



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

Executive Summary	2
Background	4
Scope and Methodology	7
Observations, Findings, Recommendations and Successful Practices	9
Conclusion	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).¹ 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 1st, 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.

¹ 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.²

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.

² 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 events³. 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 concurrences⁴. 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.

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

⁴ 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 NESHPO⁵ 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.”*

⁵ 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)⁶ 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.

⁶ 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.⁷

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.

⁷ 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

