

# Chapter 7

## Re-evaluation



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# Chapter 7 Re-evaluation

## NEPA ASSIGNMENT – CE Assignment vs. Full Assignment

The Nebraska Department of Transportation (NDOT) entered CE Assignment pursuant to [23 USC 326](#) on September 5, 2018. Under CE Assignment, NDOT assumed FHWA responsibilities for determining whether specific projects are categorically excluded from the requirement to prepare an EA or EIS. NDOT, rather than FHWA, now makes CE determinations for most projects (for exceptions, see [Chapter 1. Overview](#), Section 1.5). Re-evaluations for all EAs and EISs, as well as CE determinations not assignable to NDOT under [23 USC 326](#), will be processed per these procedures; however, they will be formally approved by FHWA. For non-assigned re-evaluations, NDOT will consult FHWA to discuss project-specific re-evaluation requirements. Once full NEPA Assignment under [23 USC 327](#) is in place, all types of environmental approvals (CE, EA, and EIS, with limited exceptions; see [Chapter 1. Overview](#), Section 1.5) will be made by NDOT.

Re-evaluation is the process of determining and documenting whether an existing National Environmental Policy Act of 1969 (NEPA) decision remains valid for the upcoming federal approval action. Re-evaluations are required when a project advances to the next major federal approval in the project development process (that is, final design, right-of-way acquisition, and construction), or when there are changes in scope, impacts, or circumstances that could affect the validity of the NEPA decision. This chapter discusses the changes that prompt the need for a NEPA re-evaluation, including the technical analysis, documentation, and procedural requirements to verify that the project remains compliant with federal regulations.

“Re-evaluations...are necessary at certain key points in the overall process to establish whether or not the NEPA document, determination or final project decision remains valid for the subsequent federal action.” FHWA 2009a

## 7.1 Definition of a Re-evaluation

Re-evaluations are required by Federal Highway Administration (FHWA) NEPA regulations ([23 Code of Federal Regulations \[CFR\] 771](#)) and are used as the mechanism for determining whether existing NEPA documentation remains valid. If the NEPA determination is found not to be valid, a new NEPA determination or supplement to the NEPA documentation is necessary.

FHWA regulations at [23 CFR 771.129](#) set forth the requirements and a time frame for written evaluations of environmental impact statements (EIS) as well as consultation procedures for projects with all types of NEPA documentation (categorical exclusions [CE]; environmental assessments [EA] and Findings of No Significant Impact [FONSIs]; and Draft, Final, and Supplemental EISs) as projects move from one stage of project development to the next. The regulations are presented below:

### § 23 CFR 771.129 Re-evaluations<sup>1</sup>

(a) A written evaluation of the draft EIS shall be prepared by the applicant in cooperation with the Administration if an acceptable final EIS is not submitted to the Administration within three years from the date of the draft EIS circulation. The purpose of this

<sup>1</sup> When considering the Nebraska Department of Transportation’s (NDOT) authority under NEPA Assignment, all references to “the Administration” (and the associated authorities thereof) in [23 CFR 771.129](#) are replaced with “NDOT.”

evaluation is to determine whether or not a supplement to the draft EIS or a new draft EIS is needed.

(b) A written evaluation of the final EIS will be required before further approvals may be granted if major steps to advance the action (e.g., authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Administration approval or grant.

(c) After approval of the [Record of Decision] ROD, FONSI, or CE designation, the applicant shall consult with the Administrator prior to requesting any major approvals or grants to establish whether or not the approved environmental document or CE designation remains valid for the requested Administration action. These consultations will be documented when determined necessary by the Administration.

A re-evaluation is not NEPA documentation, but rather it is an internal evaluation of the validity of the project's original NEPA documentation. The evaluation and its conclusion are documented when determined necessary by the criteria set forth in this guidance. During the re-evaluation, changes in the project scope, its affected environment, anticipated impacts, or mitigation measures are reviewed. In some cases, additional analysis may be required to conduct the re-evaluation. A project may require multiple re-evaluations as the project moves from environmental approval through final design, right-of-way acquisition, and construction. If, during the course of preparing a re-evaluation, it is determined that there are substantially increased or new, previously unevaluated impacts because of changes in the project or its circumstances, it may be necessary to supplement an EA or EIS, or prepare new NEPA documentation. However, additional documentation may also be presented in the re-evaluation to support the validity of the original NEPA documentation.

Based on the nature and magnitude of the changes, the re-evaluation results in one of the following outcomes:

1. The original NEPA documentation is still valid, and the project may proceed.
2. The NEPA documentation and decision are no longer valid, and some other NEPA documentation must be prepared (for example, a higher level of documentation or a supplement to the original documentation) before the project can proceed.

## 7.2 Circumstances Requiring a Re-evaluation

According to [FHWA \(2009a\)](#), a re-evaluation is intended to determine whether changes have occurred in the project and its circumstances, including changes in the design or scope of the project, new or modified laws and regulations, circumstances or project area changes, or new information in general, and whether these changes affect the validity of the original NEPA documentation or decision. Three changes in circumstances can trigger the need to conduct a re-evaluation: (1) project changes; (2) the project proceeding to the next major federal approval; and (3) exceeding the 3-year time frame established for an EIS. This section discusses each of these triggers.

### 7.2.1 Project Changes

Although project changes are not specifically called out in [23 CFR 771.129](#), they are often triggers for re-evaluation. Re-evaluations due to changes in the project apply to all completed NEPA documentation (CEs, EAs, and EISs). A change in the project can happen at any time during project development following approval of the original NEPA documentation.

Common examples of project changes include the following:

- **Changes in project engineering or design**, such as shifting or modifying a project footprint, changing the timing of construction, or modifying the project termini
- **Changes in affected environment or circumstances**, such as designation of new threatened or endangered species, changes in projected traffic or population, changes in land use, changes in laws and regulations, or the availability of new information
- **Changes in the nature and magnitude of environmental impacts**, which could be caused by changes in project design or by changes in the affected environment or circumstances
- **Changes to environmental commitments**, including avoidance, minimization, and/or mitigation measures, such as replacing a committed mitigation measure with another, assuming an area or impact could be avoided and finding out that it cannot be, or determining that a proposed mitigation measure is not feasible

Supplemental or new NEPA documentation may be necessary if changes in project design or circumstances are so large that the original NEPA documentation is no longer valid. Examples of these circumstances include a new alternative under consideration, new significant impacts identified, consultation required for impacts on new species or newly affected historic properties, or the project's prior class of action is no longer valid.

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## 7.2.2 Project Proceeding to the Next Major Federal Approval

Proceeding from one major federal approval to the next (that is, final design, right-of-way acquisition, or construction) triggers the need to determine whether the approved NEPA documentation remains valid for the requested federal action.

## 7.2.3 Exceeding the 3-Year Time Frame for an Environmental Impact Statement

FHWA sets forth the requirements and establishes a time frame for written re-evaluations of EISs in [23 CFR 771.129](#). These requirements are as follows:

- **Draft EIS.** As described in [23 CFR 771.129\(a\)](#) and [Technical Advisory T 6640.8A, Guidance for Preparing and Processing Environmental and Section 4\(f\) Documents](#), a written re-evaluation of a Draft EIS is required if the Final EIS has not been submitted within 3 years of the circulation of the Draft EIS. While the entire project must be re-examined for changes, an evaluation of a Draft EIS is to focus on any changes to the project, its setting, impacts, or new issues that have arisen since the circulation of the Draft EIS. Based on the written evaluation, a decision is made whether to document that the existing Draft EIS remains valid, to supplement the existing Draft EIS, or to prepare a new Draft EIS or Supplemental Draft EIS.
- **Final EIS.** According to [23 CFR 771.129\(b\)](#), a written re-evaluation of a Final or Supplemental EIS is required if major steps to advance the project (for example, authority to undertake final design, acquire right-of-way, or approve plans, specifications, and estimates) have not

occurred within 3 years of the approval of the Final EIS, Supplemental EIS, or the last major federal approval. The purpose of the written re-evaluation is to determine whether the Final EIS remains valid or whether a new or Supplemental EIS is required. Once again, a re-evaluation of a Final EIS is to focus on any changes to the project, its setting, impacts, or new issues that have arisen since the publication of the Final EIS and Record of Decision. Based on the written re-evaluation, a decision is made whether to document that the existing Final EIS remains valid, to supplement the existing Final EIS, or to prepare a new Final EIS.

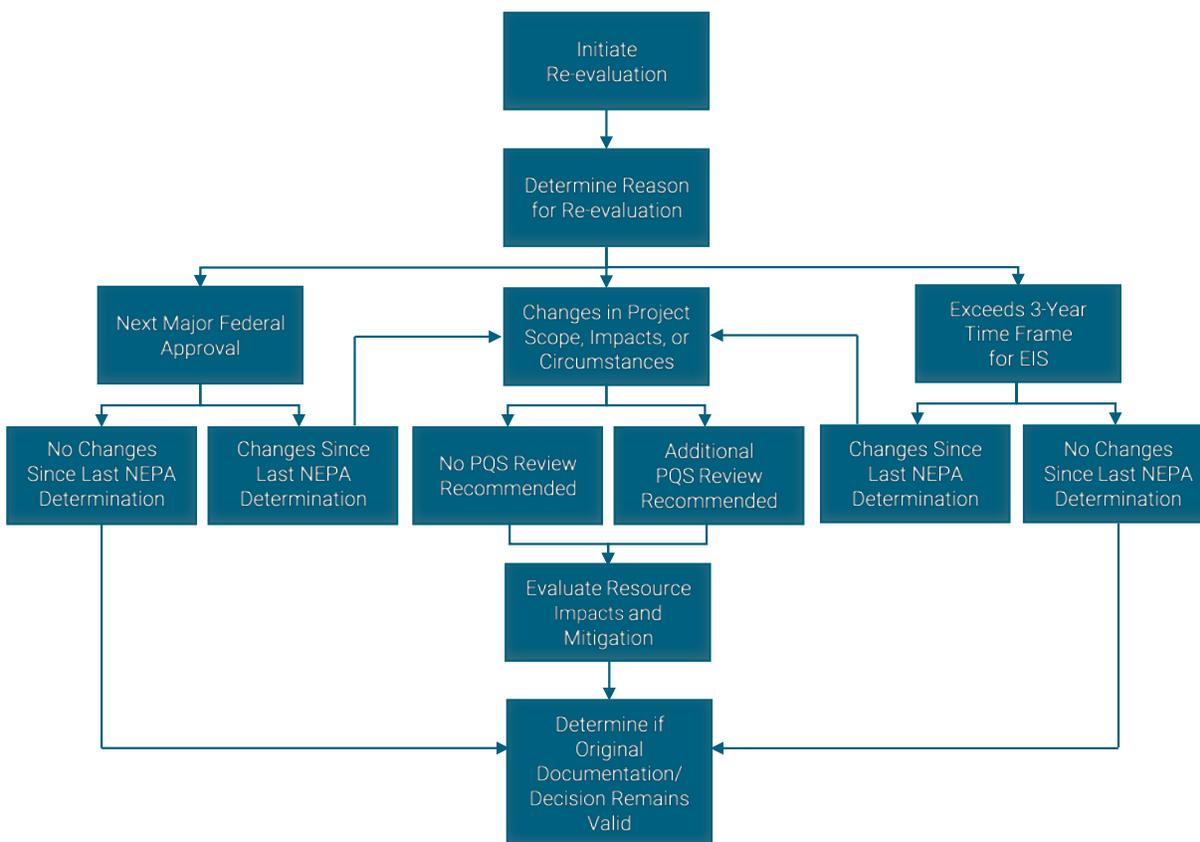
### 7.3 Re-evaluation Consultation

During the re-evaluation process, consultation with agencies and the public may be necessary and beneficial. The following should be considered:

- **Agency Consultation.** While there is no requirement that the Nebraska Department of Transportation (NDOT) coordinate with resource agencies for every NEPA re-evaluation, it is good practice to keep resource agencies informed of project changes that may affect resources under their jurisdiction. Furthermore, depending on the nature of the changes or resources affected, consultation with resource agencies may be required in accordance with regulation and existing NDOT Programmatic Agreements. For example, a change that affects new or additional historic properties may require consultation with the Nebraska State Historic Preservation Office. The document author, in coordination with the NDOT NEPA Specialist (as applicable), works with the appropriate NDOT Professionally Qualified Staff (PQS) on re-evaluation issues affecting their area of expertise, as appropriate, to determine the need for agency consultation. The document author may coordinate with resource agencies at the direction of NDOT.
- **Public Involvement.** Re-evaluation documentation does not require public review. However, NDOT may elect to conduct public outreach to inform the public of changes to the scope of work, resulting resource impacts, or environmental commitments, or to make the re-evaluation documentation available. Public involvement may also assist in identifying new community impacts or public controversy that could affect the project's class of action.

### 7.4 Performing the Re-evaluation

A re-evaluation is performed by the document author when a circumstance requiring re-evaluation is identified (see Section 7.2). In developing the re-evaluation, the document author consults with the NDOT NEPA Specialist (if different than the document author) on decisions regarding the re-evaluation. A general outline of the re-evaluation process is shown in Figure 7-1.

**Figure 7-1. Re-evaluation Process**

The document author may learn of project changes in various ways, such as the following:

- Email to or from the project development team regarding project description changes
- Project Coordination Meetings
- Meeting scheduled by the project designer to discuss changes

Based on the environmental resources in the project study area, the degree of change, and the implications of those changes on environmental impacts, the NDOT NEPA Specialist determines the need for PQS input in the re-evaluation, including which PQS need to be involved. PQS involvement is appropriate when project changes could result in additional environmental impact on a resource or resources. Project changes may require field review, additional analysis, agency coordination, and/or public involvement to evaluate the environmental implications of the change. Table 7-1 provides examples of project changes and suggests the need for PQS involvement. The NDOT NEPA Specialist documents coordination with the PQS accordingly.

**Table 7-1. Examples of Project Changes**

	No PQS Review Recommended	Additional PQS Review Recommended
Change in Scope	<ul style="list-style-type: none"> <li>Increases in project length within the environmental study area with no impacts on resources beyond what was identified in the original NEPA determination</li> </ul>	<ul style="list-style-type: none"> <li>Increases in project length beyond the environmental study area</li> <li>Increases in widths of the typical section (for example, increasing the number of lanes or adding a paved shoulder)</li> <li>Elevation to a different class of action (for example, EA or EIS)</li> </ul>
	<ul style="list-style-type: none"> <li>Changes in pavement designations (for example, <u>fly ash</u> stabilized bituminous to <u>cement</u> stabilized bituminous)</li> </ul>	
Change in Impact	<ul style="list-style-type: none"> <li>Reduction in permanent or temporary easements or acquisitions</li> </ul>	<ul style="list-style-type: none"> <li>Installation of new culvert extensions instead of replacing damaged flare end sections on existing culverts</li> <li>Removal of wetlands by a developer independent of the project</li> </ul>
Change in Circumstance	<ul style="list-style-type: none"> <li>Changes in letting dates that do not result in cumulative impacts</li> <li>Minor updates to design criteria that would not result in changes to scope or impacts (for example, pavement determinations, construction materials, work clarifications)</li> </ul>	<ul style="list-style-type: none"> <li>New or updated regulations or analysis methods applicable to the project (for example, new air quality regulations or change in status of protected species)</li> <li>Recent identification of hazardous waste site adjacent to the project</li> </ul>

The NDOT NEPA Specialist forwards information regarding the project changes (for example, updated maps, updated project description, meeting notes) and PQS involvement to the document author (if different than the NDOT NEPA Specialist) for the document author's use in conducting the re-evaluation. This information is retained in the project file.

In conducting the re-evaluation, the document author considers the project change(s) and how those changes may affect the human, physical, and natural environment. Where technical review is involved, the re-evaluation documentation includes a discussion of the changes and any resulting impacts. The following questions may assist in the development of this discussion:

- Would the changes alter the scope of the project from that identified in the original NEPA documentation?
- Do the changes fall within the previously identified study area?
- Will the changes result in a change to the previously identified CE level or NEPA class of action?
- Will the changes result in impacts on resources not previously identified as affected?
- Will the changes result in additional impacts on previously evaluated resources?

Some changes in scope, impacts, or circumstances result in changes to mitigation measures or other commitments. The document author should consider potential changes to mitigation measures and review any applicable PQS information (memo, email) to identify possible changes. If changes to mitigation measures are needed, these changes are documented in the re-evaluation.

## 7.5 Re-evaluation Documentation

Consultation is required for CEs, EAs, and EISs to establish whether or not the NEPA documentation remains valid for the next major FHWA approval milestone ([23 CFR 771.129\(c\)](#)). For projects assigned

under CE Assignment, the required consultation occurs internally within NDOT's Environmental Section. While not required by regulation, it is NDOT's general practice to document these consultations in writing for CEs and EAs to demonstrate that the required consultation occurred. Re-evaluation regulations require a written evaluation of EISs when major steps to advance the project have not occurred within 3 years of the Draft EIS, Final EIS, Final Supplemental EIS, or the last major federal approval ([23 CFR 771.129\(a\)](#) and (b)). Re-evaluations may be documented with the NDOT [Re-evaluation Form](#), email, memo to file, or other written summary; however, for more complex re-evaluations, use of the [Re-evaluation Form](#) is recommended. [Instructions for Completing the Re-evaluation Form](#) provide guidance on filling out the form. The re-evaluation documentation, in whatever form, is clearly labeled and included in the project file.

The re-evaluation documentation should be commensurate with the complexity of the project, the degree of change, the potential for controversy, and the potential for significant impacts. For more complex or controversial projects, additional analysis may be needed to support and document a conclusion that there are no new significant impacts and that the NEPA documentation remains valid. The key is to document that NDOT reviewed the NEPA documentation for changed circumstances and new information.

The completed re-evaluation documentation describes what, if any, changes occurred, and determines the validity of the original NEPA decision. The following are some considerations for written re-evaluation documentation:

- The reason for completing the re-evaluation should be explained.
- If there are changes in the project's setting or design, these changes are to be clearly contrasted with the original project and environmental analysis. Changes to the project, its affected environment, impacts, or new issues or data that have emerged since approval of the original NEPA documentation are to be described.
- Depending on the project, the nature of the changes, sensitivity of the resources, and magnitude of the impacts, the re-evaluation may require additional environmental analysis, including a field review.
- When a project is being re-evaluated, the entire project is reviewed, but the re-evaluation focuses on any changes in the project or its circumstances, and whether those changes affect environmental impacts or their significance. Aspects of the project that are unaffected by changes do not receive the same focus. Other project information and details can be incorporated by reference or briefly summarized if needed.
- On projects that have been phased for construction, the focus of the re-evaluation is on the validity of the original NEPA documentation for the current phase of the project. Project changes to date, including those considered in any earlier re-evaluation(s), need to be considered in the re-evaluation.
- The re-evaluation compares current project changes to the original NEPA documentation as well as to any earlier re-evaluations of the project. The re-evaluation should present the total change in impact on each environmental resource topic involved considering any past re-evaluations. Where multiple re-evaluations are involved for a project, comparative information may be effectively presented in a matrix.
- Documentation should be well-organized and should address the specifics of the project and NEPA documentation being re-evaluated. Written re-evaluations should be organized using the same resource analysis structure as the original NEPA documentation (for example, using the organization of the CE Smartform sections or the EA or EIS table of contents). The use of tables, charts, maps, and graphics can be useful in communicating changes.

Where changes to mitigation are required, all applicable mitigation measures from the original NEPA documentation, any previous re-evaluations, and the current re-evaluation are listed in the re-evaluation documentation. This list supersedes all previous lists of mitigation measures.

- Any public involvement or agency consultation is to be documented.
- Changes to project mitigation measures should be clearly noted, and the reason for those changes should be included in the re-evaluation documentation.
- The re-evaluation documentation needs to support the determination being made. The conclusion or finding as to whether the previous NEPA documentation remains valid should be evident.

Where changes to mitigation are required, all applicable mitigation measures from the original NEPA documentation,

any previous re-evaluations, and the current re-evaluation are listed in the re-evaluation documentation. This list supersedes all previous lists of mitigation measures.

Attachments to the re-evaluation documentation are to be provided as appropriate. Attachments may include one or more of the following:

- All applicable PQS memos
- Any design memos
- All final PQS technical analyses supporting the re-evaluation
- Updated maps or project descriptions, or both

The document author reviews the re-evaluation documentation and its conclusion, and confirms the following via email or signature on the re-evaluation documentation:

- The re-evaluation has been appropriately conducted.
- The signing document author is qualified to complete re-evaluations.
- The re-evaluation has considered all project-specific circumstances and all relevant thresholds (when a CE is involved).

The re-evaluation documentation is reviewed and approved to determine if the original decision remains valid (including consideration of CE level). The review and approval process for the re-evaluation documentation is the same as that used for the original environmental documentation type. For example, a re-evaluation of a CE Level 3 would be reviewed by an approved CE Level 3 reviewer; a re-evaluation of an EA would be reviewed by an approved EA reviewer. See [Chapter 4, Categorical Exclusion](#), Table 4-2, for review and approval authority for the various CE levels. EA and EIS re-evaluations, as well as determinations that the original project NEPA determination is no longer valid, are approved by the Environmental Documents Unit (EDU) Manager. The NDOT Approver verifies the information following the NDOT [NEPA Documentation Quality Assurance/Quality Control Manual](#) and then signs the form. By approving the re-evaluation, the NDOT Approver certifies that he or she agrees with the re-evaluation analyses and conclusions.

## 7.6 New or Supplemental NEPA Documentation

If the re-evaluation concludes that the original NEPA documentation is no longer valid, NDOT addresses the changes or deficiencies with new or supplemental NEPA documentation. This can occur, for example, when a new project alternative is under consideration or new significant impacts are identified through the re-evaluation. When new or supplemental NEPA documentation is required, the resulting documentation depends on the class of action and other factors, as follows:

- **Categorical exclusion.** A CE re-evaluation that determines that the CE designation is no longer valid would result in a new CE, an EA, or an EIS, depending on the circumstances of the project, the nature of the changes, and significance of new impacts.
- **Environmental assessment.** If the re-evaluation of an EA identifies major project changes (for example, a new alternative) or new potentially significant impacts, a new or supplemental EA would be required to determine the significance of those impacts. While supplemental EAs do not appear in regulation, they are commonly prepared. A supplemental EA focuses on the impacts of the changes, new information, or new circumstances. An EA, or supplemental EA, can supplement a previous EA, Final EIS, or other supplemental document. If the supplemental EA determines that the new impacts are significant, and NDOT intends to proceed with the project as defined, an EIS would be required.
- **Environmental impact statement.** According to [23 CFR 771.130](#), a Draft EIS, Final EIS, or Supplemental EIS may be supplemented when: (1) changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS, or (2) new information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS. A Supplemental EIS is not necessary when the changes to the proposed action, new information, or new circumstances result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS.

If the re-evaluation conclusion requires a change in class of action (for example, to an EA or EIS), documentation of the new class of action and rationale for the change is developed and included in the project file. Change in class of action to an EA or EIS requires approval of the EDU Manager; until full NEPA Assignment, FHWA approves changes in class of action to an EA or EIS as well.

## 7.7 Local Public Agency Projects

NDOT administers all federally funded Local Public Agency (LPA) transportation projects and also acts as the Responsible Charge (RC) for most LPA projects in Nebraska. In association with RC duties, the NDOT EDU either completes re-evaluations in-house or contracts a qualified consultant to do so. When NDOT is the RC for an LPA project, environmental procedures are wholly consistent with those of NDOT-sponsored projects.

Procedures differ slightly for LPA projects included in a Metropolitan Planning Organization for which NDOT does not assume RC duties. Under this scenario, NDOT may complete the re-evaluation or may require the LPA or its qualified consultant to prepare the NEPA [Re-evaluation Form](#) and associated analysis. If prepared by the LPA, the form is submitted to EDU for review and approval. The NDOT Local Projects Section is copied on all submittals.

## 7.8 Construction Change Orders

Changes in project scope that arise during construction have the potential to impact the human, physical, and natural environments and thus the validity of the NEPA documentation. When considering construction change orders, NDOT implements its [Environmental Review for Change Orders Process](#), which confirms that the change still meets the approved project scope and determines whether or not environmental commitments would continue to be met under the changed condition, including those commitments stated in the NEPA documentation and associated environmental permits. This process includes multi-tiered NDOT reviews, which are facilitated by the completion of the [Change Order Environmental Review Form](#). Upon completion of the review process, NDOT may determine that the change order can be processed and implemented without further

environmental consideration, or NDOT may determine it necessary to re-evaluate the NEPA documentation, update project permits, initiate further resource agency coordination, or implement further mitigation, prior to change order processing and implementation.

## 7.9 Laws, Regulations, and Guidance

The following guidance documents pertain to re-evaluations:

- [23 CFR 771, Environmental Impact and Related Procedures](#)
- [American Association of State Highway and Transportation Officials, March 2008, \*Reevaluations of NEPA Documents\*, prepared by ICF Consulting for American Association of State Highway and Transportation Officials, Standing Committee on Environment](#)
- [Federal Transit Administration, August 2016, \*Re-evaluations and Supplemental Documents\*, SOP No. 17](#)
- [FHWA, October 30, 1987, \*Technical Advisory T 6640.8A, Guidance for Preparing and Processing Environmental and Section 4\(f\) Documents\*](#)
- [FHWA, 2009a, \*FAQs about NEPA Reevaluations, Part 1 of a 2 Part Series\*, published in \*The Environmental Quarterly, Volume 5, Issue 2\*](#) – These FAQs are not regulation or formal FHWA guidance, but provide useful advice on re-evaluations.
- [FHWA, 2009b, \*FAQs about NEPA Reevaluations, Part 2 of a 2 Part Series\*, published in \*The Environmental Quarterly, Volume 5, Issue 3\*](#) – These FAQs are not regulation or formal FHWA guidance, but provide useful advice on re-evaluations.