

NEPA Assignment Program

Frequently Asked Questions

January 2018

What is NEPA?

- The National Environmental Policy Act (NEPA) is a Federal procedural law that establishes a national environmental policy. NEPA provides a framework for environmental planning and decision-making on projects that receive Federal funds or require Federal approvals.
- NEPA requires Federal agencies, when planning projects or issuing permits, to conduct environmental reviews to consider the potential impacts on the environment by their proposed actions.

What is NEPA Assignment?

- The phrase “NEPA Assignment” refers to an environmental review streamlining tool offered to State Departments of Transportations (DOTs) under 23 U.S.C. §326 and §327 (explained below).
- Under NEPA Assignment, the Nebraska Department of Transportation (NDOT) may legally “assume” Federal Highway Administration's (FHWA's) “assignment” of National Environmental Policy Act (NEPA) environmental review responsibilities for highway projects funded with federal-aid. Under this program, environmental review and approval is performed by NDOT without the involvement of FHWA.
- In reviewing and approving projects under NEPA Assignment, NDOT becomes responsible and liable for compliance with all applicable federal environmental laws and with FHWA NEPA regulations, policies, and guidance.
- Other Federal agencies may have review and permit obligations tied to individual highway projects. Under Assignment, though NDOT becomes the lead Federal Agency for federal-aid funded projects, NDOT is only responsible for environmental decision-making on the projects for FHWA, but not for other Federal agencies.
- Assignment does not change any current legal requirements, nor provide any shortcuts from what is currently required by law.
- Federal Law provides two ways for State DOTs to undertake NEPA Assignment:
- 23 U.S.C. § 326 - “Categorical Exclusion Assignment” - Allows State DOTs to accept assignment via Memorandum of Understanding (MOU) to make determinations regarding mostly minor projects whose environmental review is limited to making categorical exclusion (CEs)(23 CFR 771.117) determinations.
- 23 U.S.C. § 327 - called the Surface Transportation Project Delivery Program or “Full NEPA Assignment” – Allows State DOTs to assume FHWA’s NEPA responsibilities by preparing an application and then executing an MOU for a full program of environmental determinations, including Categorical Exclusion (CE), Environmental Assessments (EAs) and Environmental Impact Statements (EISs).
- NDOT is pursuing Assignment under both laws in two steps (explained below), pursuing CE Assignment first (§326 MOU), followed shortly thereafter by Full NEPA Assignment (§327 MOU).

Why would NDOT participate in the NEPA Assignment program?

- NDOT will build stronger relationships with stakeholders and public agencies through direct engagement and ownership of decision-making.

- NEPA Assignment will allow NDOT to deliver safety and highway improvement projects to the public faster while preserving environmental quality.
- The program allows for more flexibility in project decision-making, while maintaining existing requirements for environmental consultation, review, and compliance.

What is NDOT's path for NEPA Assignment?

- NDOT will seek both CE Assignment and the Full NEPA Program as separate, but simultaneous efforts.
- MOU for CE Assignment will be pursued first, followed by formal application for Full Program Assignment.
- Outreach to agencies and the public
- Preparing and updating manuals and procedures

Why pursue CE Assignment first?

- Quickly assume responsibility for majority of program
 - 95% of NDOT's highway program is reviewed at the CE level.
- Gain efficiencies for CE projects, resulting in savings for State and Local projects
- Since 2015, FHWA has delegated environmental review and approval authority to NDOT for approximately 80% of our CE level projects (CE-1s and CE-2s). FHWA has remained responsible for final review and approval of CE-3s.
- NDOT has a well-established CE program, which can quickly and efficiently be modified for CE Assignment.

What is NDOT anticipated timeframe?

- CE Assignment by spring, 2018
- Full Program Assignment by spring, 2019

What are the requirements for DOT's entering into NEPA Assignment?

- For CE Assignment (326)
 - A Memorandum of Understanding (MOU) will be drafted and subject to public notice and comment (for 30 days). Any comments provided will be considered prior to FHWA and NDOT signing the MOU. The MOU has a three-year term and may be renewed.
- Full NEPA Assignment (327)
 - NDOT will draft an application for this program and solicit public comment (for 30 days) by publishing the application. Any comments provided will become part of this application as well as how NDOT considered the comments in finalizing the application for FHWA. The application includes: the scope of assignment; current and proposed information regarding staffing and organization; current and proposed environmental review procedure tools; a description of NDOT's new role under assignment; and the training and resource requirements to assume federal environmental review responsibility.
 - FHWA and NDOT will draft an MOU which, along with NDOT's application, will be subject to notice and comment (for 30 days) in the Federal Register. If approved, the MOU, with a five-year term, will be signed by the FHWA Administrator and the state DOT.

What is the scope of the NEPA Assignment Program?

- Memoranda of Understanding (MOUs) will define the range of project actions and environmental responsibilities the State assumes.
- The NEPA Assignment Program will assign FHWA's responsibilities and consultation obligations for environmental laws under the "NEPA umbrella" to NDOT. This includes:
 - Endangered Species Act
 - National Historic Preservation Act
 - Section 4(f) Determinations
 - Determination of Probable Class of Action

What programs/decisions are not assignable and therefore retained by FHWA?

- Some of the programs/decisions retained by FHWA include:
 - Engineering decisions (such as Interchange Justification Reports)
 - Federal-aid funding decisions
 - Project-level air quality conformity determinations
 - Government-to-government Tribal consultation
 - USDOT responsibilities for statewide and metropolitan planning
 - Projects that cross state lines
 - Excluded projects (specifically set forth in the MOUs)

How will NDOT decision-making be affected by the §326 and §327 assignment processes occurring in two steps?

- After the §326 MOU is signed giving NDOT CE Assignment:
 - All NEPA determinations which qualify as CEs (with minimal exclusions explained in the MOU) will be made by NDOT instead of FHWA;
 - All EA, EIS, and other environmental approvals not assigned by the §326 MOU will continue to be made by FHWA, in the same manner as they were prior to CE Assignment.
- After Full NEPA Assignment pursuant to the §327 MOU:
 - All NEPA determinations (with minimal exclusions explained in the MOUs) will be made by NDOT instead of FHWA.
 - All EA and EIS documentation as well as FONSI and ROD decisions will be NDOT's responsibility.

Is NDOT accountable to maintain high environmental standards under Assignment?

- Under Assignment, NDOT's commitment to high standards for environmental compliance will remain unchanged.
- NEPA Assignment does not change federal environmental protection standards. All environmental laws, regulations and orders remain in effect, and NDOT will continue to be responsible for complying with all federal environmental laws, rules and orders under the "NEPA Umbrella".
- NDOT assumes legal responsibility to ensure compliance with all environmental requirements, which means that NDOT (rather than FHWA) will defend any claims on environmental decisions in federal court.

- To provide for legal responsibility, Nebraska statute (§39-1306.03) was revised in 2017 as required by federal law to waive the State's right to sovereign immunity from claims brought under NEPA.; As a result, NDOT can be held legally liable for failure to implement environmental responsibilities consistent with the law, and it will be required to defend any claims filed against it in federal court. §39-1306.03 also provides NDOT's agreement to be sued in federal court on claims brought under NEPA.
- NDOT will conduct regular internal program reviews.
- FHWA will conduct in-depth monitoring and/or audits of NDOT's performance and adherence to environmental laws, regulations and Executive Orders.
- FHWA retains final project funding authority and may revoke the program if NDOT does not perform to the required standards.
- This program increases the State's accountability as NDOT assumes more risk along with more responsibility for the quality and outcomes of its environmental documents and decisions.

How will Assignment change Project Development?

- FHWA will no longer be involved with project level environmental review, consultation and other project level environmental decision-making including environmental document approval.
- FHWA will neither review nor address comments provided as part of environmental review process, including inquiries from the general public and public officials. NDOT will review and address comments.
- FHWA will continue to provide:
 - Notices to proceed to final design, ROW, or construction with Federal aid funding.
 - Review and approval for interstate access reports and design exceptions.
 - Review and approval of Interchange Justification Reports.
 - Review of Feasibility Studies and Alternative Evaluation Reports for PODI identified projects.
- FHWA's primary role will be to monitor and/or audit NDOT to ensure compliance with the applicable NEPA Assignment MOU and federal laws, regulations and orders.

What other States have participated in NEPA Assignment?

- States currently under one or both of the programs:
 - California (326 & 327)
 - Alaska (326 and 327)
 - Texas (327)
 - Ohio (327)
 - Florida (327)
 - Utah (326 & 327)
 - Arizona (326, pursuing 327)

Will NDOT be able to initiate and complete consultation under Section 106 of the National Historic Preservation Act with Indian tribes under NEPA Assignment?

- NDOT will initiate and complete tribal consultation on a project-by-project basis. However, the USDOT Secretary's responsibilities for government-to-government consultation with Indian tribes as defined in [36 CFR 800.16\(m\)](#) cannot be assumed by NDOT under NEPA Assignment. FHWA

remains responsible for all government-to-government consultation and a tribe retains the right to request government-to-government consultation.

- NDOT remains committed to regular outreach and communication with Indian tribes regarding transportation projects in Nebraska, and after Assignment will continue its efforts to coordinate with tribes. NDOT's consultation efforts with tribes are not considered "government-to-government consultation" within the meaning of the NEPA Assignment MOUs.
- After Assignment, if an Indian tribe requests government-to-government consultation on a project under Assignment, FHWA will be responsible for conducting government-to-government consultation on the project with regard to the identified concern.

How will NEPA Assignment change the NDOT environmental process?

- NDOT internal procedures will be changed to reflect that NDOT assumed additional FHWA responsibilities for all CEs, EAs and EISs.
- Agencies and Tribes will see minimal change in environmental review/compliance.
- NDOT will take the lead on all consultation and coordination with Federal and State agencies.

How will this impact NDOT?

- NDOT must comply with its MOU commitments in assuming FHWA's environmental responsibilities, just as it has for those CEs processed under the 2015 Programmatic Categorical Exclusion Agreement between FHWA DO and NDOT.
- NDOT will continue to:
 - Maintain detailed files and records, and make them available to FHWA
 - Develop and maintain updated procedures on all environmental processes
 - Provide continuous Quality Assurance/Quality Control (QA/QC) on all actions
 - Dedicate sufficient funding and staff to implement NEPA assignment
 - Maintain the necessary professional and experienced staff to carry out the required environmental analyses
 - Institute and maintain a progressive training plan for environmental staff
 - Conduct regular self-assessments
 - Report all NEPA decisions to FHWA

How will Assignment change Agency Coordination?

- FHWA will no longer assume a role as cooperating agency in other agency projects that require environmental review, nor will it invite other agencies to be cooperating agencies for individual highway projects. NDOT will take on these responsibilities.
- FHWA will not provide project level assistance for any responsibility assumed by NDOT. FHWA may provide information about FHWA policy, guidance, and practice related to the Federal Aid Highway program as requested.
- FHWA will not intervene, broker, or otherwise be involved in any issue involving NDOT project level consultation/coordination with another Federal agency.
- FHWA may attend meetings between NDOT and other Federal or State agencies. FHWA's participation in these meetings will be as an observer for project level issues. FHWA may participate in discussions of topics of emerging national policy; or upon request by NDOT or the Federal agencies and by agreement by FHWA.

How will programmatic agreements (PA's) with other agencies be affected?

- The PA's may continue by special agreement of NDOT and the Federal or state resource agency with whom that PA has been made. If a party to an agreement does not accept NDOT acting as a Federal agency, NDOT will comply with the Federal or State requirements as prescribed in law or regulation.

How will this affect the certified Local Public Agencies (LPAs)?

- NDOT will continue to oversee the NEPA process on these projects and will solely be responsible for all environmental approvals.
- LPAs will work directly with NDOT instead of FHWA. Letters will be on NDOT letterhead instead of FHWA letterhead and NEPA approvals will come from NDOT.
- NDOT anticipates that the LPA projects will gain some efficiencies from NEPA assumption.

NEPA Assignment Does NEPA Assignment affect other decisions on fed-aid projects?

- There will be no change to any federal environmental laws or regulations; NDOT becomes the decision maker and the lead in the environmental process for federal-aid highway projects.

What happens on Day One of NEPA Assignment?

- The transfer of responsibility is immediate. For projects that are in midstream and projects that may require re-evaluations, even if FHWA signed the original environmental document, NDOT becomes responsible for the re-evaluation and/or supplemental environmental document, if necessary. Unless NDOT and FHWA specifically excludes a project or responsibility in the MOU, NDOT is responsible for everything project related for its NEPA program.

What can I do?

- Let NDOT know of any concerns you may have, so they may be addressed as early as possible.
- Prepare letters of comment or support to NDOT for submittal with the NEPA Assignment application.

Can I meet individually with the NDOT?

- Individual meetings may be arranged with the following contact:
 - NDOT contact: Brandie Neemann, Project Development Engineer, brandie.neemann@nebraska.gov, (402) 479-4795