



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

March 27, 2024

NEBRASKA DIVISION
100 Centennial Mall North, Room 220
Lincoln, NE, 68508
402-742-8460
Fax 402-742-8480
Nebraska.FHWA@dot.gov

Vicki Kramer
Director
Nebraska Department of Roads
P.O. Box 94759
Lincoln, NE 68509-4759

Director Kramer:

In accordance with 23 U.S.C 326, the Federal Highway Administration (FHWA) is required to monitor compliance of the Nebraska Department of Transportation's (NDOT) implementation of the Memorandum of Understanding for State assumption of responsibility for categorical exclusions. As you are aware, FHWA conducted our last Monitoring Review in the Fall of 2023 in partnership with NDOT.

On March 4, 2024, FHWA shared the draft report for NDOT's review and comment. NDOT responded on March 19, 2024 with concurrence on the monitoring report as drafted. This letter is to transmit the Final 2023 Monitoring Report to NDOT. FHWA appreciates NDOT's continued commitment to the section 326 MOU and would like to thank NDOT staff for their involvement in the 2023 monitoring event. Per the MOU, please post the Final Monitoring Report to NDOT's website.

If there are any questions regarding the §326 program please contact Justin Luther of my staff at 402-742-8464 or justin.luther@dot.gov.

Sincerely,

Richard Wayne Fedora, P.E.
Division Administrator

cc:
Khalil Jaber, P.E., NDOT
Brandie Neeman, P.E., NDOT
Jason Jurgens, NDOT

Enclosure



U.S. Department
of Transportation

**Federal Highway
Administration**

23 U.S.C. § 326 Monitoring Report



A 2023 Monitoring Report on the Performance and Quality of the Nebraska Department of Transportation's Categorical Exclusion Assumption Program under 23 USC 326

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

March 2024 Final Report

CONTENTS

Executive Summary	2
Background	3
Purpose and Objective	4
Scope and Methodology.....	5
Observations, Findings, Recommendations and Successful Practices	6
Conclusion.....	9

Executive Summary

The Federal Highway Administration (FHWA) initially assigned responsibilities for making categorical exclusion (CE) determinations to the Nebraska Department of Transportation (NDOT) [pursuant to 23 U.S.C. 326], on September 5, 2018, through a Memorandum of Understanding (MOU) that expired on September 4, 2021. Soon thereafter, FHWA and NDOT executed a renewed MOU on September 17th, 2021, having a term of three years. Part IV(F) of the MOU says that FHWA will periodically review the State's records and conduct interviews of State staff to evaluate the State's performance under the MOU. This review satisfies that provision.

This review considered the technical competency and organizational capacity of NDOT, as well as NDOT's performance of its CE processing functions. Performance considerations included the quality and consistency of NDOT's project determinations, adequacy and capability of the resources applied by NDOT, and the quality and consistency of the NDOT's administration of its responsibilities under the MOU. This report documents NDOT's compliance with the 326 MOU (MOU) and provides observations, findings, recommendations, and successful practices.

The review was completed through execution of several activities that include (1) review of NDOT process and procedure manuals, (2) review of findings and recommendations from the 2019 and 2020 Monitoring reports, (3) NDOT's response to corrective action taken, (4) review of NDOT's self-assessment, (5) interviews with NDOT staff, and (6) a review of a random selection of project files for CEs approved by NDOT during the assessment period.

The Nebraska FHWA Division Office (Division Office) established a six-person CE Monitoring Review Team (Team) that included Division Office staff, NDOT staff, and FHWA Headquarters' staff. The Team began the review efforts on September 25th, 2023, which culminated in a "monitoring week" the week of October 23rd – October 30th. During monitoring week, the Team conducted on-site interviews, continued to review projects and programs, discussed observations, recommendations, and successful practices by NDOT and identified preliminary results in a meeting at the end of the monitoring week.

This monitoring review considered the following six performance areas and reports on the status of each:

1. Compliance with governing laws, regulations, Executive Orders, FHWA Policy and the CE MOU.
2. Processing projects assigned under the MOU.
3. Excluded projects.
4. Required 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 especially commends NDOT for their Quality Assurance Program, Environmental Training Plan, and strengthened agency relationships. 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 streamlined CE process.

This report makes several observations regarding NDOT's adherence to the CE MOU that are described in the body of this report. No findings were identified that would compel NDOT to take corrective action (pursuant to Part IV(F)(3)(d)).

FHWA finds that NDOT is in substantial compliance with the terms of the MOU. Through active collaboration, NDOT and FHWA will work together to develop a continuous improvement plan outside of this report which identifies areas to continue to streamline and improve the NDOT CE Assignment Program. FHWA and NDOT will jointly monitor the development and implementation of the continuous improvement plan. FHWA remains committed 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 17, 2021 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 and on NDOT's website.

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.

The State has adequate manuals and procedures demonstrating their readiness to continue assuming 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.

NDOT has developed and updated guidance during the review period including:

- NDOT Environmental Section Training Plan
- FHWA and NDOT Coordination Process for Non-Assigned Projects
- NEPA File Management and Documentation Guidance
- NDOT Environmental Justice Policy
- T&E Matrix Tools
- Planning and Environmental Linkages Guidance
- Section 106 Programmatic Agreement
- T&E Matrix Programmatic Agreement
- Public Involvement Plan Template
- Final Design Policy
- Traffic Noise Analysis Guidance Manual
- NDOT Noise Policy
- Hazardous Material Review Guidance Manual

NDOT is working on several guidance documents and improvements currently. Chapter 9 of the Environmental Procedures Manual will be updated to include virtual public involvement and methods to measure public involvement effectiveness. Additionally, NDOT is drafting Emergency Relief Environmental Procedures and updating the Nebraska Categorical Exclusion Guidance (NECE) and Section 4(f) Guidance.

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. Assess the efficiency and effectiveness by completing a comprehensive review of NDOT manuals related to utilities and conducting interviews with relevant staff and management to gather insights into the current practices and challenges faced during the integration of utilities in CE level projects. [Performance Requirements 1, 2, 3, 5]
2. Assess the efficiency and effectiveness of the NDOT’s environmental certification process and the implementation of environmental commitments made in construction projects. This evaluation will entail a review of NDOT manuals and procedures related to environmental commitment documentation and implementation. Additionally, interviews will be conducted with NDOT environmental document staff and district personnel responsible for ensuring the proper execution of commitments specified in construction contracts. [Performance Requirements 1, 2, 3, 5]
3. Assess the effectiveness and efficiency of NDOT's environmental QA process, with a specific focus on the QA of the Categorical Exclusion (CE) process. This evaluation will aim to determine the extent to which NDOT's Environmental QA procedures ensure compliance with environmental regulations, uphold environmental commitments, and effectively address project environmental considerations. The objective will involve conducting a review of project files. [Performance Requirement 5, 6]
4. Review the adequacy of NDOT's provision of financial and staff resources, as well as the training programs associated with the CE Assignment Program. Verify that staff qualifications, credentials, experience, and expertise align with the level of decision-making capacity required for their roles. [Performance Requirements 4, 5, 6]

Scope and Methodology

This monitoring review was a joint initiative between FHWA and NDOT. The review team included staff from the FHWA Nebraska Division, FHWA Headquarters’ Office of Project Development and Environmental Review, and NDOT project development division. The complete listing of Review Team members are listed below:

Justin Luther, FHWA Program Delivery Team Lead	Owen Lindauer, FHWA Senior NEPA Project Specialist, HEPE	Jon Barber, NDOT Environmental Documents Unit Supervisor	Brandie Neemann, NDOT Project Development Engineer
Dillon Dittmer, Former FHWA Environmental Protection Specialist, Nebraska Division	Jason Jurgens, NDOT Environmental Section Manager	Luke Pitts, NDOT Environmental Project Management Unit Supervisor & NEPA Assignment	

The review was completed through execution of several activities, including review of NDOT process and procedure manuals, interviews with NDOT staff, 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 September 17th, 2021, to June 14th, 2023. The pool of projects to consider for review was 141 projects which was provided by NDOT. FHWA used a 90% confidence level and 10% margin of error to determine the random sample size of 46 projects for review by the team.

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.

The review team identified two observations regarding compliance with laws, regulations, Executive Orders, FHWA policy, and the CE MOU. One is a general observation regarding the overall status and assessment of NDOT's manuals, procedures, and plans while the other observation is an update of a prior monitoring report finding related to whether a project's NEPA documentation was completed prior to final design.

Observation I.1: Since the completion of the first monitoring review, NDOT staff have carefully assessed and updated many environmental review procedures and have indicated those changes in updated manuals. In addition, largely due to periodically high turnover of NDOT environmental review staff, NDOT Environmental Section leadership have integrated the updated processes and procedures into a variety of training events and approaches.

Observation I.2: During the term of this third monitoring event, the review team learned from NDOT's self-assessment summary report that an NDOT Final Design Policy memo has been finalized, and procedures associated with conducting project coordination meetings (PCM) have been updated. The NDOT self-assessment identified 99% of project CEs were completed prior to final design. This is in comparison to the last monitoring event (November 2020), which reported 81% of project CEs were completed prior to final design. The improvement appears to be the result of the new procedures designed to ensure CE approvals for individual projects occur prior to the start of final design.

Successful Practice: NDOT section leadership saw a need to integrate timely training on the various updated process and procedures which were a result of QA reviews, new regulations, or requirements to ensure those changes were understood by NDOT Environmental staff.

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

The processing of assigned CE reviews includes five main observations about program management, review processes, project file management, interagency consultation for individual projects, commitment documentation and implementation, and project recordkeeping.

Observation II.1: The collaborative nature that resulted by including NDOT staff in the monitoring review process of project file review and the resultant collaborative discussions has led to the identification of a variety of suggestions of areas where NDOT could make existing processes more efficient and reduce process redundancies.

Observation II.2: The consistency of the documentation in project records and filing protocols were the focus of this observation. Based on review of project files, the review team noted differences in content and completeness for local government sponsored projects compared with State DOT sponsored projects. Upon further review, NDOT members of the review team realized that the “missing” LPA project documentation was filed in the project’s design folder rather than the environmental review folders. During the period of the review, NDOT staff indicated they had updated their electronic filing system (OnBase) protocols to address this issue; the team found improvement in file structure for projects approved later in the review cycle. The team found NDOTs implementation of the complete file checklist which identifies what and where documents need to be filed has led to enhanced consistency. The complete file checklist was implemented during the timeframe of the review and the team noted a marked improvement in files utilizing the checklist. The review team also noted inconsistency in the Section 106 documentation in project files. Specifically, NDOT relies on a form to summarize the outcome of Section 106 compliance. The form content is compliant, although somewhat incomplete because the form may indicate no SHPO consultation occurred but does not also indicate none was required because the review proceeded according to the terms of a programmatic agreement.

Observation II.3: Documentation and communication of environmental commitments were the focus of this observation. In project files reviewed, the party responsible for ensuring the implementation of the commitment may benefit from greater specificity. Also, there were some instances of inclusion of design phase environmental commitments in the NDOT green sheet that is intended to communicate construction phase commitments to construction contractors. The team also identified the phrasing of contractor commitments in contract-enforceable language is an area to continue improving. Lastly, the review team learned that commitment documentation for railroad projects that were approved using a CE rather than a minor CE (MCE) were not always incorporated into railroad agreements correctly. NDOT Environmental Section staff have recently provided additional training (post review discovery) to NDOT Local Assistance Division railroad liaisons who are responsible for ensuring that environmental commitments are incorporated appropriately into applicable railroad contracts.

Observation II.4: The team found that recordkeeping and timing of identifying utilities was unclear on local projects. This review focused on the NDOT process for utility relocation and the associated documentation of when, or if, utility relocation was to occur. Currently, the discussion on utility relocation occurs late in the project delivery process and is usually recorded in notes for the PCM 70 and PCM 90 meetings, during which NDOT environmental staff can raise questions on whether or when utility relocations might occur.

Observation II.5: Excess land disposal project files were reviewed for this observation. The review of disposal project files follows a simplified CE approval process that relies on a NDOT-53 (Probable Class of Action) form. This form lacks information on possible impacts of the disposal of excess land. There are SME memos relating to consideration of specific resources (Section 106, HazMat, Section 7, T&E species). In discussing NDOT’s approach to excess land disposal documentation, NDOT staff indicated they would consider disposals in a MCE approach to documentation, with standard language relevant to impacts related to excess land disposal projects.

Recommendation II.1: The review team shared suggestions related to the timing and frequency of re-evaluations, expanding the use of MCE for minor scope actions, and modifying CE elevation thresholds to reduce the current CE Level framework from 3 to 2 tiers.

Recommendation II.2: The Section 106 project template form may benefit from adding information to clearly reference other programmatic agreements when compliance relies upon that agreement.

Recommendation II.3: The project file review identified a template likely used for Hazardous Materials Reports contains a subject matter expert's (SME) opinion whether the project reviewed met the CE criteria or not. This appears to be out of sequence and should not be in the Hazardous Materials Report.

Recommendation II.4: NDOT should consider how environmental commitments that needed to occur either before or after construction should be documented and tracked.

Recommendation II.5: NDOT should ensure discussions to describe the details of utility relocations if federal funds are used in the relocation are occurring in all PCM meetings.

Successful Practice: NDOT has developed a Continuous Process Improvement Plan to record and implement these and other suggestions to improve their program and to make it more efficient.

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.

This monitoring review did not identify any projects that should have been excluded from assignment to NDOT. During the period of the monitoring review NDOT did not identify any CE projects that would be excluded from assignment.

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. The team found the roles for NDOT Professionally Qualified Staff (e.g., T&E Species Biologist, Wetlands Biologist, Section 106 Specialist) are defined in NDOT environmental manuals. Like many large organizations in the United States, NDOT was not alone in experiencing challenges to maintaining their staff during and after the period of the pandemic. The review team learned from interviews that NDOT was challenged by periodic staff turnover. Some key positions where staff departed included SMEs in threatened and endangered species, wetlands, and NEPA. During the time when staff either left NDOT or NDOT hired replacements, NDOT maintained their project reviews and NEPA approvals while also working on program efficiencies, such as the renewal of NDOT's Section 106 programmatic agreement and the Threatened and Endangered Species "Matrix" Programmatic Agreement. Additionally, NDOT anticipated more tribal consultation workload resulting from the Section 106 Programmatic Agreement and hired an additional Section 106 SME.

Observation IV.1: One of the outcomes of the staff turnover, the review team learned through interviews, was NDOT's expansion of approaches and opportunities for staff training. Much of that training load was carried by the NDOT environmental leadership staff through informal mentoring and cross training. NDOT has formally cross trained wetlands and T&E staff by sending individuals to technical training programs, such as the USFWS Interagency Cooperation for Endangered Species and Basic Wetland Delineation from the Wetland Training Institute. Additionally, there appears to be more informal cross training amongst project delivery team members occurring through the NDOT PCM meetings.

Observation IV.2: An additional outcome of the PCM meetings we learned from interviews was the enhanced interdisciplinary collaboration among project delivery staff. One example of the collaboration an interviewee told the team, was that the construction activities checklist was confusing to some staff.

Recommendation IV.1: In an effort to continue to enhance the NDOT organizational staff capabilities and expertise, NDOT could consider collaborating with FHWA in capacity building efforts. These could include exploring the use of the FHWA Resource Center staff to deliver training modules or utilizing peer exchanges with other State DOTs.

Recommendation IV.2: The review team recommends that the NDOT design staff be made aware of the construction activity checklist term definitions and that project changes during construction may require new resource impact assessments. NDOT plans to bring up this issue to the NDOT Project Documents Committee, which brings key stakeholders together to increase awareness and address issues.

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

Based on information presented in NDOT's self-assessment report and through interviews, NDOT has implemented a refined quality control and quality assurance (QC/QA) process. The result has created a continuous feedback improvement loop where staff performing the QC have an open line of communication to discuss areas of concern and enhance the quality of the environmental program.

Observation V.1: NDOT staff interviews indicated they believe that the QC/QA process has been refined over the period of this review based on the content of quarterly QA results to staff via a continuous feedback loop between environmental program leadership and staff. The timely reporting of QA results to staff has spurred productive staff conversations that feedback to future QA reviews that monitor overall program quality. Additionally, staff interviews suggested a need to clarify on local projects who is responsible for completing the Environmental Certification. Environmental Certifications were not found in OnBase for two State-sponsored and one local-sponsored projects. The team found inconsistencies on how the environmental certification should be filed in NDOT's electronic file system, OnBase.

Recommendation V.1: NDOT leadership could address clarifications in how the environmental certification should be filed through updating the environmental procedures manual with a focus on roles and responsibilities.

Successful Practice: As a result of the refined QC process, the review team identified a positive result in a project file where a change in project design led to modifying the boundaries of sensitive areas on the plans. Other files indicated that the NEPA specialist was creating memos to the project file in order to capture and clarify project updates.

Conclusion

This report describes the results of a 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.

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.

In summary, and in conjunction with adjustments made to the 2021 Section 326 MOU renewal, FHWA finds that NDOT is in substantial compliance with the terms of the MOU. In accordance with Part IV(F)(3)(a), NDOT will have an opportunity to review a draft of this report and provide any disputes regarding findings in writing to FHWA. As identified in stipulation VI (E), NDOT will post the final monitoring report on the NDOT website.

In closing, FHWA thanks NDOT for its time, effort and courtesy provided to us during our monitoring review. FHWA and NDOT will continue to work on improvements as a result of this monitoring review and will continue to identify process improvements which will be documented in the continuous process improvement plan. FHWA looks forward to continuing the productive working partnership with NDOT.

For Additional Questions, please contact:

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

