memo template to use to document site specific ER CE reviews. During its development, however, NDOT informed FHWA that the memo format would only be used for ER repairs specific to the 2019 flooding event. Since NDOT chose to develop the ER CE memo template specifically and only for the grouping of 2019 ER repair projects -- rather than holistic technical assistance developing environmental procedures for the Nebraska ER program -- FHWA was precluded from providing technical assistance on the memo. Under the assignment program, FHWA is precluded from participating in assigned project actions, including batching of assigned projects like the 2019 ER batch of projects that was advanced by NDOT (23 U.S.C. 326(b)(2)).

To assist within the capacity available, FHWA did provide limited, broad and generalized environmental program guidance during the 2019 flood events and at the initial stages of NDOT's development of their ER CE memo template (until FHWA was informed the procedures would not apply beyond the specific 2019 ER site reviews). Later, FHWA provided a general written response to a final draft of 2019 ER CE memo template and its attached "NDOT March 2019 Emergency Relief Project Summary of Approach", which was provided by NDOT in August 2019. Importantly, what NDOT provided to FHWA for the requested review was incomplete and was missing some of the material that was referenced as attached (see [Appendix D](#)). Therefore, the missing material was not reviewed by FHWA.

Of note, the ERCE form and its associated summary of approach document that was initially provided to FHWA for review and comment in August 2019 was changed by NDOT without FHWA review, as demonstrated in ERCEs applied to projects. The changed version contained material not previously seen by FHWA, such as filing changes and a change in QC approach which were problematic in application. See [Appendix E](#) for the applied "NDOT March 2019 Emergency Relief Actions Summary of Approach" as contained in NDOT ERCE Batch 4 (approved by NDOT 10/24/19).

- a. ER project records were not available to FHWA: Throughout the ER event and response phase, FHWA reminded NDOT that ER records would need to be stored in OnBase to meet their MOU obligations and align with their procedures. During the early stages of the 2020 monitoring, FHWA learned that over 95% of NDOT's project-specific 2019 ER records were not contained in the OnBase system. Per NDOT's procedures, project records are required to be stored in OnBase.

*From NDOT's Documentation Plan (June 2018), page 1: "As part of fulfilling NEPA responsibilities, NDOT must retain project and general administrative files. To that end, every decision-making document must be included in the project files within NDOT's document management system, OnBase. The Federal Highway Administration (FHWA) will perform a monitoring review on NEPA actions and project files to ensure all required documentation is present."*

Instead of storing files in OnBase, NDOT's 2019 ER CE memo states "it was necessary to deviate from standard processes of utilizing OnBase as the repository for NEPA documentation, and instead, project documentation is captured in the GIS application, Environmental server and/or Bridge server." This decentralizing or spreading project documentation throughout three different locations may have contributed to some of the issues described below. Importantly, this precluded FHWA's access to the materials for the 2020 monitoring review.



Given the volume of ER projects within the population of projects to review during the 2020 monitoring event, approximately half the review projects were 2019 ER projects. Because these records were not available in OnBase, FHWA was required to deviate from its standard random sample approach for the ER project reviews. This delayed the review and required FHWA to change methodologies at the last minute, introducing additional complexities in retrieving requisite data. FHWA was not afforded access to the full ER records. Instead, FHWA had to give a short list of ER projects to NDOT to subsequently generate specific records via email. FHWA requested additional records on multiple occasions, until NDOT verified no additional project-specific records were available.

More specifically, the 2020 Monitoring review found:

- b. Guidance, procedures, and environmental documentation standards for Emergency Relief projects did not exist at the start of the 2019 ER event. NDOT did generate a CE memo template for use in documenting 2019 ER events as well as basic guidance for some environmental review elements five months after the emergency event. Therefore, any repairs that would have occurred prior to this point would have needed to follow the regular federal-aid program environmental review procedures and documentation standards. No evidence of this was found. Either the ER response was delayed five months while the environmental procedures were developed, or repairs occurred without environmental review and/or outside NDOT's established procedures.
- c. Although helpful for their 2019 ER program of projects, the general ERCE memo developed for the event lacked sufficient detail to allow for adequate, consistent and compliant reviews for all resources under the NEPA umbrella of laws, regulations, and executive orders (i.e., aeronautics coordination, Section 4(f), Endangered Species Act (ESA)/Nebraska Nongame and Endangered Species Conservation Act (NESCA), impaired waters review, wetland/Waters of the United States (WOUS) review, etc.). Also, it lacked sufficient instruction on how to document analyses and determinations for resources. For example, the CE memo states: "*if impaired waters were present, further review occurred on the relevant DDIR<sup>1</sup> to determine if NDOT was a contributor, and to determine any necessary mitigation.*" The process for determining/analyzing whether NDOT was a contributor to an impaired water, whether the project would impact an impaired water and in what circumstances mitigations were warranted are unclear and undocumented.
- d. Some 2019 technical ER environmental procedures created by NDOT (i.e., aeronautic coordination, hazardous materials review and ESA/NESCA coordination) led to two potential procedural tracks of environmental review for a project. One track was for repairs that were in construction or had already been constructed prior to environmental review and consultation. The other track was for repairs that had yet to occur.

From the NDOT 2019 ER CE template memo regarding Hazardous Materials: "*A potential for medium or high impact resulted in coordination with the District to determine whether work was complete; if work was not yet complete, reasonable attempts to mitigate were explored and implemented.*" During the review, evidence of this coordination could not be found in the records.

In addition, there is an NDOT commitment with the Aeronautics Division via email dated July 17, 2019 to coordinate repair projects yet to occur if they are within 10 miles of airports. Although there were ER projects within the sample that occurred within 10 miles of an airport, evidence of this coordination could not be found in the records.

For ESA/NESCA compliance, NDOT's July 31, 2019 memo (contained as an attachment to the CE memo) states "*Sites were analyzed based on the assumption that work was complete if the action was designated as 'emergency' repairs or 'permanent repairs incidental to emergency repairs.'*" Additionally, there is no

---

<sup>1</sup> Detail Damage Inspection Report.

documentation within the CE memo that NDOT coordinated with NGPC and USFWS on the approaches detailed in the July 31 memo (see “g.” below for more information).

Because of this two-track approach for some technical environmental reviews, FHWA asked NDOT for a list of construction start dates for the sample of ER repair projects under review for the 2020 monitoring effort. From FHWA’s email data request on October 22, 2020, *“There are a few commitments/procedures that change, depending upon whether the emergency work had already been completed (ex, asbestos on bridges). For the sample project list we provided, please give us the start date for the repairs, so we have an understanding of what procedures applied to which projects. If [the] specific day isn’t known, please provide a small date range (ex, work began the 3rd week of August 2019).”* The Review Team intended to use this information to determine which review track was used per project, to determine if the interim procedures were correctly followed, and whether it was performed in compliance with commitments made to external agencies.

NDOT’s November 17, 2020 response, via email attachment:

*“With the exception of a limited number of permanent repair projects, NDOT was completing environmental reviews with an assumption that the reviews were occurring ‘after the fact’ and all work was complete. For certain large projects where it was understood that construction would be ongoing into the next construction season, NDOT attempted to exercise professional judgement for commitments that could be implemented for remaining work.*

*“Given the magnitude of this catastrophic emergency event, NDOT did not have it in its processes a feasible manner for collecting ‘construction start date’ information for each site and therefore the Environmental Section cannot provide this information to FHWA. NDOT may consider this as we develop agency ER procedures.”*

Without information on when construction started, it is unclear how NDOT employed these two-track approaches, per their commitments made to the agencies (Department of Aeronautics, USFWS, NGPC). Also, it was impossible for the Review Team to determine whether the appropriate track was applied to the ER projects reviewed as part of this monitoring event.

- e. Timing of the start of repairs compared to the timing of completing NEPA reviews was not possible for the Review Team to determine. As noted above, NDOT was not able to produce records to demonstrate when construction started for the subset of ER projects reviewed and therefore, the Review Team could not determine the timing of the NEPA determination and associated permitting compared to when the repair action occurred.

As noted by NDOT in the response referenced above, *“NDOT was completing environmental reviews with an assumption that the reviews were occurring ‘after the fact’ and all work was complete”*. While there is an understanding that stabilization and repair efforts needed to immediately protect life and property at the time of the flooding event itself should not be delayed for the sake of environmental reviews, it is also understood that many of these repair projects started weeks to months after the emergency event.

Independently and separately from the individual repair efforts, the FHWA did request and receive verification that environmental reviews and permits were complete prior to authorizing funds to reimburse repairs in FHWA’s Financial Management Information System (FMIS) through an amended construction authorization form for the ER event.

- f. Specific resource review records were missing from all the project files provided to FHWA. For example, evidence of Section 4(f) reviews was not provided for the ER projects. From NDOT’s March 2019 ER procedure memo pertaining to Section 4(f): *“NDOT NEPA Specialists reviewed each DDIR individually utilizing available GIS layers to check for Section 4(f) resources; this look was documented within the ER*

*GIS application rather than the standard process of utilizing the 4(f) Initial Assessment form.” On October 22, 2020, FHWA asked for, but did not receive this documentation per ER project.*

- g. NDOT reviews for ESA and NESCA did not follow Matrix procedures for some ER projects. For ESA reviews, impaired water reviews, Section 4(f), and WOUS determinations the project record was limited to only stating “no impact” with no basis for that determination provided. For example, the records did not indicate whether a “no impact” or “no use” was due to lack of resources being present, avoidance of resources that are present or another reason. For ESA and NESCA reviews, not only was the documentation insufficient to demonstrate the determination was not arbitrary or capricious, but it also did not follow established review protocols as set forth in the Matrix PA. Nor, was it captured in the 2019 ER interim agreements with the USFWS and NGPC. For 404 permitting needs, no delineations or permitting materials were provided with the ER records. There would frequently be a “no impact” statement printed from a table, but no supporting information was provided. More specifically, on October 22, 2020, FHWA sent an email to NDOT, noting: *“The March 2019 ER procedures memo (attached to the CEs) contains a reference to the following material, but we don’t seem to have it..... ‘the email addendum to the Letter dated June 14, 2019 from Nebraska Game and Parks Commission, the email addendum to the Letter dated June 18, 2019 from United States Fish and Wildlife Service’. Please provide these addendums.”*

Based on coordination with NGPC and USFWS, these agencies were not coordinated with regarding NDOT’s approach to making and documenting no effect determinations for the 2019 ER events which was a deviation from the Matrix PA. As outlined in NDOT’s July 31, 2019 memo, NDOT based no effect determinations upon the magnitude of the scope of work. From the memo, *“If the project scope indicated that work to repair damage would be minor (i.e. shoulder repair, gravel placement, ditch debris cleanout) in nature, then the project received an effect determination of “no effect” and if the project scope indicated that work to repair damage would be more extensive in nature (i.e. entire or multiple construction seasons), then the project received an effect determination of “may affect, not likely to adversely affect” or “may affect”.*

There is no documentation within the CE memo that NDOT coordinated with NGPC and USFWS on the approaches detailed in the July 31 memo or that the agencies concurred with this approach. When an example of the ER no effect documentation was shared with the NGPC, NGPC expressed concerns with the level of documentation. In addition, basing a species affect determination on whether a project is viewed as “minor” or “extensive” is arbitrary, not supportable by science or data and does not comply with statute.

- h. Of the ER projects reviewed, two of the projects were misclassified as (c)(9) eligible activities as they required additional ROW, which is not allowed under 23 CFR 771.117(c)(9).
- i. Per program requirements, an environmental certification using the appropriate standard NDOT form is required for all projects. The certification was not provided for the 2019 ER projects. None of the event-specific ER procedures developed by NDOT provided an alternative approach to certification and therefore it appears this step did not occur for the 2019 ER projects.
- j. Quality control (QC) records were not provided per project following the established NDOT QC protocol using the standard forms. A deviation from this procedure was not disclosed to FHWA in August 2020 when NDOT provided their 2019 ERCE memo and overview of approach to FHWA for a “red-flag” review. However, the following statement was found in ERCEs reviewed as part of this monitoring event: *“A full deviation of standard processes occurred in this instance and the standard QC form was not utilized. After document preparation, QC reviewed occurred by either a NEPA Specialists, Environmental Project Managers or the NEPA Assignment Manager as reflected in field ‘QC Review Date’ found in the FIS Application. The Environmental Document Unit Manager approval also serves as a QC review.”* The Review Team requested QC records for the ER projects, which NDOT provided. The QC documentation consisted of a single table of all projects in our ER subset as evidence of QC. The documentation table only included the specific ER subset we requested. The simplicity of the table itself appears insufficient to demonstrate adequate QC reviews occurred per project, and consists only of the project identifier, the date

someone completed QC, and the date the CE was signed. See [Appendix F](#) for the QC documentation table that was provided.

- k. Per NDOT procedures, a Green Sheet is issued for all projects. The Green Sheet demonstrates NEPA and technical reviews are complete, contains mitigation for the project, and includes as attachments the associated permits for the project. No Green Sheets were provided for the ER projects.

**Successful Practices (Repeated from the 2020 Monitoring Report):**

- a. The FHWA monitoring review team recognize that the magnitude of the flooding events required NDOT staff to quickly mobilize and develop strategies to manage the increasing demands made upon their normal workloads as well as revise approaches to project environmental reviews in order to mitigate the effects of this major disaster. That recognition also came out in our interviews of NDOT environmental program leadership in recognizing that NDOT Environmental program staff applied creativity and hard work in performing their best to respond to this event.
- b. For ER reviews, NDOT developed a GIS application within a few months after the flooding events, to perform screening and assessments of possible environmental resources that could be affected by repair projects. While we commend the development of the GIS tool as a successful practice for screening purposes, we observed through the project file reviews and interviews that it was not a successful substitute for a fuller assessment nor for meeting documentation requirements.
- c. Through the ER project file reviews, FHWA observed thorough assessments and documentation for the Section 106 of the National Historic Preservation Act (NHPA) and floodplain reviews. NDOT staff who developed these approaches and applied them at the project-level are commended for their efforts.

**Summary ER Finding (Repeated from the 2020 Monitoring Report):** The Emergency Relief environmental review program is not compliant with the stipulations of the MOU or FHWA’s implementing regulations. The non-compliant actions were discovered in the missing documentation in project reviews, incomplete and inconsistent procedures based on review of NDOT’s review procedures and confirmed through staff interviews. Based on the efforts of the review team, we could not determine whether NEPA and technical reviews were completed consistently or in a timely manner. NDOT did not comply with stipulations contained in IV.F. of the CE MOU or their document retention procedures for the 2019 ER project records, did not follow NDOT review procedure for project certification or Green Sheets, did not follow established protocols as set forth in the Matrix PA, and misclassified some of the CE determinations as compliant with 23 CFR 771.117(c)(9).

*NOTE, repeated from the 2020 Monitoring report: The Nebraska 2018 Section 326 MOU expired prior to the issuance of this final report. The 2021 Section 326 MOU renewal MOU excluded the ER program from assignment until such time as the stipulations within the 2021 326 MOU are satisfied. Furthermore, interim coordination procedures between FHWA and NDOT for ER events were developed by FHWA and captured in Appendix B of the Nebraska Division Risk-Based Stewardship and Oversight Touch-Point Guide.*

**5. Observation: Delegation of authorities.**

*Additional documentation, beyond what is found in the 2020 Monitoring Report or working files, was not warranted.*

**6. Observation: Agency Coordination.**

*Additional documentation, beyond what is found in the 2020 Monitoring Report or working files, was not warranted.*

**7. Observation: Agency Coordination.**

*Additional documentation, beyond what is found in the 2020 Monitoring Report or working files, was not warranted.*

**OFR Subpart II: Processing assigned CE reviews: consistency in assessment and documentation standards as outlined in FHWA-accepted NDOT manuals and as stipulated in Stipulation IV.B. of the MOU.**

*Additional documentation, beyond what is found in the 2020 Monitoring Report or working files, was not warranted.*

**OFR Subpart III: Excluded projects; Determination and documentation of CEs excluded from the CE Assignment Program and retained by FHWA as stipulated in Stipulation IV.C. of the MOU.**

*Additional documentation, beyond what is found in the 2020 Monitoring Report or working files, was not warranted.*

**OFR Subpart IV: Adequate State resources (including provision of financial resources), qualifications, expertise, standards, and training.**

*Additional documentation, beyond what is found in the 2020 Monitoring Report or working files, was not warranted.*

**OFR Subpart V: State Quality Control & MOU Performance Monitoring and Quality Assurance.**

**1. Observation: Quality Control (QC) and Quality Assurance (QA) of NDOT project files for assigned actions.**

*Additional documentation, beyond what is found in the 2020 Monitoring Report or working files, was not warranted.*

**2. Observation: Procedures for checking technical reviews prior to CE approval or the next major federal approval.**

*Additional documentation, beyond what is found in the 2020 Monitoring Report or working files, was not warranted.*

**3. Observation: Quality Control of categorical exclusion documentation.**

During both the 2019 and the 2020 monitoring event, the Review Team again identified QC issues. In 2020, most 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, and as mentioned, project files were missing required documentation. The Review Team was unable to determine if peer reviews were completed by staff experienced to perform QC and could not find evidence of NDOT management providing QC of peer reviews, specific QC comments or what QC review details were provided by peer reviewers regarding errors and omissions.

Specific to the regular federal-aid program, examples of errors include but are not limited to the following:

Sample of Issues Observed within regular federal-aid program CEs reviewed	CE approval level, and QC issue type
For the project, there was a commitment for the contractor to provide a groundwater management plan to NDOT environmental. However, there was no documentation in the file or that it was reviewed (project was in construction at the time of the review).	CE level: 2 Missing file content
In the 4(f) Initial Assessment form, none of Section 2 was completed. There was also no explanation of why an eligible property was not carried forward for analysis. The mitigation language in the CE was also inaccurate, as it states <i>“the contractor will not complete work...within the boundaries of ...the Niobrara NSR”</i> ; however, work must occur within these boundaries since the road passes through the boundaries.	CE Level: 1 Documentation QC Assessment QC
T&E conservation condition S-3 was included in the PQS memo and technical documentation, but it was omitted from CE.	CE Level: 1 Documentation QC Assessment QC
The Biological Assessment (BA) notes that a survey occurred; however, survey reports were not found in OnBase. Also, the BA agency and tribal correspondence was not in the project file.	CE Level: 3 Missing file content
The overall project description is difficult to understand and based on the CE and attachments, it is unclear whether the bridge closure is due to project construction or flooding. Regarding the closure, the traffic disruption block in the CE was checked, noting that there would be a detour longer than 30 days. However, there was no indication of the actual duration of the detour which would be important information for determining impacts and significance.	CE Level: 2 Documentation QC Assessment QC
The Section 4(f) Initial Assessment form states there will be a use of a protected trail in one section, then in another section states they’ll be no use of the trail. Also, the same form says a use of campground would occur, but then the CE states there is no use of the campground.	CE Level: 2 Assessment QC
For batched projects, the ESA Matrix review could only be found in one of the batched project files in OnBase and not in the files for the other batched projects.	CE Level: 2 Missing file content
The T&E reevaluation was not saved within the OnBase T&E folder.	CE Level: 2 Missing file content
The resource review in the CE states that detours/closures would not occur; however, a mitigation stipulates that the project would not result in closures/detours greater than 30 working days. This insinuates that closures/detours could be allowed if less than 30 days and without prompting a NEPA reevaluation. (repeat QC issue from 2019 monitoring event)	CE Level: 1-2 (3 projects) Documentation QC
The 4(f) Initial Assessment form states there is a “no adverse effect” to register-eligible sites and therefore no 4(f) use, however the form lacked justification for the “no use” determination. Additionally, there is no mention of the historic properties (archaeological sites/district) within the 4(f) blocks of the CE.	CE Level: 2 Documentation QC, Assessment QC
Due to a day-long sidewalk closure resulting from the project, a detour route for pedestrians was identified. The NDOT Civil Rights Specialist specifically identified this detour route because it would be more appropriate for ADA purposes. While there was a commitment (mitigation) to post signs to warn pedestrians of the sidewalk closure, there was no mitigation to sign the detour route. Without identifying this detour route in a mitigation and requiring signing of the detour, it is unclear how the project contractor would be made aware of the need for this designated detour route, and ultimately how pedestrians would be notified of/guided along this ADA-friendly route.	CE Level: 1 Documentation QC, Assessment QC
The project description in the CE states that an aspect of the scope of work would be determined at the plan-in-hand which is typically held prior to the CE being approved. In addition, the project description was updated during final design. Therefore, this statement should have been updated in the project description form and CE. Depending on the scope item, changes to the scope could have affected certain resource reviews (e.g. T&E, wetlands)	CE Level: 1 Documentation QC Missing file content
The CE included a mitigation to obtain a floodplain permit; however, this permit was already obtained so this mitigation was unnecessary.	

<p>Project was identified within 4 miles of an airport. The CE states that NDOT would coordinate with the Department of Aeronautics (DOA). However, per the CE instructions, this coordination should have occurred during NEPA.</p>	<p>CE Level: 1 Documentation QC Assessment QC Missing file content</p>
<p>Within the 4(f) Initial Assessment form, Section 3 (determination of use) was not completed.</p>	<p>CE Level: 1 Documentation QC</p>
<p>The project includes a temporary closure of a local road due to its proximity to bridge repairs on US-30; however, it is not identified as a closure in the CE check box. Not mentioned in the CE, this local road is a grade-separated underpass at the railroad crossing and is one of only two crossings within the town limits (with the other crossing being at-grade). CE Block 15.8 notes that because local road <i>“is anticipated to carry a very low amount of traffic, a detour was determined to not be required.”</i> Federal-aid projects in Nebraska require a designated detour route for all road closures. Based on the documentation provided in the file and CE, impacts from closing the local roadway were not adequately considered or mitigated.</p> <p>The CE states that segments of road that would be under construction for this project would be used as a detour for another project, occurring at the same time. Of note is that the road that would be used as a detour would be constructed under traffic with lane closures; however, the CE does not mention the lane closures and, therefore, does not analyze the potential effects of detouring traffic onto a road with lane closures.</p>	<p>CE Level: 2  Documentation QC  Assessment QC</p>
<p>Sometime between the project description updates on 6/12/2018 and 10/30/2019, the project termini were extended. In reviewing the available project descriptions on OnBase, the project length extensions are not identified in the “Updates/Reviews” section or elsewhere in the form. Therefore, it is difficult to discern whether these extensions were considered during the original technical environmental reviews or if reevaluations were warranted.</p>	<p>CE Level: 2  Documentation QC  Assessment QC</p>
<p>The CE states asbestos was found in structure 30013. The hazardous materials PQS memo is silent on asbestos at structure 30013. However, the Asbestos Containing Materials (ACM) Survey Report issued before the CE and PQS memo, notes that said structure was investigated and tested negative for asbestos. Regarding different structures on the project, the findings section in the hazardous materials PQS memo identified the wrong bridges as testing positive for asbestos (structure 29338 tested positive, but the PQS memo listed it as structure 228).</p>	<p>CE Level: 2  Documentation QC  Assessment QC</p>
<p>The approved Public Involvement Procedure (PIP) that was current at the time of the public involvement review was not followed. Detours, with out-of-distance travel of up to 16 miles and durations of 2-3 days for each interchange ramp closure, were included with the project. However, public involvement determined outreach during NEPA was not required and therefore, did not occur. Per the approved PIP: <i>“at a minimum, the public will be engaged through a targeted mailer when: a detour...is used”</i> (PIP, pp. 14, 16-17).</p>	<p>CE Level: 2  Documentation QC  Assessment QC</p>
<p>The 4(f) Block (2.3) in the CE lists mitigations rather than description of resources/impacts. Also, the CE mitigation didn’t include one of the Section 4(f) properties identified for avoidance in the Initial Assessment Form, and as such, this property was not marked on the plans for avoidance.</p>	<p>CE Level: 2 Documentation QC Assessment QC</p>
<p>Two previously recorded historic sites were identified, but not located during surveys. They were also not evaluated for NRHP eligibility since they would not be impacted (according to the Section 106 records). However, the records show it was later determined there would be minimal impacts at these sites. This was not reflected in the 4(f) discussion, and the Historic properties block (10.1) in the CE indicated there are no listed or eligible properties within the APE. Furthermore, the finding of No Historic Properties Affected may have not been the correct determination and the 106 PQS supplemental evaluation doesn't clearly state whether the NHPA determination is still appropriate.</p>	<p>CE Level: 2  Documentation QC  Assessment QC</p>
<p>Based on project records, there appears to be potential for interference with two local events during construction. The CE is checked “no” for interference with local events; however, justification to support this statement is not provided. Based on records, it appears the project</p>	<p>CE Level: 3  Documentation QC</p>

<p>detour route will occur during, and will go through, the location of one of the events. In addition, an exposition which, per public comments, brings heavy traffic to the system is also held in the Town. While the CE mentions that there would be increased traffic volumes during these events, there is not an assessment regarding how the project, when combined with these events, will impact the roadway network, the community, or the events.</p> <p>The public also noted concerns about agriculture-related transport impacts during harvest season if the detour is not removed within the 60 days promised by NDOT and prior to September. However, the CE mitigation says the detour must not extend beyond 135 days.</p> <p>Furthermore, multiple public comments were received requesting construction to occur when school is not in session to avoid interference with the school bus route. While the responses to public comments indicated that the closure/detour is anticipated to occur during the summer to avoid impacts to school bus routes, the CE notes that the construction end date is anticipated to be 8/31/2021 and acknowledges that the detour would be in place for a couple of weeks while school is in session.</p> <p>A commenter expressed concerns about tourism traffic for the local communities and the potential for economic effects resulting from the closure and detour occurring in spring and fall. NDOT's response to the commenter did not address this concern.</p>	Assessment QC
Sensitive areas were not included in the E sheets in CE attachments, as required.	CE Level: 1 Documentation QC
Wetlands PQS memo states a non-notifying NWP 3 would be used, but the next sentence states a 404 permit is not needed.	CE Level: 1 Documentation QC Assessment QC
The Section 4(f) Initial Assessment form refers to a single school property by different names, causing confusion as to which 4(f) properties are being discussed. The middle school, instead of the high school, was incorrectly carried to the mitigation. Additionally, the historic properties were not discussed in the Section 4(f) Initial Assessment form, per the instructions.	CE Level: 1 Documentation QC
Multiple issues in Matrix SEP form, including: ginseng Heritage database blocks checked both "Yes" and "No" in Step 1; responses were missing for the northern long-eared bat and Pallid Sturgeon habitat questions in Step 2; and blowout penstemon and curlew county listings were answered "No" in Step 1, but species' habitat question(s) were then answered in Step 2, which is incorrect. Required conservation conditions were missing.	CE Level: 1 Documentation QC Assessment QC
There are multiple project files where the ESA agency consultation materials are missing. There are multiple project files where T&E, migratory bird, and eagle surveys are missing.	Multiple Missing file content

Based on the above sampling, it is noteworthy that the most complex CEs (level 3) had the fewest noted errors (total of 2 errors/omissions). Importantly, Level 3 CEs go through a more robust QC review which includes an NDOT manager level review and approval. Most errors/omissions identified during the review were CEs that receive less stringent review and no manager review or approval demonstrated. From the table above, 12 errors/omissions were identified for CE level 1 projects and 13 errors/omissions were identified for CE Level 2 projects, respectively. Although missing file content was listed the least frequently in the table, some references pertained to multiple projects. Therefore, in the categories of document review QC errors, errors in assessment and missing file material, there is not a single category that stands out as being the primary source of the issues. For more information on the scope of what NDOT has approved for review under CE Levels 1, 2, and 3, and NDOT's delegation of staff approval authority for each CE level, please see Appendix H.

Importantly, through interviews with NDOT staff, FHWA learned program-level Quality Assurance actions only occur as part of the MOU-required self-assessment report. Through the life of the 2018 MOU, only one self-assessment report had been generated (October 2020). Additionally, based upon the 2020 monitoring review, NDOT does not appear to have an overall process to identify and capture QC trends at the project level, which could then inform QA improvements.



**Recommendation (repeated from the 2020 CE Monitoring Report):** NDOT should consider whether the review and approval authorities designated as CE level 1, 2, and 3 by NDOT are appropriate for achieving the necessary quality control needed under the assignment program, in particular in light of the frequency of environmental staff turnover (see Observation IV.1).

**Finding (repeated from the 2020 CE Monitoring Report):** As required by Stipulation IV.F.2 of the MOU, FHWA and NDOT shall cooperate in monitoring performance of the MOU, and monitoring “Performance considerations will include, without limitation, the quality and consistency of the State’s project determinations...” As demonstrated by this observation and the parallel observation from the 2019 Monitoring Report, the quality and consistency of the State’s project determinations must improve. Furthermore, NDOT is not fully adhering to MOU Stipulation IV.E, including subpart 2, which states “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.”

As Stipulated under IV.F.7. of the MOU and repeated from the 2020 Nebraska CE Monitoring Report:, “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 USC 326, and other applicable Federal laws and regulations.” To that end, FHWA requests that NDOT establish a written, documented QA procedure for quarterly program QA oversight by NDOT with a goal of decreasing project file and CE documentation and assessment errors and omissions. FHWA requests a copy of the quarterly QA procedure be provided within 120 days of issuance of the 2020 Monitoring final report, with implementation of the first quarterly NDOT review within 180 days of issuance of the final 2020 Monitoring report. A written summary of each quarterly QA effort, including a summary of any program adjustments made in response to the quarterly QA review, will be provided to FHWA prior to the next quarter. This requirement will be adjusted, as needed, based on the results of the next FHWA Section 326 Monitoring effort.

## Conclusion

This report acts as supplemental documentation and is a companion to the 2020 Nebraska CE Monitoring Report.

During the 2020 Monitoring review, the Review Team identified several practices NDOT has employed to successfully deliver their program. In addition, the Team identified recommended process improvements for NDOT’s consideration that could, when implemented, improve program effectiveness, efficiency, and/or transparency and could increase efficiencies in process and review timing. The review Team also identified several findings that require NDOT prepare an action plan detailing the corrective steps NDOT will take to resolve each of the findings identified, with a copy of the action plan provided to FHWA within 120 days of the final 2020 Monitoring Report. For a complete listing of the Observations, Findings and Recommendations from the 2020 Monitoring event, refer to the 2020 Monitoring Report.

## Appendix A: FHWA 2019 Monitoring Review Cover Letter



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

**NEBRASKA DIVISION** 100 Centennial Mall North, Room 220  
Lincoln, NE, 68508

June 18, 2020

402-742-8460  
Fax: 402-742-8480  
Nebraska.FHWA@dot.gov

Kyle Schneweis, P.E.  
Director  
Nebraska Department of Transportation  
Lincoln, NE

Dear Mr. Schneweis:

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 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 accordance with the MOU, FHWA is required to periodically assess NDOT's implementation of the MOU stipulations. The first FHWA Monitoring Review under the MOU was conducted by FHWA in the Spring 2019. FHWA met with NDOT to provide preliminary findings from the Monitoring Review on March 29<sup>th</sup>, 2019. Since that time, FHWA has provided NDOT with a draft copy of the report for review and comment, has met with NDOT to discuss the findings and recommendations in more detail and has also met with NDOT to discuss the project-specific items identified by the review team in more detail.

From the review, FHWA identified approximately a dozen innovative practices NDOT has employed to successfully deliver the program. In addition, the FHWA review team provided recommended process improvements that could, if implemented, improve program effectiveness, efficiency and/or transparency. FHWA also identified instances where full or partial non-adherence to requirements occurred, and in these instances, also provided recommendations to address these findings at the program level.

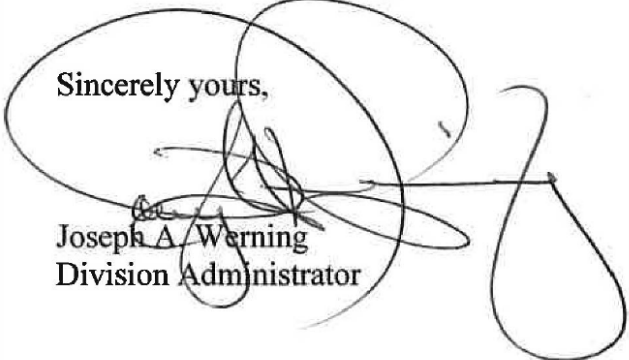
FHWA finds that NDOT is compliant with the terms of the MOU, but there are a number of findings that require NDOT action to ensure substantial compliance. FHWA anticipates that NDOT will respond to this review by making necessary program modifications, which FHWA will assess during a subsequent monitoring event. With these program modifications, NDOT will more fully satisfy the requirements of the CE MOU. FHWA recommends that NDOT prepare an action plan detailing the corrective steps to resolve the findings contained in the report. Once finalized, please provide a copy of the action plan to the FHWA Nebraska Division.

More detailed information on the findings, recommendations and successful practices identified during the review are outlined in the enclosed final Monitoring Report. Importantly, the

Monitoring Report was finalized in consideration of the draft report comments provided by NDOT as well as the additional information provided by NDOT subsequent to the Monitoring Review event.

As a friendly reminder and per the MOU stipulations, please post the Final Monitoring Report to NDOT's website. FHWA looks forward to our continued partnership and, if requested, remain available to provide technical assistance to NDOT to the extent allowable under the MOU. As always, FHWA appreciates your and your staff's time, patience and assistance in conducting and finalizing this review.

Sincerely yours,



Joseph A. Werning  
Division Administrator

Enclosure: 2019 CE MOU Monitoring Report

cc: Khalil Jaber, NDOT  
Brandie Neeman, NDOT  
Jason Jurgens, NDOT  
Melissa Maiefski, FHWA  
Owen Lindauer, FHWA  
Jomar Maldonado, FHWA

## Appendix B: Email: Request for 2019 findings and recommendations response

**From:** [Neemann, Brandie](#)  
**To:** [Maiefski, Melissa \(FHWA\)](#); [Jurgens, Jason](#)  
**Cc:** [Liebig, Kyle](#); [Kresl, Zachary \(FHWA\)](#); [Petracek, Sue \(FHWA\)](#)  
**Subject:** RE: 2019 CE MOU Monitoring report  
**Date:** Friday, October 23, 2020 2:36:10 PM

**CAUTION:** This email originated from outside of the Department of Transportation (DOT). Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Melissa,

Thank you for your October 19<sup>th</sup> response. There are several items contained in this request, so I want to make sure I address each of them.

First, regarding a response to Findings and Recommendations to the 2019 FHWA review, NDOT understands that FHWA is requesting an action plan that addresses each of the findings from the 2019 Monitoring Report, referring to both the cover letter and the final Monitoring Report as evidence of the request. FHWA has also indicated that they reviewed the Self-Assessment, recently provided to FHWA by NDOT, and found it to be lacking such an action plan.

Based on the Monitoring Report and its cover letter, NDOT understood the “action plan” to be a recommendation. Below, I have included the contents of both, highlighting the specific areas that influenced our conclusion:

1. From the monitoring report cover letter:

*FHWA finds that **NDOT is compliant** with the terms of the MOU, but there are a number of findings that require NDOT action to ensure substantial compliance. FHWA **anticipates that NDOT will respond** to this review by making necessary program modifications, which **FHWA will assess during a subsequent monitoring event**. With these program modifications, NDOT will more fully satisfy the requirements of the CE MOU. **FHWA recommends that NDOT prepare an action plan** detailing the corrective steps to resolve the findings contained in the report. Once finalized, please provide a copy of the action plan to the FHWA Nebraska Division.*

2. The final Monitoring Report, in both the Executive Summary and Conclusions section, uses very similar language.
3. In addition, recommendations are defined by the final Monitoring Report as follows:

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

In addition, FHWA cites IV.F.4 of the MOU in making the above-noted request. However IV.F.4 pertains to project and administrative records maintained and referenced in the State’s record

retention schedules, and not the creation or modification of program level documents, as requested by FHWA. Provision IV.F.4 provides:

*The State shall maintain **project and administrative records** pertaining to...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.*

Furthermore, NDOT could find no requirement in the MOU that states the self-assessment must address the findings, observations or recommendations in monitoring report. Per IV.F.2 of the MOU, the self-assessment report should identify any areas where improvement is needed and what measures the NDOT is taking to undertake those improvements. We are confident that the self-assessment report, transmitted to FHWA on October 16, 2020, met those requirements.

We apologize if there has been confusion with regard to the action plan. As is evident from NDOT's Self-Assessment report, NDOT took many of FHWA's recommendations into account as it engaged in the Self-Assessment exercise as required by the MOU. We suggest that with the monitoring event right around the corner, FHWA plan to utilize the event to ask any remaining questions about consideration of FHWA findings from the last reporting period.

Referring to the second item in your email below, documentation on final design, NDOT is on track to provide this deliverable by October 30<sup>th</sup>.

Finally, in response to the extra item, SOP for submittals to FHWA, Kyle Liebig will be responding to this, and a couple other items, by the end of the day today.

Thanks,  
Brandie

---

**From:** Maiefski, Melissa (FHWA) <melissa.maiefski@dot.gov>  
**Sent:** Monday, October 19, 2020 11:31 AM  
**To:** Neemann, Brandie <Brandie.Neemann@nebraska.gov>; Jurgens, Jason <Jason.Jurgens@nebraska.gov>  
**Cc:** Liebig, Kyle <kyle.liebig@nebraska.gov>; Kresl, Zachary (FHWA) <zach.kresl@dot.gov>; Petracek, Sue (FHWA) <Sue.Petracek@dot.gov>  
**Subject:** RE: 2019 CE MOU Monitoring report

Thanks Brandie for the additional information.

Regarding a response to Findings and Recommendations from the 2019 FHWA review: In order to effectively complete the current monitoring event, FHWA respectfully requests some level of response to our 2019 findings and recommendations as soon as possible, in compliance with IV.F.4. of the MOU. I waited to make this request, thinking there may be a response within the self-assessment, and while I did see reference to a few items, I didn't see a response to the majority of findings and recommendations identified by FHWA in 2019.

Regarding the 2019 final design finding deliverable, thanks for letting me know the product will be late. We will do our best to provide any feedback on the submittal prior to December 11, 2020, assuming we receive it by October 30<sup>th</sup>. If the submittal will be delayed, please let me know.

In addition, one extra item – I had sent the latest version of the document submittal process to NDOT 2 weeks ago. There was one slight modification, noting that if multiple program documents were submitted at the same time, FHWA *may* need additional review time. By the end of this week, please let me know if NDOT has any comments or concerns regarding the adjustment so we can finalize that procedure.

Thanks,  
Melissa

---

**From:** Neemann, Brandie [<mailto:Brandie.Neemann@nebraska.gov>]

**Sent:** Thursday, October 8, 2020 12:55 PM

**To:** Maiefski, Melissa (FHWA) <[melissa.maiefski@dot.gov](mailto:melissa.maiefski@dot.gov)>; Jurgens, Jason <[Jason.Jurgens@nebraska.gov](mailto:Jason.Jurgens@nebraska.gov)>

**Cc:** Liebig, Kyle <[kyle.liebig@nebraska.gov](mailto:kyle.liebig@nebraska.gov)>; Kresl, Zachary (FHWA) <[zach.kresl@dot.gov](mailto:zach.kresl@dot.gov)>; Petracek, Sue (FHWA) <[Sue.Petracek@dot.gov](mailto:Sue.Petracek@dot.gov)>

**Subject:** RE: 2019 CE MOU Monitoring report

**CAUTION:** This email originated from outside of the Department of Transportation (DOT). Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Melissa,

Thank you for reaching out on these items from the 2019 monitoring event. Here's an update on the two items noted.

Regarding the first item, an action plan to address recommendations made during monitoring, NDOT believed that development of this document was a recommendation and did not have a specific timeframe or requirement for completion. Since the 2019 monitoring event concluded, NDOT has prioritized other action items, including project delivery needs and various CE assignment activities to improve the CE assignment program.

The second item, documentation on final design, is nearly complete. We have developed revisions to Ch 1, the Roadway Design Manual and PCM guidance for state projects. These items are complete and could be provided to FHWA immediately. The PCM guidance, the final deliverable for this package, was not developed by us and did not meet our expectations. We are working with Local Assistance Division to better document the PCMs for their projects, which as you know, have some nuances in process compared to NDOT projects.

Unfortunately, we will not be able to complete the Local Assistance PCM guidance until later this month. My apologies for not reaching out when we missed the original submittal goal. We do think

it's important to send a complete package of documentation, and would do so by **COB Friday, October 30, 2020**. If you would like us to send the completed items ahead of time, let me know.

Given the new delivery date for a complete package, please advise if FHWA can provide review and comment for implementation by December 11, 2020. We are confident that these procedures, while not formally documented, are already functioning quite well. We are happy to report that since the 2019 monitoring event, our success rate has increased drastically. In fact, NDOT data indicates that 100% of our regular state program projects and 88% of our regular local program projects have NEPA approved before final design.

Thanks,  
Brandie

---

**From:** Maiefski, Melissa (FHWA) <[melissa.maiefski@dot.gov](mailto:melissa.maiefski@dot.gov)>  
**Sent:** Wednesday, October 7, 2020 5:23 PM  
**To:** Jurgens, Jason <[Jason.Jurgens@nebraska.gov](mailto:Jason.Jurgens@nebraska.gov)>; Neemann, Brandie <[Brandie.Neemann@nebraska.gov](mailto:Brandie.Neemann@nebraska.gov)>  
**Cc:** Liebig, Kyle <[kyle.liebig@nebraska.gov](mailto:kyle.liebig@nebraska.gov)>; Kresl, Zachary (FHWA) <[zach.kresl@dot.gov](mailto:zach.kresl@dot.gov)>; Petracek, Sue (FHWA) <[Sue.Petracek@dot.gov](mailto:Sue.Petracek@dot.gov)>  
**Subject:** 2019 CE MOU Monitoring report

Hello, hopefully everyone is doing well. I wanted to take a moment to check the status of the findings and recommendations from the 2019 326 CE MOU monitoring event.

1. FHWA had recommended, in the report itself and the cover letter, that NDOT provide an action plan for addressing the findings within the report. The Division does not have a record of receiving this recommended action plan. From the monitoring report cover letter:

*FHWA finds that NDOT is compliant with the terms of the MOU, but there are a number of findings that require NDOT action to ensure substantial compliance. FHWA anticipates that NDOT will respond to this review by making necessary program modifications, which FHWA will assess during a subsequent monitoring event. With these program modifications, NDOT will more fully satisfy the requirements of the CE MOU. FHWA recommends that NDOT prepare an action plan detailing the corrective steps to resolve the findings contained in the report. Once finalized, please provide a copy of the action plan to the FHWA Nebraska Division.*

2. Separate, there was a specific finding within the report to which FHWA requested a response within one month of issuance of the final report. From the report:

***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.*

NDOT did provide a schedule and tentative approach for this specific finding on 7/17/2020 via email, directed to our DA and copied to me (attached). Based on this document, NDOT was scheduled to provide a draft response package to the Division for review no later than September 18, 2020, with a goal of FHWA review and concurrence on the package by 10/16/2020. To date, I haven't received the referenced response package. With your requested review and concurrence date fast approaching, please let me know when we can expect to receive your official submittal. When submitting, please be sure to use our official submittal process (send to official mailbox with a cc to me and Zach).

Please let me know if there are any questions, and I look forward to receiving the referenced materials,

Melissa

Meissa Maiefski  
Program Delivery Team Lead  
FHWA-Nebraska Division  
100 Centennial Mall North, room 220  
Lincoln, NE 68508  
402-742-8473



## Appendix C: NDOT November 2020 response letter

**NEBRASKA**

Good Life. Great Journey.

DEPARTMENT OF TRANSPORTATION

November 3, 2020

Joe Werning  
Division Administrator  
Federal Highway Administration  
100 Centennial Mall N Rm 220  
Lincoln, NE 68508-3803

Subject: Response to FHWA Recommendation for NDOT Action Plan Detailing Corrective Steps to Resolve Findings from the 23 U.S.C. §326 Monitoring Report (the Report)

Dear Mr. Werning:

Thank you for your recent call to discuss ongoing concern regarding FHWA's request for an NDOT action plan detailing corrective steps taken in response to the findings contained in the CE Monitoring Event Report. The intention of this letter is to attempt to resolve any lingering concerns regarding this issue.

On October 19, 2020, FHWA emailed NDOT requesting "some level of response to our 2019 findings and recommendations as soon as possible, in compliance with IV.F.4." Brandie Neemann responded to FHWA on October 23, 2020, indicating that NDOT believed there was a misunderstanding, because NDOT did not read the CE Monitoring Report recommendation regarding a corrective action plan ("recommendation" defined in the Report as "suggested actions to change or improve the conditions described by the observation") to be a required action. Ms. Neemann suggested in her email that FHWA review the results of NDOT's self-assessment where it was clear FHWA recommendations were taken into consideration, and that we discuss any further questions FHWA had about corrective actions during the upcoming monitoring event. We believed this to be an honest misunderstanding, and in the interest of efficiency simply wished to avoid creating an additional task for NDOT to complete and FHWA to review so close to the upcoming monitoring event.

On October 29, 2020, you and I visited on the phone, and you expressed your continued concern that NDOT has not met this provision of the Report; therefore, NDOT has attempted to meet your request for a formal response regarding corrective action in the bullets set forth below:

Kyle Schneiders, PE Director

Department of Transportation

**MAILING ADDRESS**

PO Box 94759  
Lincoln, NE 68509-4759

**PHYSICAL ADDRESS**

1500 Highway 2  
Lincoln, NE 68502

**PHONE** 402 477 4567

**EMAIL** [NDOT.ContactUs@nebraska.gov](mailto:NDOT.ContactUs@nebraska.gov)

[dot.nebraska.gov](http://dot.nebraska.gov)

**Finding (1):** 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.

**NDOT Corrective Action:** Kyle Liebig, NEPA Assignment Manager, is notified prior to documents being posted to our website for use in order to ensure that they have been submitted to FHWA for review prior to implementation by NDOT. In addition, NDOT and FHWA have worked together to create an SOP to address this Finding, and the SOP is in final drafting.

**Finding (2):** 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."

**NDOT Corrective Action:** NDOT has added a question to the DR53 to verify that the project is assignable. The EDU Manager has also trained staff regarding this topic during regular staff meetings held by the EDU Manager. In addition, NDOT has improved its QA/QC process to review for this item. Finally, NDOT included a question on this topic when conducting its Self-Assessment review. Notably, during the Self-Assessment review, NDOT found no instances of CE approval of non-assignable projects.

Kyle Schneeweis, PE, Director

Department of Transportation

MAILING ADDRESS

PO Box 94759  
Lincoln, NE 68509-4759

PHYSICAL ADDRESS

1500 Highway 2  
Lincoln, NE 68502

PHONE 402-477-4567

EMAIL [NDOT.Center@dot.nebraska.gov](mailto:NDOT.Center@dot.nebraska.gov)

[dot.nebraska.gov](http://dot.nebraska.gov)

**Finding (3):** 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).

**NDOT Corrective Action:** NDOT has a system in place for checking and documenting for this item. Environmental Certifications are required for all Federal-aid projects and are reviewed by NDOT Environmental Project Managers for non-Metropolitan Planning Organizations (MPO) local projects and reviewed by the MPO for their local projects. In addition, PS&E processes include this element in order to complete the Construction Authorization Form. This topic was also reviewed during NDOT's self-assessment, and all projects that had been let during the self-assessment period of review had an Environmental Certification contained in the project file.

**Finding (4):** NDOT does not have a process to rechecking NEPA compliance when federal funds are provided to utility companies after NEPA is completed.

**NDOT Corrective Action:** NDOT typically does not use federal aid for utility relocations for state projects. However, if the utility work is known at the time of NEPA evaluation (i.e., included in the construction plans and let as part of the transportation project), it is reviewed and included in NEPA documentation. In addition, NEPA documentation includes a construction commitment requiring notification to NDOT for re-evaluation consideration in the event utility relocations on federal aid projects are discovered. NDOT is currently developing the Project Coordination Meeting (PCM) process used for State Projects to be utilized for Local Projects, which would verify whether utility relocations not previously addressed by the approved NEPA Documentation would be carried out with federal funds. Finally, the Environmental Certification contains a question asking if the project is consistent with the NEPA documentation; this check verifies that the contents of the plans package are consistent with the NEPA documentation.

**Finding (5)(a):** 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.

**Finding (5)(b):** 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.

Kyle Schneiders, P.E. Director

Department of Transportation

**MAILING ADDRESS**

PO Box 94759  
Lincoln, NE 68509-4759

**PHYSICAL ADDRESS**

1500 Highway 2  
Lincoln, NE 68502

**PHONE:** 402-471-4567

**EMAIL:** [NDOT.ContactUs@nebraska.gov](mailto:NDOT.ContactUs@nebraska.gov)

[dot.nebraska.gov](http://dot.nebraska.gov)

**NDOT Corrective Action (5)(a):** This issue was discussed with FHWA on May 7, 2020 (draft monitoring response meeting), and during this meeting Mr. Maldonado indicated that FHWA Division offices have received internal guidance on this subject. It was acknowledged, however, that NDOT had not been provided this guidance (see CE MOU Section IV.A.5). NDOT requested this information, but to date has not received the internal guidance. Upon receipt, NDOT will review its CE guidance to see if modifications are necessary. In the interim, the EDU Manager has trained staff regarding this topic during regular staff meetings held by the EDU Manager. In addition, NDOT included this item as part of its Self-Assessment review and found no instances of use of more than one CE activity in CE Documentation during the most recent monitoring period.

**(5)(b):** FHWA's finding regarding processing of public comments is addressed in NDOT's new Public Involvement Procedure (Chapter 9 of the Environmental Procedures Manual, Section 9.6).

**Finding (6):** 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.

**NDOT Corrective Action:** As noted in the finding, NDOT notified FHWA immediately and corrected the issue with the Division office. The EDU Manager discussed this topic with staff during regular staff meetings held by the EDU Manager. In addition, NDOT included a question on this topic when conducting its Self-Assessment review, and the results confirmed that this is no longer an issue.

**Finding (7):** 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.

**NDOT Corrective Action:** NDOT is unclear how this relates to CE MOU Section IV.F.4. However, it is NDOT's observation that development of a training plan is a priority 4 gap, which we understood were due within 6 months of implementation of full NEPA assignment. The draft schedule for full NEPA assignment has been provided to FHWA.

Kyle Schneeweis, PE, Director

Department of Transportation

MAILING ADDRESS

PO Box 94759  
Lincoln, NE 68509-4759

PHYSICAL ADDRESS

1500 Highway 2  
Lincoln, NE 68552

PHONE: 402.477.4367

EMAIL: [NDOT.ContactUs@nebraska.gov](mailto:NDOT.ContactUs@nebraska.gov)

[dot.nebraska.gov](http://dot.nebraska.gov)

# NEBRASKA

Good Life. Great Journey.

DEPARTMENT OF TRANSPORTATION

**Finding (8):** The majority of CEs reviewed contained substantive errors that should have been captured and prevented through adequate QC protocols.

**NDOT Corrective Action:** NDOT continues to be committed to accuracy in our CE Documentation and included a review of QA/QC as part of our Self-Assessment. As identified in our Self-Assessment Report, NDOT was mindful of the examples provided in the Report and identified minor errors and inconsistencies. NDOT will continue to address the importance of accuracy with staff during ongoing Environmental Section and Unit meetings.

In closing, we thank you for the opportunity to resolve this issue prior to the upcoming Monitoring Event. NDOT appreciates the input FHWA provides regarding potential improvements to our CE program. Please feel free to contact me if you have any further questions or concerns regarding this issue.

Sincerely,



Khalil Jaber  
Deputy Director – Engineering

cc: Kyle Liebig, NEPA Assignment Manager, Project Development Division

## Appendix D: August 2019 correspondence--2019 ERCE

**From:** [Maiefski, Melissa \(FHWA\)](#)  
**To:** [Liebig, Kyle \(kyle.liebig@nebraska.gov\)](#); [Jurgens, Jason \[Jason.Jurgens@nebraska.gov\]](#)  
**Cc:** [Stapp, Scott \(FHWA\)](#); [Petracek, Sue \(FHWA\)](#); [Burroughs, Marv \(FHWA\)](#)  
**Subject:** FHWA response: Draft ERCE Package for Review  
**Date:** Thursday, August 1, 2019 5:33:16 PM  
**Attachments:** [Draft ERCE Package.pdf](#)

---

Hi Kyle, FHWA reviewed the attached and offers the following feedback....

- From the CE assignment readiness assessment, Gap 77 remains (creation of environmental ER procedures). Our understanding is that this effort is specific to the March 2019 flood event, but that it will continue to evolve into the ultimate procedures that would satisfy Gap 77. Therefore, our review and comment is specific to program-level recommendations, in the spirit of the CE MOU stipulations IV.A.7 and 9.
- The NDOT email, below, indicates the form will only be used for emergency (temporary repairs), and incidental permanent repairs. The form/memo itself does not specify this. To minimize risk of misapplication to stand-alone permanent repairs, the form should be clarified.
- To be clear, any and all impacts from the federal action need to be disclosed and assessed, even if they are not specifically listed in the table provided. As a recommendation, you may want to add an "other" column to the table, where impacts that are not otherwise listed in the table could be captured per action, as applicable.
- To minimize NDOTs risk, consider adding more information to the HazMat element of the "Summary of Approach". From the text: "A potential for medium or high impact resulted in coordination with the District to determine whether work was complete; if work was not yet complete, reasonable attempts to mitigate were explored and implemented. With regard to bridge projects, each DDIR was reviewed individually for potential asbestos or lead impacts, and coordination occurred with NDHHS." What happens if the project proponent/contractor spreads hazardous materials, or if asbestos/lead paint was released? The approach does not explain this aspect, but it should be captured somewhere. This same question could apply to other elements in the review – what happens if there is/was an impact? Some areas seem to explain what would occur, but others do not.
- Public Involvement plan – we're still operating under the 2015 PIP – to minimize NDOTs risk, consider documenting the PI that occurred and how it complies with the approved PI plan, for your records.
- Several of the elements within the "Summary of Approach" provide some explanation of process to demonstrate the action is still being reviewed by NDOT to determine and disclose impacts and that the review will still get to the same outcome as established procedures, however other elements do not. For example, the text under Section 4(f) and 6(f) demonstrate the assessment steps that will be followed, and that the assessment outcome will be similar to the outcome of existing procedures (are there properties, will there be a use, and if there is a use, the process and documentation will then follow normal 4(f)/6(f) procedure). However, the information provided for EJ and Section 106 do not adequately demonstrate what process would be followed, nor that the outcome would be consistent with the outcome of the existing procedures/agreements. Perhaps the additional information is within the noted supplemental documents, but since they were not provided, FHWA does not know if the information is there. NDOT should ensure the process and consistency element is documented somewhere, to minimize NDOT risk.
- Within the Table, we recommend:

- Including an acronym list, so acronyms used are clear to all users/reviewers
  - Clarifying what “construction related access restrictions” and “Construction related traffic restrictions” mean
  - For T&E Tribal, T&E federal, and THPO coordination, clarify if the response means “coordination is required and was completed” (yes/no), or if it means something else
  - It is our understanding that only 1 CE category will be used for all actions reviewed using a common table (for example, all actions listed within one table will all be approved using only c9). To help prevent a misstep, FHWA would recommend adding this stipulation to the memo, the summary of approach, or table.
- For the record, the attachments referenced within the ERCE package were not included, and therefore were not reviewed by FHWA.
  - We assume that as needed, backup/support information will be kept in the project file.

Hopefully the feedback is helpful,

Melissa

Sue, s/ER and s/env, thanks

---

**From:** Liebig, Kyle [<mailto:kyle.liebig@nebraska.gov>]

**Sent:** Thursday, August 1, 2019 11:05 AM

**To:** Maiefski, Melissa (FHWA) <[melissa.maiefski@dot.gov](mailto:melissa.maiefski@dot.gov)>; Stapp, Scott (FHWA) <[scott.stapp@dot.gov](mailto:scott.stapp@dot.gov)>; Petracek, Sue (FHWA) <[Sue.Petracek@dot.gov](mailto:Sue.Petracek@dot.gov)>

**Cc:** Neemann, Brandie <[Brandie.Neemann@nebraska.gov](mailto:Brandie.Neemann@nebraska.gov)>; Jurgens, Jason <[Jason.Jurgens@nebraska.gov](mailto:Jason.Jurgens@nebraska.gov)>; Barber, Jon <[Jon.Barber@nebraska.gov](mailto:Jon.Barber@nebraska.gov)>; Dittmer, Dillon <[Dillon.Dittmer@nebraska.gov](mailto:Dillon.Dittmer@nebraska.gov)>; Huxoll, Jennifer <[Jennifer.Huxoll@nebraska.gov](mailto:Jennifer.Huxoll@nebraska.gov)>

**Subject:** Draft ERCE Package for Review

Good Morning Melissa and Scott,

Attached you will find our draft Emergency Relief CE package that will be utilized for all ER projects designated as emergency or urgent permanent/permanent repairs incidental to emergency repairs.

We are requesting a red flag review to be completed by FHWA Division office. As we discussed yesterday, the timing for this review is pretty short. We would like to have your comments back as early as possible tomorrow (Friday).

Please let us know if you have questions along the way.

Thanks,

**Kyle Liebig**

*Environmental Project Manager*



## March 2019 Emergency Relief Categorical Exclusion

### DEPARTMENT OF TRANSPORTATION

Under the *Memorandum of Understanding Between Federal Highway Administration, Nebraska Division and the Nebraska Department of Transportation, State Assumption of Responsibility for Categorical Exclusions*, as authorized by 23 USC §326 (herein referred to as the CE MOU and CE Assignment), the Federal Highway Administration (FHWA) has delegated approval authority of certain Categorical Exclusion (CE) actions to the Nebraska Department of Transportation (NDOT). The environmental review, consultation, and other actions required by applicable Federal environmental laws for the attached projects are being, or have been, carried out by NDOT under CE Assignment pursuant to the CE MOU.

NDOT has developed this Emergency Relief Categorical Exclusion (ERCE) to document review and approval of actions taken as a result of a declared emergency event causing damage to transportation facilities and which qualify for listing under 23 CFR 771.117, including emergency repair work and permanent repairs, including permanent repairs incidental to the emergency repair.

This ERCE addresses activities resulting from the disaster declared by the Governor of the State of Nebraska, effective March 12, 2019, and by the President of the United States, resulting in Major Disaster Declaration DR-4420 declared March 21, 2019, for the incident period of March 9, 2019 to April 1, 2019.

NDOT has reviewed these actions and has determined they meet the definition of a categorical exclusion contained in 23 CFR 771.117. These actions were reviewed per 23 CFR 771.117(a) and (b), to determine if any unusual circumstances were in existence that would result in the need for a higher level NEPA analysis (i.e., the preparation of an Environmental Assessment or an Environmental Impact Statement), and no unusual circumstances were identified.

Individual reviews have been conducted for each location and are documented in the attachments. Programmatic assessments have been utilized for Environmental Justice, Public Involvement, Noise and Air, and are attached, along with a summary explanation of approaches by resource. Each site has been reviewed for applicable permitting considerations, and documentation of any permits (if required) will be available in the project file.

Indirect effects from these actions are not anticipated. These actions will not induce growth, change land uses, substantially change travel patterns within a community, or substantially impact water quality, drainage patterns, or other resources of concern. Because no substantial human, environmental, or economic impacts have been identified for this project; no cumulative impacts are expected.

The State has determined that these actions have no significant impact(s) on the environment and that there are no unusual circumstances as described in 23 CFR 771.117(b). As such, these actions are 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.

NDOT Environmental Unit Document Manager:

PLEASE PRINT

Signature

Date



# NDOT March 2019 Emergency Relief Projects

## Summary of Approach

### **All Resources/Collection and Review Tool:**

Due to the magnitude of the March 2019 catastrophic flood event, NDOT developed a streamlining tool utilizing a custom ESRI GIS web application called the ER DDIR App to streamline the environmental review process. The bedrock data for the ER DDIR App consists of the information input into the individual DDIRs; this data was pulled from the FHWA MSAR application.

Inside the ER DDIR App are multiple GIS layers of information that assist the reviewers to perform their environmental review. Each discipline/resource must complete a series of questions relevant to their respective area of review as it relates to the emergency event. Additional details about the methodology of the ER DDIR App is available upon request.

The attached Table represents NDOT's documentation of the *result* of each discipline's/resource's individual DDIR review utilizing the ER DDIR App.

The purpose of this summary is to provide background and explanation of NDOT's *approach* or process for performing individual DDIR review for the March 2019 emergency event.

### **Hazardous Materials:**

NDOT PQS reviewed each DDIR individually to determine whether the projects were exempt from hazardous material review. If the project was exempt, no database review was completed. If the project was not exempt, NDOT completed a database review to determine the potential for impacts, and the table reflects the potential – low, medium or high. A potential for medium or high impact resulted in coordination with the District to determine whether work was complete; if work was not yet complete, reasonable attempts to mitigate were explored and implemented. With regard to bridge projects, each DDIR was reviewed individually for potential asbestos or lead impacts, and coordination occurred with NDHHS. See Table for Hazardous Materials results of review.

### **Noise/Air:**

After a general review of the March 2019 emergency event, NDOT PQS determined a programmatic response to be appropriate because the March 2019 emergency repair and urgent permanent projects are not considered Type I projects; therefore, no noise study is warranted. No air quality analysis is needed as all counties in Nebraska are in attainment. In addition, the aforementioned actions have no meaningful potential mobile source air toxics (MSAT) effects; therefore, no MSAT analysis is warranted. See the *Noise and Air Programmatic Assessment*.

### **Public Involvement:**

NDOT officials attempted to engage the public and provide as much information and involvement as possible in response to the March 2019 emergency event, however no formal project by project public involvement occurred. A programmatic response was prepared to reflect NDOT's efforts, and no documentation is contained in the table except to the extent the NEPA Specialist

reviewed the project to ensure it met the parameters of the programmatic assessment. See the *Public Involvement Review for the NDOT March 2019 Emergency Relief Program*.

**Environmental Justice:**

After an NDOT PQS review of the March 2019 emergency event, the PQS determined a programmatic response, rather than an individual review of each DDIR was appropriate in response to the March 2019 emergency event. No documentation is contained in the table except to the extent the NEPA Specialist reviewed the project to ensure it met the parameters of the programmatic assessment. See the *Environmental Justice Review for the NDOT March 2019 Emergency Relief Program*.

**Section 106:**

See May 3, 2019 letter to Jill Dolberg, Deputy State Historic Preservation Officer re: the March 2019 Major Nebraska Disaster/Emergency Response Streamlining Process, and the June 12, 2019 email addendum to the Letter.

**Threatened and Endangered Species (T&E):**

See May 7, 2019 letter to U.S. Fish and Wildlife Service and Nebraska Game and Parks Commission re: the March 2019 Major Nebraska Disaster/Emergency Response Streamlining Process, the email addendum to the Letter dated June 14, 2019 from Nebraska Game and Parks Commission, and the email addendum to the Letter dated June 18, 2019 from U.S. Fish and Wildlife Service.

**Airport Coordination:**

NDOT PQS coordinated with NDOT Division of Aeronautics, and agreed that NDOT would review each DDIR individually, and would coordinate for incomplete/ongoing projects within two miles of an airport, and any incomplete/ongoing bridge projects within 10 miles of runway endpoints. See Table for Airport results of review.

**Section 4(f) and Section 6(f) review:**

NDOT NEPA Specialists reviewed each DDIR individually utilizing available GIS layers to check for 4(f) resources. If 4(f) resources were present, further review occurred on the relevant DDIR for any 4(f) use. If a 4(f) use was found, NDOT utilized its usual forms and guidance, with the exception of the SmartForm.

With regard to Section 6(f), if a Section 4(f) use was detected, Section 6(f) review occurred by contacting the Nebraska Game and Parks Commission (NGPC) to determine if the property utilized Land and Water Conservation Funds. If the property did utilize Land and Water Conservation Funds, NDOT will coordinate with NGPC to determine if a conversion is necessary. See Table for results of 4(f)/6(f) review.

**Wetlands:**

NDOT PQS reviewed each DDIR for scope and description of work, and depending on the activity and potential impacts, performed analysis (desktop reviews, delineations and/or determinations), and developed a permitting strategy (notifying/non-notifying Nationwide Permit or Individual Permit). If the scope of the project and impacts did not meet the criteria for a Nationwide Permit,

then NDOT PQS would coordinate with USACE and prepare Individual Permit applications and/or related documentation. See Table for the results of Wetland reviews.

**Farmland:**

NDOT NEPA Specialists reviewed each DDIR individually to determine if additional ROW was acquired. If ROW was acquired, the NEPA Specialists utilized available GIS layers to check whether there was prime, unique, or farmland of state/local significance. If these resources were present, NDOT utilized its usual forms and guidance, with the exception of the SmartForm.

**WSR/NRI:**

NDOT NEPA Specialists reviewed each DDIR individually utilizing available GIS layers to check for WSR/NRI resources in the area. If the project occurred within or near the boundaries of a WSR/NRI resource, then coordination occurred with NPS officials. Coordination is summarized within the Table.

**Floodplains:**

After a review of the March 2019 emergency event, NDOT Floodplains PQS determined a programmatic response was appropriate in response to the March 2019 emergency event. No documentation is contained in the table except to the extent the NDOT Floodplains PQS reviewed the project to certify that it meets the parameters of the programmatic assessment. See the *Floodplains Programmatic Assessment*.

**Unique and Impaired Waters:**

NDOT PQS reviewed each DDIR individually utilizing available GIS layers to check for impaired waters in the area. If impaired waters were present, further review occurred on the relevant DDIR to determine if NDOT was a contributor, and to determine any necessary mitigation.

In addition, NDOT PQS reviewed each DDIR individually to determine if stormwater permitting requirements were applicable.



## **Appendix E: “NDOT March 2019 Emergency Relief Actions, Summary of Approach” as applied to projects (from NDOT ERCE Batch 4, approved 10/24/19)**

### **NDOT March 2019 Emergency Relief Actions Summary of Approach**

#### **All Resources/Collection and Review Tool:**

Due to the magnitude of the March 2019 catastrophic flood event, the NDOT developed an environmental review streamlining tool that utilizes a custom ESRI Geographic Information Systems (GIS) web application called the Emergency Relief (ER) Detailed Damage Inspection Report (DDIR) App. The source data for the ER DDIR App consists of the information input into the individual DDIRs, which originated from FHWA’s Mobile Solution for Assessment and Reporting (MSAR) application. The GIS Application serves as the central repository for Environmental documentation and review.

Inside the ER DDIR App are multiple GIS layers of information that assist the reviewers to perform their environmental review. Each discipline/resource must complete a series of questions relevant to their respective area of review as it relates to the emergency event. Additional details about the methodology of the ER DDIR App is available upon request.

The attached Table represents NDOT’s documentation of the *result* of each discipline’s/resource’s individual DDIR review which utilized the ER DDIR App.

The purpose of this summary is to provide background and explanation of NDOT’s *approach* or process for performing individual DDIR review for the March 2019 emergency event.

The actions analyzed and approved through this ER process deviate from standard process as set forth below.

#### **Project File:**

The standard documentation repository (OnBase) utilizes project control numbers to catalogue project documentation, including NEPA documentation; during this ER event, projects were tracked primarily by DDIR ID’s, and not all projects resulted in an assigned project control number at the time of ERCE approval. As such, it was necessary to deviate from standard processes of utilizing OnBase as the repository for NEPA documentation, and instead, project documentation is captured in the GIS application, Environmental server and/or Bridge server.

#### **SmartForm Documentation:**

A full deviation of standard process occurred as the GIS Application takes the place of SmartForm. A table will be generated in lieu of the standard output from SmartForm. The actions presented in the table will be based on like activity code (23 CFR 771.117), e.g., actions listed under a C(9) will only be processed or batched with other actions categorized as C(9).

#### **Professionally Qualified Staff (PQS) Memos:**

By and large PQS Memos are absent from the documentation, however, the GIS Application captured all relevant PQS Memo criteria and all actions were reviewed by NDOT PQS. In some instances additional information was needed to fully understand the Environmental review, and was captured in a traditional PQS Memo or in further attachments contained within the ERCE.

**Probable Class of Action (NDOT-53):**

A full deviation of standard process occurred in this instance and the NDOT-53 was not utilized. However, a designation of Class of Action did occur in the review and approval of all DDIRs, which is found within the MSAR application.

**Right of Way (ROW):**

The attached Table indicates if ROW was required or needed for each action, based off of the information found in the DDIR. ROW for the ER Event may include any of the following: Right of Entry, Easements (Permanent or Temporary), and/or Acquisitions. NDOT ROW Division will provide ROW Certification prior to obligation.

**Hazardous Materials:**

NDOT Professionally Qualified Staff (PQS) reviewed each DDIR individually to determine whether the projects were exempt from hazardous material review. If the project was exempt, no database review was completed. If the project was not exempt, NDOT completed a database review to determine the potential for impacts, and the table reflects the potential – low, medium or high. A potential for medium or high impact resulted in coordination with the District to determine whether work was complete; if work was not yet complete, reasonable attempts to mitigate were explored and implemented. With regard to bridge projects, each DDIR was reviewed individually for activities that would result in potential asbestos or lead impacts. If an activity was present, coordination occurred with Nebraska Department of Health and Human Services and documented in the ER DDIR App. See Agreement for the Disposal of Bridge Debris between NDOT and DHHS, concurred on October 3, 2019, and see Table for Hazardous Materials results of review.

**Noise/Air:**

After a general review of the March 2019 emergency event, NDOT PQS determined a programmatic response to be appropriate because the March 2019 emergency repair and urgent permanent projects are not considered Type I projects; therefore, no noise study is warranted. No air quality analysis is needed as all counties in Nebraska are in attainment. In addition, the aforementioned actions have no meaningful potential mobile source air toxics (MSAT) effects; therefore, no MSAT analysis is warranted. See the *Noise and Air Programmatic Assessment*.

**Public Involvement:**

NDOT officials attempted to engage the public and provide as much information and involvement as possible in response to the March 2019 emergency event, however no formal project by project public involvement occurred. A programmatic response was prepared to reflect NDOT's efforts, and no documentation is contained in the table except to the extent the NEPA Specialist reviewed the project to ensure it met the parameters of the programmatic assessment. See the *Public Involvement Review for the NDOT March 2019 Emergency Relief Program*.

**Environmental Justice:**

After an NDOT PQS review of the March 2019 emergency event, the PQS determined a programmatic response, rather than an individual review of each DDIR was appropriate in response to the March 2019 emergency event. No documentation is contained in the table except to the extent the NEPA Specialist reviewed the project to ensure it met the parameters of the programmatic assessment. See the *Environmental Justice Review for the NDOT March 2019 Emergency Relief Program*.

**Section 106:**

See May 3, 2019 letter to Jill Dolberg, Deputy State Historic Preservation Officer re: the March 2019 Major Nebraska Disaster/Emergency Response Streamlining Process, and the June 12, 2019 email addendum to the Letter.

**Threatened and Endangered Species (T&E):**

See May 7, 2019 letter to U.S. Fish and Wildlife Service and Nebraska Game and Parks Commission re: the March 2019 Major Nebraska Disaster/Emergency Response Streamlining Process, the email addendum to the Letter dated June 14, 2019 from Nebraska Game and Parks Commission, the email addendum to the Letter dated June 18, 2019 from United States Fish and Wildlife Service, and the July 31, 2019 memo to Project File documenting NDOT's process. As noted in the July 31, 2019 memo, NDOT reviewed every project for the possibility that work was not complete. However, due to the multi-faceted, agency-wide approach of addressing the ER event, in some instance work was already complete by the time of Environmental review, and in some instances, attached commitments could not be implemented.

**Airport Coordination:**

NDOT PQS coordinated with NDOT Division of Aeronautics, and agreed that NDOT would review each DDIR individually, and would coordinate for incomplete/ongoing actions within two miles of an airport, and any incomplete/ongoing bridge projects within 10 miles of runway endpoints. If coordination was required, the Division of Aeronautics reviewed the project and provided commitments for the contractor. Those commitments were forwarded to the contractor through the Construction Division or Local Assistance Division for those incomplete/ongoing actions. For actions that were complete and within the 2/10 mile areas, no coordination was required per Department of Aeronautics. See Table for Airport results of review.

**Section 4(f) and Section 6(f) review:**

NDOT NEPA Specialists reviewed each DDIR individually utilizing available GIS layers to check for Section 4(f) resources; this look was documented within the ER GIS application rather than the standard process of utilizing the 4(f) Initial Assessment form. If 4(f) resources were present, further review occurred on the relevant DDIR for any 4(f) use. If a 4(f) use was found, NDOT utilized its usual forms and guidance, with the exception of the SmartForm.

With regard to Section 6(f), if a Section 4(f) use was detected, Section 6(f) review occurred by contacting the Nebraska Game and Parks Commission (NGPC) to determine if the property utilized Land and Water Conservation Funds. If the property did utilize Land and Water Conservation Funds, NDOT will coordinate with NGPC to determine if a conversion is necessary. See Table for results of 4(f)/6(f) review.

**Wetlands:**

NDOT PQS reviewed each DDIR for scope and description of work, and depending on the activity and potential impacts, performed analysis (desktop reviews, delineations and/or determinations), and developed a permitting strategy (notifying/non-notifying Nationwide Permit or Individual Permit). If the scope of the project and impacts did not meet the criteria for a Nationwide Permit, then NDOT PQS would coordinate with United States Army Corps of Engineers (USACE) and prepare Individual Permit applications and/or related documentation. See Table for the results of Wetland reviews.

**Farmland:**

NDOT NEPA Specialists reviewed each DDIR individually to determine if additional ROW was acquired. If ROW was required, the NEPA Specialists utilized available GIS layers to check whether there was prime, unique, or farmland of state/local significance. If these resources were present, NDOT utilized its usual forms and guidance, with the exception of the SmartForm.

**Wild and Scenic Rivers (WSR)/National Rivers Inventory (NRI):**

NDOT NEPA Specialists reviewed each DDIR individually utilizing available GIS layers to check for WSR/NRI resources in the area. If the project occurred within or near the boundaries of a WSR/NRI resource, then coordination occurred with NPS officials. Coordination is summarized within the Table.

**Floodplains:**

After a review of the March 2019 emergency event, NDOT Floodplains PQS determined a programmatic response was appropriate in response to the March 2019 emergency event. The table indicates the NDOT Floodplains PQS reviewed the project to certify that it either meets the parameters of the programmatic assessment (PA), or that an individual 650.111 PQS Memo has been completed (see notes if applicable). For documentation, see the *Floodplains Programmatic Assessment*, or if an individual 650.111 PQS Memo is completed, see the project file.

When the table indicates that the action occurs within a floodplain or floodway, but no permit is required, NDOT verified that the State Minimum Standards were met. The action reviewed may be located in a community which is not participating in the National Floodplain Insurance Program.

**Unique and Impaired Waters:**

NDOT PQS reviewed each DDIR individually utilizing available GIS layers to check for impaired waters in the area. If impaired waters were present, further review occurred on the relevant DDIR to determine if NDOT was a contributor, and to determine any necessary mitigation.

In addition, NDOT PQS reviewed each DDIR individually to determine if stormwater permitting requirements were applicable.

**Wellhead Protection Areas:**

NDOT NEPA Specialists reviewed each DDIR individually utilizing available GIS layers to check for wellhead protection areas. If areas were present, documentation is noted in the attached Table, and NDOT relied upon contract standard specifications 107.01, 107.09, 107.18 and the Unexpected Waste Action Plan (UWAP).

**Construction Related Traffic/Access Restrictions:**

Access is defined as a means of vehicle ingress or egress between a highway and abutting property or an intersecting local public road or street. Access is also defined as entrances or driveways from properties to a public road system.

NDOT NEPA Specialists reviewed each DDIR individually utilizing MSAR DDIR information to check for any traffic or access restrictions, as defined by NDOT's Categorical Exclusion (CE) Guidance, that were caused by the construction effort, not due to restrictions caused by the flood itself.



**Other Impacts:**

If the NEPA Specialist or PQS encountered a resource impact that was not otherwise captured by the ER DDIR App, documentation was captured by using the "other" or "comment" fields.

**Quality Control:**

A full deviation of standard processes occurred in this instance and the standard Quality Control (QC) form was not utilized. After document preparation, QC reviewed occurred by either a NEPA Specialists, Environmental Project Managers or the NEPA Assignment Manager as reflected in field "QC Review Date" found in the GIS Application. The Environmental Document Unit Manager approval also serves as a QC review.

## Appendix F: NDOT 2019 ER Project-Level QC Documentation

**From:** [Liebig, Kyle](#)  
**To:** [Maiefski, Melissa \(FHWA\)](#)  
**Cc:** [Kresl, Zachary \(FHWA\)](#); [Jurgens, Jason](#)  
**Subject:** RE: CE Monitoring record request  
**Date:** Thursday, October 15, 2020 11:09:35 AM  
**Attachments:** [image001.png](#)  
[2019\\_ERCE\\_QC Complete Date.xlsx](#)

**CAUTION:** This email originated from outside of the Department of Transportation (DOT). Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Good Morning Melissa,

The approved ERCE, which are contained in the individual DDIR folders in the Sharefile system (typically called ERCE\_Batch\_###.pdf), contain our written guidance, procedures and agreements that were used by NDOT for the 2019 ER event.

The file is complete except for the QC documentation, for which I have attached a report showing the date that the QC was completed. The ERCE contains a "Summary of Approaches" document which outlines our processes for the 2019 ER event. In that write up we have the following text on QC;

### Quality Control:

A full deviation of standard processes occurred in this instance and the standard Quality Control (QC) form was not utilized. After document preparation, QC reviewed occurred by either a NEPA Specialists, Environmental Project Managers or the NEPA Assignment Manager as reflected in field "QC Review Date" found in the GIS Application. The Environmental Document Unit Manager approval also serves as a QC review.

Quality Control was performed by our Environmental Project Manager, Nick Burnham, for all the sites cleared through the ER GIS App and approved by Jon Barber, with the ERCE.

If you have questions, please let me know.

Thanks,

Kyle

---

**From:** Maiefski, Melissa (FHWA) <melissa.maiefski@dot.gov>  
**Sent:** Wednesday, October 14, 2020 10:36 AM  
**To:** Jurgens, Jason <Jason.Jurgens@nebraska.gov>; Liebig, Kyle <kyle.liebig@nebraska.gov>  
**Cc:** Kresl, Zachary (FHWA) <zach.kresl@dot.gov>  
**Subject:** CE Monitoring record request  
**Importance:** High

Hi Jason and Kyle, please send any written guidance, procedures, templates, and/or agreements in place that were used by NDOT for the 2019 ER event.

Also Kyle, I don't believe I'd heard back from last weeks email yet – do we have the complete ER records related to environmental review for the ER sites listed (ex, env cert, etc)?

Thanks,

Mel

**Content of NDOT 10/15/2020 email attachment, Excel spreadsheet:**

<b>DDIR_ID</b>	<b>QC_Complete_Date</b>	<b>CE_Approved_Date</b>
L63-ER7	2/26/2020	2/27/2020
L93-01	8/16/2019	8/16/2019
L82-06	8/16/2019	8/16/2019
L54-04	11/19/2019	11/20/2019
L39-11	10/24/2019	10/24/2019
D2-13	10/24/2019	10/24/2019
L1-327	2/4/2020	2/6/2020
D3-43	2/13/2020	2/13/2020
D2-11	2/13/2020	2/13/2020
L27-06	8/16/2019	8/16/2019
L70-5	2/4/2020	2/6/2020
D3-02	2/11/2020	2/13/2020
L27-08	8/16/2019	8/16/2019
D3-39	2/11/2020	2/13/2020
L23-02	10/24/2019	10/24/2019
D2-27	12/31/2019	12/31/2019
D3-45	12/31/2019	12/31/2019
L21-02	1/24/2020	1/24/2020
D2-07	2/13/2020	2/13/2020
L27-13	10/24/2019	10/24/2019
D2-14	2/11/2020	2/13/2020
L2-01	12/20/2019	12/30/2019
L63-		
ER1-2	2/26/2020	2/27/2020
L59-05	2/4/2020	2/6/2020
L19-06	10/24/2019	10/24/2019
D3-20	2/13/2020	2/13/2020
D2-22	2/11/2020	2/13/2020
L34-06	10/24/2019	10/24/2019
L47-02	10/24/2019	10/24/2019
L84-02	11/19/2019	11/20/2019
L27-11	8/16/2019	8/16/2019
L11-01	11/19/2019	11/20/2019
L2-04	12/20/2019	12/30/2019
D4-04	2/13/2020	2/13/2020
L78-4	8/16/2019	8/16/2019
L80-01	10/24/2019	10/24/2019
L39-07	10/24/2019	10/24/2019
L59-02	12/5/2019	12/5/2019
D4-11	2/13/2020	2/13/2020
L70-08	12/20/2019	12/30/2019
L39-01	10/24/2019	10/24/2019
L87-02	12/5/2019	12/5/2019
L27-15	8/16/2019	8/16/2019

L19-01	10/24/2019	10/24/2019
D2-10	10/24/2019	10/24/2019
D4-08	12/3/2019	12/3/2019
L63-ER9	2/26/2020	2/27/2020
L64-04	12/20/2019	12/30/2019
L82-02	8/16/2019	8/16/2019
D8-05	2/11/2020	2/13/2020
L4-04	2/4/2020	2/6/2020
L55-03	10/24/2019	10/24/2019
D3-25	7/16/2020	7/20/2020
L8-01	2/4/2020	2/6/2020
L28-04	10/24/2019	10/24/2019

## Appendix G: NDOT CE Approval Levels

From the NDOT Environmental Procedures Manual, Table 4-1, approved 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 Any exception	Individual Section 4(f) Evaluation
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 Nationwide Permit Pre-Construction Notification	Clean Water Act Section 404 Individual Permit 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.

***2020 Nebraska CE Monitoring Supplemental Report  
For Additional Questions, please contact:***

Melissa Maiefski  
Program Delivery Team Lead  
Federal Highway Administration  
100 Centennial Mall North, Rm 220  
Lincoln, Nebraska 68508  
Phone: (402)742-8473

