

**PROGRAMMATIC  
CATEGORICAL EXCLUSION AGREEMENT  
BETWEEN  
THE FEDERAL HIGHWAY ADMINISTRATION  
AND  
THE NEBRASKA DEPARTMENT OF ROADS**

**REGARDING THE PROCESSING OF HIGHWAY PROJECTS CATEGORICALLY  
EXCLUDED FROM THE REQUIREMENTS TO PREPARE EITHER AN  
ENVIRONMENTAL ASSESSMENT OR ENVIRONMENTAL IMPACT STATEMENT**

APRIL 2015

(SUPERSEDES AGREEMENT DECEMBER 1, 2008 - PROGRAMMATIC AGREEMENT  
FOR NEPA CATEGORICALLY EXCLUDED TRANSPORTATION PROJECTS)



U.S. HIGHWAY 20 BRIDGE OVER THE WHITE RIVER, DAWES COUNTY  
PHOTOGRAPH BY JUSTIN WILLIAMS

**Whereas**, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370h (2014), and the Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500-1508) direct Federal agencies to consider the environmental impacts of their proposed major Federal actions through the preparation of an environmental assessment (EA) or environmental impact statement (EIS) unless a particular action is categorically excluded;

**Whereas**, the Federal Highway Administration's (FHWA) distribution and spending of Federal funds under the Federal-aid Highway Program and approval of actions pursuant to Title 23 of the U.S. Code are major Federal actions subject to NEPA;

**Whereas**, the Secretary of Transportation has delegated to FHWA the authority to carry out functions of the Secretary under NEPA as they relate to matters within FHWA's primary responsibilities (49 CFR 1.81(a)(5));

**Whereas**, the FHWA's NEPA implementing procedures (23 CFR part 771) list a number of categorical exclusions (CE) for certain actions that FHWA has determined do not individually or cumulatively have a significant effect on the human environment and therefore do not require the preparation of an EA or EIS;

**Whereas**, the Nebraska Department of Roads (NDOR) is a State agency that undertakes transportation projects using Federal funding received under the Federal-aid Highway Program and must assist FHWA in fulfilling its obligations under NEPA for the NDOR projects (23 CFR 771.109);

**Whereas**, Section 1318(d) of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405 (July 6, 2012), allows FHWA to enter into programmatic agreements with the States that establish efficient administrative procedures for carrying out environmental and other required project reviews, including agreements that allow a State to determine whether a project qualifies for a CE on behalf of FHWA;

**Whereas**, the FHWA developed regulations implementing the authorities in section 1318(d), effective November 6, 2014;

**Now, therefore**, the FHWA and NDOR enter into this Programmatic Agreement ("Agreement") for the processing of categorical exclusions.

#### **A. PARTIES**

The Parties to this Agreement are the Federal Highway Administration ("FHWA") and the Nebraska Department of Roads (hereinafter "NDOR").

#### **B. PURPOSE**

The purpose of this Agreement is to authorize NDOR to determine on behalf of FHWA whether a project qualifies for a CE specifically listed in 23 CFR 771.117 as listed in Appendix A and B of this Agreement.

### C. AUTHORITIES

This agreement is entered into pursuant to the following authorities:

1. National Environmental Policy Act, 42 U.S.C. 4321 - 4370
2. Moving Ahead for Progress in the 21st Century Act, P.L. 112-141, 126 Stat. 405, Sec. 1318(d)
3. 40 CFR parts 1500 - 1508
4. DOT Order 5610.1C
5. 23 CFR 771.117

### D. INTRODUCTION

The FHWA Nebraska Division follows the philosophy that the goal of the NEPA process is better decisions and not bigger documents. The primary purpose of this Agreement is to increase flexibility, streamline the environmental process, and reduce paperwork while maintaining appropriate consideration of projects' impacts on the human and natural environment. This Agreement provides for the expeditious processing of CE actions by NDOR, under the guidance and with the approval of FHWA. NDOR shall develop project documentation that demonstrates that project actions meet the CE criteria established under this Agreement and shall demonstrate that project actions meet the definition of a CE defined in 23 CFR 771.117(a) (see Council on Environmental Quality [CEQ] definition below) and have no unusual circumstances defined in 23 CFR 771.117(b) that would require the preparation of either an EA or EIS. The FHWA shall rely upon this documentation as a basis for any CE determinations it must make as part of consideration of notices to proceed to final design, right-of-way purchases, or construction.

NDOR will satisfy all conditions contained herein for all projects processed under this Agreement. This Agreement supersedes the December 17, 2008 CE processing agreement held between FHWA and NDOR, titled *Programmatic Agreement for the Review and Approval of NEPA Categorically Excluded Transportation Projects between the Federal Highway Administration Nebraska Division and the Nebraska Department of Roads*. This agreement applies to all projects that involve FHWA funding or approvals. This Agreement does not apply to 100% state funded projects that do not require FHWA approval.

In accordance with FHWA regulations [23 CFR 771.117(a)], CEs are actions which meet the definition contained in the CEQ regulations at 40 CFR 1508.4, and based on past experience with similar actions, do not involve significant environmental impacts and therefore are categorically excluded from the need to prepare an EA or EIS. They are actions which:

- Do not induce significant impacts to planned growth or land use for the area;
- Do not require the relocation of significant numbers of people;
- Do not have a significant impact on any natural, cultural, recreational, historic, or other resource;
- Do not involve significant air, noise or water quality impacts;
- Do not have significant impacts on travel patterns; or
- Do not otherwise, either individually or cumulatively, have any significant environmental impacts

The term "Significant" as used in NEPA is defined at 40 CFR 1508.27 and requires consideration of both context and intensity.

This agreement has been developed to be in conformance with the policy and procedures for the environmental processing of CE actions as defined in Section 23 CFR 771.117 (and as amended).

#### **E. RESPONSIBILITIES**

NDOR is responsible, as part of their processing proposed projects under this agreement, for:

1. Conducting appropriate environmental studies to determine if the CE classification is proper per 23 CFR 771.117(a) and (b), including considering unusual circumstances. Such unusual circumstances include, but are not limited to:
  - a. Significant environmental impacts;
  - b. Substantial controversy on environmental grounds;
  - c. Significant impacts on properties protected by Section 4(f) of the DOT Act or Section 106 of the National Historic Preservation Act; or,
  - d. Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.
2. Classifying all CE project actions as Level 1, or Level 2 CE Actions in accordance with 23 CFR 771.117 and this Agreement. The appropriate determination of a CE is based upon the type of action and project impacts; and,
3. Conducting environmental analyses and preparing documentation that serves as a basis for making a CE determination; and,
4. Coordinating with FHWA in the event cumulative effects may be of concern for an action; and,
5. Processing all CE project actions according to the terms of this agreement; and,
6. Preparing documentation in accordance with terms of this agreement utilizing NDOR's CE Determination Form, in agreement with FHWA Division office; *[NDOR is committed to developing electronic or "Smart Form" documentation tools for future incorporation into an online document production and storage system. These forms/systems will be incorporated, modified, and/or replaced as necessary with concurrence from with FHWA throughout the term(s) of this Agreement.]*; and,
7. Making CE determinations (CE approvals) on FHWA's behalf for Level 1 and Level 2 CE Actions; and,
8. Conducting quality control and quality assurance reviews to ensure that the provisions of this agreement are being appropriately followed; and,
9. Ensuring qualified staff perform all environmental reviews and documentation; and,
10. Assuring compliance with all applicable federal environmental and related requirements.

The FHWA Nebraska Division Office is responsible for:

1. Providing timely responses to request for reviews and approvals of items submitted by NDOR including but not limited to:
  - a. Questions on class of action
  - b. Reviews for Section 4(f), Section 106, Section 7 impacts
  - c. Review and approval of Level 3 CE Actions
2. Participating in any project level agency coordination, consultation, public involvement activity, or government to government consultation, as appropriate; and,
3. As part of its program oversight responsibility, conducting monitoring of NDOR's performance according to the terms of this agreement; and,
4. Determining whether a project should be classified as a Level 3 CE, EA or EIS

#### **F. CE ACTION LEVELS**

Activity types and environmental impact thresholds that define Level 1 and Level 2 CE actions for purposes of this agreement are defined in Appendices A and B. If a project does not meet the criteria for a Level 1 or Level 2 CE Action and a variance is not provided by FHWA, the project would be processed as either a Level 3 CE, an EA, or EIS as determined by FHWA. NDOR shall ensure that each project processed under this Agreement will be documented in accordance with the thresholds specified in the appendices of this Agreement.

CE determinations for Level 1 CE actions shall only be approved by a full-time equivalent NDOR Environmental Documents NEPA Analyst, the NDOR Environmental Document Unit Supervisor, or the NDOR Environmental Section Manager. CE determinations for Level 2 CE actions shall be only approved by the NDOR Environmental Documents Unit Supervisor or the Environmental Section Manager.

For projects that will likely exceed the Level 2 CE actions thresholds, NDOR will provide FHWA pertinent project scope and potential resource impact information using NDOR's *Probable Class of Action* form (or a successor form in agreement with FHWA) for FHWA to make the class of action determination. This will occur early in the environmental review process or during planning.

Level 3 CE actions can include projects with impacts greater than those listed as Level 1 or Level 2 CE actions. Level 3 CE actions must meet the intent of 23 CFR 771.117 in that they must satisfy the criteria for CE classification and cannot involve significant environmental impacts. Level 3 CE documentation shall be approved for content and accuracy by the NDOR Environmental Documents Unit Supervisor or the Environmental Section Manager prior to submittal to FHWA. FHWA retains approval authority for Level 3 CE actions.

This Agreement shall not preclude NDOR from requesting, or FHWA granting a CE review level *variance* when the project action results in a minor exceedance of the thresholds listed in Appendix A or B, on a case-by-case basis. NDOR shall provide FHWA pertinent project information and justification relevant to the *variance* request. In addition, the project action must qualify as a listed CE activity in 23 CFR 771.117 (c) or (d). Nothing in this Agreement diminishes FHWA's right to individually review any CE action, or prevent NDOR from requesting FHWA review of a Level 1 or Level 2 classified project.

## **G. DOCUMENTATION OF NDOR CE APPROVALS AND CERTIFICATIONS**

NDOR shall ensure that it fulfills the following responsibilities for documenting CE approvals made by NDOR on behalf of FHWA, and State CE certifications for CE actions to be approved by FHWA:

1. For actions listed in Appendix A and B, NDOR will identify the applicable action, ensure any conditions specified in FHWA regulation are met, verify that unusual circumstances do not apply, address all other environmental requirements, and complete the review with a NDOR signature evidencing approval.
2. In addition, for actions listed in 23 CFR 711.117 (d), NDOR shall prepare documentation that supports the CE determination and that no unusual circumstances exist that would make the CE approval inappropriate.

NDOR shall maintain a project record for CE approvals it makes on FHWA's behalf and each CE submitted to FHWA for approval. This record should include at a minimum:

1. Any checklists, forms, or other documents and exhibits that summarize the consideration of project effects and unusual circumstances;
2. A summary of public involvement complying with the requirements of FHWA-approved public involvement policy;
3. Any stakeholder communication, correspondence, consultation, or public meeting documentation;
4. The name and title of the document approver and the date of NDOR's approval or FHWA's final approval; and
5. Documented re-evaluations (when required) or a statement that a re-evaluation was completed for the project (when documentation is not necessary).

Inherently governmental functions, such as CE approvals, must be performed by a government employee.

Any electronic or paper project records maintained by the NDOR shall be provided to FHWA at their request. NDOR will retain those records, including all letters and comments received from governmental agencies, the public, and others for a period of no less than three (3) years after completion of project construction. This 3-year retention provision does not relieve NDOR of its project or program recordkeeping responsibilities under 2 CFR § 200.333 or any other applicable laws, regulations, or policies.

## **H. REEVALUATIONS**

It may become necessary for NDOR to re-evaluate the CE classification for projects having CE determinations. Re-evaluations shall be conducted by NDOR in accordance with 23 CFR 771.129. If there is a change in project scope or impacts, a written re-evaluation will be required prior to further approvals being granted. The re-evaluation of a CE shall be conducted by NDOR for the following circumstances:

1. If the project scope has changed since the last CE determination

2. If the project impacts have changed since the last CE determination
3. If regulatory changes occur that would influence the project or necessitate a reevaluation of impacts.

A reevaluation would be necessary if there are substantial changes in the proposed action that are relevant to social, economic or environmental concerns or if there are new circumstances or information relevant to social, economic, or environmental concerns with bearing on the proposed actions or its impacts.

NDOR shall document re-evaluations using a memorandum to the file or the reevaluation block on the CE form, commensurate with the action. The signature authority for re-evaluations will be the same as for the original CE document unless the re-evaluation indicates a change in the level of document is needed. It is the responsibility of NDOR to ensure that the conditions of the project have not changed and the NEPA determination remains valid for the action.

#### **I. STATE DOT PERFORMANCE MEASURES**

On a quarterly basis, NDOR will provide FHWA a list of Level 1 and Level 2 CE actions processed under this Agreement. The previous quarter's data will be provided to FHWA no later than the 10th of the first month after each consecutive quarter. At a minimum the list will contain the project number, control number, project name, date of NDOR approval, CE action level, and the corresponding (c) list or (d) list category used to approve the project.

For national reporting purposes, FHWA will periodically request NDOR to report the duration to complete CE processing. NDOR and FHWA Nebraska Division will mutually agree on the methodology used to measure CE processing duration.

NDOR must maintain adequate organizational and staff capability and expertise, or as appropriate, procure through consultant services some or all of the technical expertise needed, to effectively carry out the provisions of this Agreement. This includes:

1. Using appropriate technical and managerial expertise to perform the functions set forth under this Agreement; and
2. Devoting adequate financial and staff resources to carry out the certification and processing of projects under this Agreement

NDOR shall have written protocols to ensure that environmental commitments are fulfilled.

NDOR will continue to offer training as part of its environmental consultant prequalification process to ensure high quality standards in documentation preparation. A minimum of 3 training events during the five year Programmatic Agreement period will be held.

NDOR will monitor its processes relating to project approvals, environmental analysis and project file documentation and check for errors and omissions. NDOR shall take corrective action as needed and will document quality control activities and any corrective actions taken and will provide FHWA a summary of the findings upon request.

NDOR will utilize interim written QA/QC procedures effective on the signature date of this agreement. Final quality control process and written procedure will be provided to FHWA Nebraska Division no later than *June 2016*.

NDOR shall ensure that project records are available to the public consistent with requirements applicable to Federal agencies under 5 U.S.C. §552 [the Freedom of Information Act (FOIA), as amended in 2002], NEPA, and consistent with applicable FHWA regulation, policy, and guidance.

#### **J. MONITORING**

Full compliance with the Agreement will be determined by FHWA through completion of process reviews on an annual basis for the first two years of this agreement, then every other year thereafter.

NDOR and FHWA will jointly conduct process reviews of all Level 1 and Level 2 CE actions, and prepare a report detailing the findings, recommendations and best practices. The results of such reviews will be used to determine what agreement modifications, if any, may be needed and a reasonable schedule to address process review action items shall be included in the report. FHWA shall review Level 3 CE actions at least once during the life of this 5 year agreement and as needed.

Nothing in this Agreement shall prevent FHWA from undertaking other monitoring or oversight actions, including process reviews, with respect to NDOR performance under this Agreement. FHWA may identify findings or observations, as a result of its oversight monitoring, that NDOR has not performed according to the provisions of this agreement. In such cases NDOR shall prepare and implement a corrective action plan to address such findings and observations. At its sole discretion, FHWA may require NDOR to perform other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with applicable Federal laws and regulations.

#### **K. TERM, RENEWAL, TERMINATION, & MODIFICATIONS**

This Agreement shall have a term of five (5) years, beginning on the date of the last signature. This Agreement is renewable for additional terms of five (5) years each, if NDOR requests renewal and FHWA determines that NDOR has satisfactorily carried out the provisions of this Agreement. In considering any renewal of this Agreement, FHWA will evaluate the effectiveness of the Agreement, compliance with the terms of the agreement, and its overall impact on the environmental review process.

NDOR shall post an executed copy of this Agreement on its web site, available to the public.

At least six (6) months prior to the end of each term, NDOR and FHWA shall meet to discuss the results under the Agreement and consider amendments to this Agreement. If the parties do not renew the Agreement, then it shall expire at the end of the term then in effect.

Either party may terminate this Agreement at any time by giving at least a 30 day written notice to the other party.

Any party to this Agreement may request that it or the Appendices be amended to reflect changes, whereupon the parties shall consult to consider such an amendment. If the parties agree to amend this Agreement or the Appendices, then FHWA and NDOR may execute an amendment with new signatures and dates after all necessary reviews are completed. The term of the Agreement shall remain unchanged unless otherwise expressly stated in the amended Agreement. Minor non-substantive changes to the Appendices may be made through

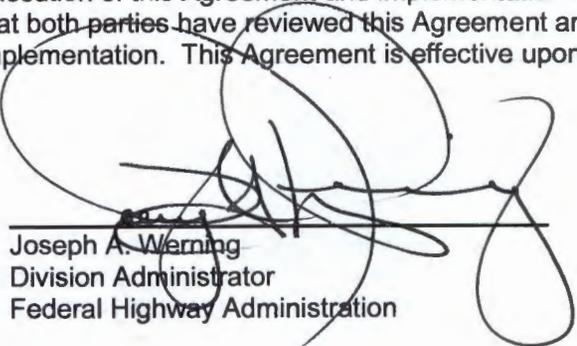
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appropriate clarification guidance to better refine implementation of the agreement based on experience. This will not require re-execution of the Agreement, but would require the written consent of both parties.

Expiration or termination of this Agreement shall mean that NDOR is not able to make CE approvals on FHWA's behalf.

**Signatures**

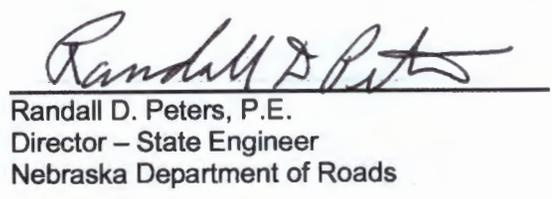
Execution of this Agreement and implementation of its terms by both parties provides evidence that both parties have reviewed this Agreement and agree to the terms and conditions for its implementation. This Agreement is effective upon the date of the last signature below.



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Joseph A. Werning  
Division Administrator  
Federal Highway Administration

4-15-2015  
Date



\_\_\_\_\_

Randall D. Peters, P.E.  
Director – State Engineer  
Nebraska Department of Roads

4/14/15  
Date

### **Appendix A: Level 1 CE Actions**

Due to the limited scope of work for certain projects and based on NDOR and FHWA's past experience with similar actions, these actions meet the intent of CEQ regulation (Section 1508.4) and 23 CFR 771.117(a) and 771.117(c): some actions "...meet the criteria for CEs in the CEQ regulation and normally do not require any further NEPA reviews by the Administration."

These projects must have independent utility and logical termini and must not exceed any of the Level 1 project impact thresholds listed in the next section. Based on past experience, projects listed below will not result in any significant impacts to the human and/or natural environment. If environmental resources will be impacted, the level of documentation will need to be elevated.

The NDOR shall be ultimately responsible for ensuring that projects meet the criteria of a Level 1 CE action and do not require any further NEPA approvals. The following project actions correlate to the actions described in 23 CFR 771.117(c)(1) through (25) and have been determined to meet the criteria of a Level 1 CE action as defined by NDOR and FHWA:

- (1) Activities which do not involve or lead directly to construction, such as planning and research activities; grants for training; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system. Examples include:
  - Study type projects (i.e. feasibility studies, etc.).
  - Visual bridge inspection, including collection of physical samples (e.g. paint chips, timber pile cores, etc.), that is not part of a larger undertaking.
- (2) Approval of utility installations along or across a transportation facility. Examples include:
  - Tower lighting and street lighting projects.
  - Repair/replacement of intersection, underpass, overpass or other roadway lighting.
- (3) Construction of bicycle and pedestrian lanes, paths, and facilities. Examples include:
  - Walkways, sidewalks, re-construction of shared-use paths and facilities, construction of a bike path on an existing railroad bed, designations of certain highways as bike routes, painting of existing paved shoulders as bike lanes, ADA ramps.
  - Construction of new shared-use paths and facilities will require at least a Level 2 review.
- (4) Activities included in the State's "highway safety plan" under 23 U.S.C. 402.
- (5) Transfer of Federal lands pursuant to 23 U.S.C. 107(d) and/or 23 U.S.C. 317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA.

- (6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction. Examples include:
  - Maintenance and/or replacement of existing noise wall panels and/or posts
- (7) Landscaping. Examples include:
  - Beautification or facility improvement projects (i.e. landscaping, curb and gutter replacement, installation of park benches, decorative lighting, etc.)
- (8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur. Examples include:
  - The installation, replacement or maintenance of signs and signals, pavement markings/raised pavement markers/sensors, traffic calming activities, and/or new or replacement fencing.
  - General pavement marking or "line painting" projects, other than re-striping a roadway to increase capacity.
- (9) The following actions for transportation facilities damaged by an incident resulting in an emergency declared by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121):
  - (i) Emergency repairs under 23 U.S.C. 125; and
  - (ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:
    - (A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and
    - (B) Is commenced within a 2-year period beginning on the date of the declaration.
- (10) Acquisition of scenic easements. Examples include:
  - Land acquisition by a public agency/public park entity for passive recreational use.
- (11) Determination of payback under 23 CFR part 156 for property previously acquired with Federal-aid participation.

- (12) Improvements to existing rest areas and truck weigh stations. Examples include:
- Improvements to existing rest areas and weigh stations for minor maintenance (i.e. mill and resurfacing of existing ramp and parking areas, lighting or other enhancements to rest area facilities). Projects involving major construction may require a higher level of documentation.
  - Rest Area/Weigh Station electrification and construction/installation supporting alternative energy vehicles at existing facilities
- (13) Ridesharing activities. Examples include:
- Transportation corridor fringe parking facilities, park-and-ride lots and ridesharing activities
- (14) Bus and rail car rehabilitation.
- (15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.
- (16) Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.
- (17) The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a CE. Examples include: Purchase or conversion of vehicles to alternative fuel uses (CNG, E-85, etc.)
- (18) Track and railbed maintenance and improvements when carried out within the existing right-of-way.
- (19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.
- (20) [Deleted due to inapplicability in the NDOR Transportation Program].
- (21) Deployment of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience. Examples include, but are not limited to, traffic control and detector devices, lane management systems, electronic payment equipment, automatic vehicle locaters, automated passenger counters, computer-aided dispatching systems, radio communications systems, dynamic message signs, and security equipment including surveillance and detection cameras on roadways and in transit facilities and on buses. Other examples include:
- Replacement of existing or installation of new traffic signals, flashing beacons, railroad warning devices and the installation of ITS system components
  - Upgrade of existing tower lighting to new technologies that ensure a lesser impact than the current system.
  - Fiber optic trenching within the existing roadway ROW

- Implementation of other new safety or operations technologies.
- (22) Projects, as defined in 23 U.S.C. 101 that would take place entirely within the existing operational right-of-way. Operational right-of-way refers to right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose. This area includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, etc.) and other areas maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities. Portions of the right-of-way that have not been disturbed or that are not maintained for transportation purposes are not in the existing operational right-of-way. Example actions may include:

- General highway maintenance and improvements such as pavement repair, armor coat, chip/fog seal, crack/joint seal, grinding/resurfacing, microsurfacing, mill and inlay/overlay, shoulder surfacing, trench widening, shoulder reconstruction.
- Culvert installation and maintenance activities including headwall, wingwall and other similar repair replacement or modification; installation or replacement of Flared End Sections (FES); in-kind replacement; new curb and flume installation (new locations), repair/replacement, etc.
- Bridge maintenance and repair activities including bridge deck overlays; deck repairs (including Class III repairs); rail repair/replacement; abutment and wingwall repair, replacement or modification; approach slab replacement; painting; anti-icing system installation.
- Guardrail replacement, repair and modification and associated surfacing where roadway ditches and back slopes will not be relocated, mail box turnouts, etc.
- Sediment and erosion control work including slope/slide repair and reconstruction.
- Construction of new or improvements to existing NDOR facilities when the actions occur within the existing operational right-of-way.

(23) Federally-funded projects:

- (i) That receive less than \$5,000,000 of Federal funds; or
- (ii) With a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated project cost.

(Note: Total project costs include all phases of work on a project, from preliminary engineering, to final design, right-of-way, construction, etc. The \$5,000,000 cumulative threshold includes all federal funds applied to the project, regardless of phase.)

Example actions may include:

- General highway maintenance and improvements such as pavement repair, armor coat, chip/fog seal, crack/joint seal, grinding/resurfacing, microsurfacing, mill and inlay/overlay, shoulder surfacing, trench widening, shoulder reconstruction.
- Culvert installation and maintenance activities including headwall, wingwall and other similar repair replacement or modification; installation or replacement of Flared End

- Sections (FES); in-kind replacement; new curb and flume installation (new locations), repair/replacement, etc.
- Bridge maintenance and repair activities including bridge deck overlays; deck repairs (including Class III repairs); rail repair/replacement; abutment and wingwall repair, replacement or modification; approach slab replacement; painting; anti-icing system installation.
  - Guardrail replacement, repair and modification and associated surfacing where roadway ditches and back slopes will not be relocated, mail box turnouts, etc.
  - Sediment and erosion control work including slope/slide repair and reconstruction.
- (24) Localized geotechnical and other investigations to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.
- (25) Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. 1341; 1342)) carried out to address water pollution or environmental degradation. Examples include:
- Conservation/mitigation easements and fee simple.
- (26, 27, 28) These "(c)" listed activities cannot be processed as a Level 1 Action per 23 CFR 711.117(c)(26-28) and the provisions identified in MAP-21 (see Appendix B).
- (29) [Deleted due to inapplicability in the NDOR Transportation Program].
- (30) [Deleted due to inapplicability in the NDOR Transportation Program].

**Level 1 CE Action - Impact Thresholds:**

Projects that exceed the following thresholds will not be considered eligible for processing as a Level 1 CE Action:

- Any acquisition of new temporary or permanent right-of-way for construction. All Level 1 CE actions must occur within existing right-of-way
- National Wild and Scenic River or National Recreational River corridor impacts. Upon written concurrence from the agency of jurisdiction, a finding of "no impact" would not preclude processing the action as a Level 1 CE.
- An action that causes greater than 1-foot rise in the Base Flood Elevation (BFE), any rise in a floodplain that potentially impacts an adjacent structure, or any rise in a floodway.
- Section 404 Nationwide Permit requiring Pre-Construction Notification or an Individual Permit or a Section 9 Coast Guard Permit.
- Impacts to wetlands greater than 0.50 acre, including isolated wetlands/waters of the state.
- Impacts to state or federally threatened or endangered species resulting in a "May Affect" determination per the Nebraska Biological Evaluation Process *Matrix* and requiring further review and resource agency concurrence.
- Impacts to historic properties or historic districts. All Level 1 CE Actions must result in a *No Potential to Affect* or a *No Historic Properties Affected* determination.

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- Hazardous material conflicts: If the project qualifies as an exemption per the Hazardous Material Manual and/or it has been determined by NDOR HazMat specialists there is low potential for conflict with hazardous materials it qualifies for Level 1.
- Section 4(f) use (temporary or permanent), determination of 4(f) exception, or a 6(f) conversion.
- Minor traffic disruption, including the use of a temporary road, detour or ramp closure unless the use of such facilities satisfy the following conditions:
  - Duration of the detour is less than 30 working days in length;
  - Designated detours would result in adverse (out-of-direction) travel less than 5 miles in urban areas or 25 miles in rural areas;
  - Provisions are made for access by local traffic and so posted;
  - Through-traffic dependent businesses will not be adversely affected;
  - The detour or ramp closure will not interfere with any local special event or festival;
  - The temporary road, detour or ramp closure does not substantially change the environmental consequences of the action;
  - There is no unresolved controversy associated with the temporary road, detour, or ramp closure
- The action will not result in the complete closure of access to residential properties greater than 5 working days, closure of business access during operational hours or access restrictions to emergency service facilities or providers.
- A Type I project as defined by NDOR's approved Traffic Noise Policy and 23 CFR 772, will not qualify as a Level 1
- Any adverse impact to minority or low income populations
- Unresolved public or agency controversy on environmental grounds. If NDOR identifies or receives notification of human, natural or economic impacts as a result of the project after all other issues have been addressed (e.g. permits, authorizations, agreements, etc. have been received), the action cannot be processed as a Level 1 CE action. NDOR shall coordinate with FHWA to determine the proper level of environmental review if unresolved controversy exists.

## Appendix B: Level 2 CE Actions

Due to the limited scope of work for certain projects and based on NDOR and FHWA's past experience with similar actions, these actions meet the intent of CEQ regulations (Section 1508.4), and 23 CFR 771.117(a), (b), and (c). Furthermore, these actions satisfy the criteria for CE Classification and do not involve significant environmental impacts. These projects must have independent utility and logical termini and must not exceed any of the Level 2 CE action impact thresholds listed below. Level 2 CE actions require documentation to ensure no unusual circumstances are present (ex., significant environmental impacts; substantial controversy on environmental grounds; significant impact on properties protected by Section 4(f) of the DOT Act or Section 106 of the National Historic Preservation Act; or inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action) that would warrant a higher level of NEPA documentation.

Certain projects that exceed Level 1 CE action impact thresholds can be processed as a Level 2 CE project *only* if they meet the criteria of a Level 2 CE action *and* if they do not exceed Level 2 CE action impact thresholds. Those projects that do not meet the criteria for Level 2 shall be processed at the next appropriate higher level, whether it be a Level 3 CE, EA, or EIS.

The following project actions correlate to the actions described in 23 CFR 771.117(c) and have been determined to meet the criteria of a Level 2 CE action as defined by NDOR and FHWA. Level 1 Actions listed in Appendix A but not listed below are incorporated by reference to the list of Level 2 CE actions:

- (22) Projects, as defined in 23 U.S.C. 101 that would take place entirely within the existing operational right-of-way. For this agreement, Operational right-of-way includes the property rights necessary to build, operate and maintain the transportation facility (i.e. roadways, trails, bikeways, share use paths, etc.) and its appurtenances. Appurtenances include, for example, culverts, bridges, fencing, sidewalks, roadway approaches, shoulders, signing, ditches and backslopes. Operational right-of-way would not include non-economical remnants or existing ROW not necessary for the operation or maintenance of the transportation facility, or property acquired for environmental mitigation.

Based on previous experience with similar actions, examples may include:

- Reconstruction actions meeting the terms (operational right-of-way) and associated Level 2 CE resource impact thresholds.
  - Minor Realignment actions (less than one (1) mile in length) occurring within the Operational ROW.
  - Construction of new or improvements to existing NDOR facilities when the actions occur within the existing operational right-of-way.
- (23) Projects that receive less than \$5,000,000 of Federal funds or with a total estimated cost of not more than \$30,000,000 and with Federal funds that comprise less than 15 percent of the total estimated project cost (project costs would include preliminary engineering, right-of-way, etc. if Federal funds are used for those associated project actions).
- (26) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes), if the project meets the constraints listed in 23 CFR 771.117 (e).

Based on previous experience with similar actions, examples may include:

- Construction of bicycle lanes and pedestrian walkways, sidewalks, shared-use paths, or facilities and trailhead parking.
- Beautification or facility improvement projects (i.e. landscaping, curb and gutter installation and replacement, ADA ramps/curb ramps, installation of park benches, decorative lighting, etc.).
- Other project types based on past experience with similar actions with concurrence from FHWA.

(27) Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints listed in CFR 23 771.117 (e).

Based on previous experience with similar actions, examples may include:

- Other project types based on past experience with similar actions with concurrence from FHWA.
- If the project includes a roundabout, coordinate with FHWA to determine appropriate class of action.

(28) Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings if the project meets the constraints listed in 23 CFR 771.117(e).

Based on previous experience with similar actions, examples may include:

- Construction of associated pedestrian crossings, grade-separated pedestrian crossings, and connecting pathways.
- Other project types based on past experience with similar actions with concurrence from FHWA.

### **Level 2 CE Action Impact Thresholds**

The environmental resources listed below require documentation to illustrate that no significant impacts will occur. The Level 2 classification cannot be applied to projects when any of the thresholds below are exceeded:

- No addition of through-lane capacity. Auxiliary lanes and turn lanes less than a mile in length are not considered capacity-adding actions. Center turn lanes, regardless of length, are not considered capacity-adding actions.
- No acquisition of more than a minor amount of right-of-way or that would result in any residential or non-residential displacements. For this agreement, minor amounts of ROW are defined as less than 2 acres per linear mile, and no removal of major property improvements. Examples of Major improvements include residential and business structures, garages, or the removal of other features which would change the functional utility of the property. Removal of minor improvements, such as fencing, landscaping, sprinkler systems, and mailboxes would be allowed.
- No need for a bridge permit from the U.S. Coast Guard under Section 9 of the Rivers and Harbors Act.

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- No need for an Individual Section 404 permit under the Clean Water Act, or a Section 10 permit under the Rivers and Harbors Act, from the U.S. Army Corps of Engineers.
- No finding of adverse effect to any historic property considered under Section 106 of the National Historic Preservation Act.
- No Section 4(f) use resulting in greater than the following: de minimis impacts, an excepted use, or use of a programmatic evaluation.
- No finding of "may affect, likely to adversely affect" threatened or endangered species or critical habitat under the Endangered Species Act, and no use of unique conservation conditions requiring resource agency concurrence that are not included within the "Matrix" PA.
- No construction of temporary access, or the temporary or permanent closure of existing road, bridge, or ramps, that would result in major traffic disruptions,
  - A temporary traffic and access disruption would not be considered major if it meets the following conditions:
    - Duration of the detour or temporary access is less than a total of 135 working days (a typical construction season);
    - Designated detours would result in adverse (out-of-direction) travel less than 5 miles in urban areas or 25 miles in rural areas;
    - Provisions are made for access by local traffic and so posted;
    - Through-traffic dependent businesses will not be adversely affected;
    - The detour or ramp closure will not interfere with any local special event or festival;
    - The temporary road, detour or ramp closure does not substantially change the environmental consequences of the action;
    - The action will not result in the complete closure of access to residential properties greater than 10 working days, closure of business access during operational hours or access restrictions to emergency service facilities or providers.
    - There is no unresolved controversy associated with the temporary road, detour, or ramp closure
  - A permanent traffic and access disruption cannot
    - permanently close a roadway, roadway intersection, or interstate ramp
    - create new intersections
    - convert a local street into a higher classification of roadway
    - permanently change the functional utility of the property
- No Changes in access control that result in change to the functional utility of adjacent properties.
- No floodplain encroachment other than functionally dependent uses (e.g. bridges, wetlands) or actions that facilitate open space use (e.g. recreational trails, bicycle and pedestrian paths). For CE Level 1 actions listed in Appendix A that are elevated to a Level 2 CE review, an encroachment is allowed, but the action cannot cause greater than 1-foot rise in the BFE, any rise in a floodplain that impacts an adjacent structure, or any rise in a floodway.
- No construction activities in, across, or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers. For CE Level 1 actions listed in Appendix A that are elevated to a Level 2 CE review, the activity can

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occur in, across or adjacent to one of these resources, but the action cannot impact the resource. The presence of an impact is determined based upon coordination with the agency with jurisdiction.

- No unresolved public or agency controversy on environmental grounds. If NDOR identifies or receives notification of negative human, natural or economic impacts as a result of the project after all other issues have been addressed (e.g. permits, authorizations, agreements, etc. have been received), the action cannot be processed as a Level 2 CE action. NDOR shall coordinate with FHWA to determine the proper level of environmental review if unresolved controversy exists
- Actions that meet the Type I project as defined by NDOR's approved Traffic Noise Policy and 23 CFR 772.
- Actions that increase capacity in exceedance of 100,000 vehicles per day in the 20th year following the project construction (see DEQ MOU), projects that may result in high potential for Mobile Source Air Toxics effects (MSAT Level 3), or a project considered Regionally Significant within a designated non-attainment area.
- Projects occurring within the boundaries of an active Superfund site with soil disturbance below or beyond preexisting roadway fill, or projects with a high potential for encountering contaminants.
- The action cannot be processed as a Level 2 CE action if the project results in a potential for disproportionately high and adverse impacts as determined by the NDOR HCRS.
  - If mitigation is required to avoid disproportionately high and adverse impacts, or if protected populations or social service providers express project-related social or economic impact concerns, coordination will occur with FHWA to determine if the project will require a Level 3 CE or higher level NEPA review. This coordination should occur as early as possible, and must include enough information to reasonably anticipate the level of impact and make the NEPA class determination.

**Appendix C: Level 3 CE Actions**

Any proposed action that does not meet the criteria of Level 1 or Level 2, either due to an impact threshold or action type, will be processed as a Level 3 CE or higher level NEPA document. FHWA retains approval authority for Level 3 actions and approval of the associated Form. For projects that will likely exceed the Level 2 thresholds, NDOR will provide FHWA pertinent project scope and potential resource impact information using NDOR's *Probable Class of Action* form (or a successor form in agreement with FHWA) to make the proper class of action determination. This will occur early in the environmental review process or during planning. For Level 3 actions, NDOR shall provide appropriate documentation certifying the proposed action meets the criteria of 23 CFR 771.117(c) or 23 CFR 771.117(d) and Appendix C of this agreement using the Level 3 CE form.