

STATE OF NEBRASKA
Minutes of the
Nebraska Board of Public Roads Classifications and Standards

March 24, 2023

Nebraska Department of Transportation,
Central Headquarters Building Auditorium
1500 Nebraska Parkway, Lincoln, Nebraska

Meeting and Hearings Notices:

- Statewide news release emailed and posted on Nebraska Department of Transportation website, March 17, 2023.
- Event posted on the State of Nebraska website (Public Meeting Calendar), March 17, 2023.
- Tentative agenda emailed to each board member and interested persons, March 17, 2023.
- Meeting agenda kept current and on public display in Liaison Services Section, Room 123B, Nebraska Department of Transportation, 1400 Nebraska Parkway, Lincoln, Nebraska.
- Meeting agenda posted in the main entrance of the Nebraska Department of Transportation 1500 Nebraska Parkway building, March 24, 2023.

Board members present:

Roger Figard, Lincoln, Chairman
James A. Litchfield, Wakefield, Vice Chairman
Barbara Keegan, Alliance
John F. Krager, Omaha
Brandie Neemann, Lincoln
Edward R. Wootton, Sr., Bellevue

Board members absent:

Steven D. Rames, Norfolk
Timothy W. Weander, Omaha
Congressional District 3 representative seat is vacant.
Class 5, 6 or 7 County representative seat is vacant.

Board member present but not voting:

Russell L. Kreachbaum, Jr., Central City *(to be confirmed by the Legislature in early 2023)*.

Staff members present:

LeMoyne D. Schulz, Board Secretary & Highway Local Liaison Coordinator, NDOT, Lincoln
Barbara Hasterlo, Office Associate, Liaison Services Section, UNL, LTAP/NDOT, Lincoln

Others in attendance:

Kyle Christensen, Roadway Design, NDOT, Lincoln
Nathan Sorben, Roadway Design, NDOT, Lincoln
Mick Syslo, Roadway Design, NDOT, Lincoln
Kent Miller, Bridge Division, NDOT, Lincoln
Ryan Balluck, Administrative Programs Officer 1, Government Affairs, NDOT, Lincoln
Mitch Doht, Director, Nebraska Local Technical Assistance Program (LTAP), Lincoln

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Chairman Figard called the meeting to order at 9:00 a.m. The meeting was open to the public. Chairman Figard announced that Board Member, Lisa Kramer, had submitted her resignation effective January 21, 2023.

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Chairman Figard made the following announcements in compliance with the Open Meetings Act.

- A copy of the Open Meetings Act is available for inspection and is posted by the entrance to this room.
- The Meeting Agenda and a copy of all materials that were provided to the Board Members, prior to the start of this meeting, are available on the table by the entrance to this room.
- A sign in sheet is available. Visitors are not required to sign but are encouraged to do so.

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There were no changes from the originally published agenda:

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Mr. Wootton moved to approve the November 18, 2022, meeting minutes. Mr. Litchfield seconded the motion. Members Keegan, Litchfield, Wootton, and Figard voted YES. Members Krager and Neemann abstained. Members Rames and Weander were absent. The motion carried.

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The board considered the status of the submission of the 2022 Annual Certification of Program Compliance. The filing deadline was October 31, 2022.

1. A total of 93 County, 523 Municipal, and NDOT certifications have been received.
2. Five (5) Municipal certifications are delinquent: Brule, Lamar, Oconto, South Bend and Winslow. Highway-User Revenue distribution was suspended, at the request of the board, beginning with the February 2023 distribution. Currently in the second month of suspension.

Mr. Wootton moved to accept the Status Report of the 2022 Annual Certification of Program Compliance as presented. Mr. Krager seconded the motion. Members Keegan, Krager,

Litchfield, Neemann, Wootton, and Figard voted YES. Members Rames and Weander were absent. The motion carried.

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NDOT - Presentation 3R Standards for Freeways. Mr. Sorben gave a presentation on the NDOT Presentation on a Practical Design Program for 3R Standards on Freeways. Mr. Syslo assisted in answering additional questions.

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Request to update 428 Nebraska Administrative Code (NAC)

- Chairman Figard provided an update.
Motion #1: Mr. Wootton moved to study, and when appropriate, update the Board’s regulations Title 428 Nebraska Administrative Code for Minimum Standards, and in doing so, update other affected regulations and state statutes as needed. Mr. Litchfield seconded the motion. Members Keegan, Krager, Litchfield, Neemann, Wootton, and Figard voted YES. Members Rames and Weander were absent. The motion carried.

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- Motion #2: Mr. Wootton moved to approve the Chairman’s appointment of a five-person committee, as follows: Brandie Neemann representing the state; Steve Rames representing the municipalities; Barbara Keegan representing the counties; John Krager representing the consultants & municipalities; and Chairman Figard to assist in outreach to public partners. Chairman Figard offered to chair the committee. Ms. Keegan seconded the motion. Members Keegan, Krager, Litchfield, Neemann, Wootton, and Figard voted YES. Members Rames and Weander were absent. The motion carried. (See *attachment #1*.)

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Biennial Election of Officers

Chairman Figard announced the election of officers as the next item of business (*terms commencing at the conclusion of today’s meeting*).

Nominations were opened for Chairperson, Vice Chairperson and Secretary.

Ms. Keegan moved to keep all elected officers in their current positions for a two-year term, as follows:

Chairperson	Roger Figard
Vice Chairperson	Jim Litchfield
Secretary	LeMoyne Schulz

Mr. Krager seconded the motion. Members Keegan, Krager, Litchfield, Neemann, Wootton and Figard voted YES. Members Rames and Weander were absent. The motion carried.

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Other business:

- Mr. Balluck provided a state and federal Legislative Report.

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Correspondence and general information. Chairman Figard announced he has been invited to speak at the Vision Zero conference in Omaha on April 4, 2023, where he plans to speak on what the role of the NBCS is, and its goal of a safe and uniform system of highways, roads, and streets.

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There were no Comments from the Audience.

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Acknowledgement of Visitors.

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The next tentative meeting is scheduled to be held on April 21, 2023, at 9:00 a.m., in the Nebraska Department of Transportation Central Headquarters Building Auditorium, 1500 Nebraska Parkway, Lincoln, Nebraska. *(There was no April 21, 2023, meeting, due to lack of agenda items. No further meetings were held from April 21, 2023, through June 16, 2023.) The next meeting is scheduled for July 21, 2023, at 9:00 a.m., in the Central Headquarters Building Room B12, 1500 Nebraska Parkway, Lincoln, Nebraska.)*

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There being no further agenda items, Mr. Wootton moved to adjourn. Mr. Litchfield seconded the motion. Members Keegan, Krager, Litchfield, Neemann, Wootton and Figard voted YES. Members Rames and Weander were Absent. The motion carried and the business meeting adjourned at 10:10 a.m.

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LeMoyne D. Schulz
Secretary for the Board
<https://dot.nebraska.gov/business-center/lpa/boards-liaison/>

Nebraska Board of Public Roads Classifications and Standards (NBCS)
March 24, 2023 Board Meeting
Request to Update 428 Nebraska Administrative Code (NAC) – Schedule

The NBCS Board normally meets the third Friday of the month. It normally does not meet in August and December. The following is an estimated schedule for updates to 428 NAC.

NBCS Board Meeting March 24, 2023 motion to update 428NAC2, and designate committee members

Phase (estimated duration): estimated schedule and brief description (see following pages for detailed descriptions for each phase)

Phase 1 (six months): March 2023 – September 2023 **Development of Revised Regulations** by the NBCS

Draft Initial Changes (*three months*) March – May 2023, *Committee meeting:* May

Public Outreach and Feedback – summer 2023, *Committee meeting:* July

Draft Additional Changes (*three months*) July 2023 – Sept 2023, *Committee meeting:* Sept

NBCS Board Meeting August 18, 2023 keep the Board updated – information only

Public Outreach and Feedback – fall 2023, *Committee meeting:* Oct

NBCS Board Meeting November 17, 2023 motion to proceed into rulemaking, ends Phase 1

Phase 2 (one month): December 2023 **Permission to Proceed to Rulemaking**

Phase 3 (two months): January 2024 – February 2024 **Rulemaking** (Administrative Procedures Act §84-901 et al) including public hearing

Phase 4 (up to four weeks after public hearing):

NBCS Board meeting March 15, 2024 Adoption by the NBCS Board

Phase 5 (four to six weeks): May 1, 2024 **Review and Approval by Attorney General and Governor**

Phase 6 one to two weeks following Governor's approval: May 15, 2024 **Filing with the Secretary of State, effective date, and promulgation by the NBCS**

Note: if any changes to statutes are proposed, a schedule will need to be developed for those

Attachment No. 1

Page 1 of 8 Pages

Nebraska Board of Public Roads Classifications and Standards (NBCS)
March 24, 2023 Board Meeting
Request to Update 428 Nebraska Administrative Code (NAC)

Request to Update NBCS Regulations (428 NAC)

Legal Authority. The Nebraska Board of Public Roads Classifications and Standards (NBCS) is required by Nebraska Revised Statute (Neb. Rev. Stat.) §39-2109 to assist in developing the state's functional classification system by identifying and adopting specific criteria for each functional classification set forth in Neb. Rev. Stat. §39-2103 and §39-2104. The NBCS is also required in Neb. Rev. Stat. §39-2113 to develop minimum standards of design, construction, and maintenance for each functional classification. Specific criteria for functional classifications are set forth in regulation Title 428 Nebraska Administrative Code (NAC) Chapter 1, abbreviated as 428 NAC 1. Minimum standards are in Title 428 NAC Chapter 2, abbreviated as 428 NAC 2.

Request to the Board. The NDOT is requesting the NBCS to update its regulations, 428 NAC 1 and 428 NAC 2. Significant changes being considered as of this writing are the following:

- bringing the state functional classification system more in line with the national functional classification system,
- eliminating design criteria from minimum standards that, through research, are no longer considered controlling criteria¹, but would still be addressed by the design professional using standard industry practices and guidelines,
- redefining some types of work (new, reconstruction, 3R², maintenance),
- adding 3R work for Freeways (state highways),
- reducing some standard bridge widths from desirable to minimum (state highways), and
- adding performance-based concepts ("practical design").

Other changes will occur, including errata. The focus herein will be on the above list.

Rulemaking. Changes to regulations involve the Governor's office and require a rulemaking process, including a public hearing. Details of this process are attached.

NDOT Support. The NDOT will provide support staff and resources for the process, in accordance with Neb. Rev. Stat. §39-2107.

Schedule. A schedule is attached.

Suggested Board Motion #1: To update Board regulations Title 428 Nebraska Administrative Code and, in doing so, update other affected regulations and state statutes as needed.

If Board Motion #1 is approved, **Suggested Board Motion #2: To approve the Chairman's appointed five-person committee of Board members to guide the updating process and make recommendations to the Board.**

¹ *Controlling criteria* are thresholds for design elements and dimensional features considered as most important to operational and safety performance and require a formal design exception if not met. Examples are design speed, bridge structural capacity, lane width, shoulder width, horizontal alignment, and other geometric design elements.

² 3R refers to a Resurfacing, Restoration, and Rehabilitation scope of work or project.

Nebraska Board of Public Roads Classifications and Standards (NBCS)
March 24, 2023 Board Meeting
Request to Update 428 Nebraska Administrative Code (NAC)

Additional Information/Details

Past Updates. Several times over the fifty-plus years since the NBCS was established, changes have been made to its regulations. Most recently, 428 NAC 3, 428 NAC 4, and 428 NAC 5 were eliminated. The most recent changes to 428 NAC 1 occurred in 2009. The most recent changes to 428 NAC 2 (minimum standards) were made in 2016 and before that in 2010. There are various reasons for making changes. In 2009, the remote residential functional classification was added to 428 NAC 1. In 2016, 428 NAC 2 was brought more in line with national standards (controlling criteria) and 3R work was allowed for county roads and municipal streets.

Limited Scope of 428 NAC 2. 428 NAC 2 addresses safety performance by focusing on a few important criteria. It expresses these as prescriptive criteria such as design speed, design structural loading capacity, lane width, etc. Thus, the design professional has a good starting point, but must consider much more to achieve a safe, quality transportation facility. Examples of what 428 NAC 2 does **not** cover, and therefore is not under the direct purview of the Board:

- design of sidewalks, curb ramps, trails, bicycle lanes, intersections, crashworthiness (guardrail and attenuators), or road/street lighting,
- drainage, hydraulics, and hydrology criteria and standards,
- placement of traffic control devices³ except for a very few specific circumstances.

These are addressed by the design professional using standard industry practices and guidelines. One example is guidance provided by the American Association of State Highway and Transportation Officials (AASHTO); Neb. Rev. Stat. [§39-1316](#) cites this organization in the context of the state highway system. Another is the *Manual on Uniform Traffic Control Devices* (MUTCD), which was adopted in Neb. Rev. Stat. [§60-6,118](#).

Intent of Proposed Changes. It is the intent of the proposed changes to bring the state functional classifications more in line with national functional classifications, eliminate some non-controlling design standards criteria, update definitions for types of work (new, reconstruction, 3R, and maintenance), and add practical design concepts, to bring the MDS more in line with the current transportation industry research and guidelines. It is not the intent of the proposed changes to expand the scope of the MDS by including items from the bulleted list under Limited Scope of Minimum Design Standards above.

Reason for the More Significant Changes. With regard to functional classification changes, there is confusion as well as added expense tracking and mapping the two classification systems; ultimately, this may have to be a separate activity if it proves too unwieldy or lengthy to fit into this request. With regard to roadway design, the transportation industry trend is fewer prescriptive criteria when determining a project's scope, and increased reliance on safety performance criteria, i.e. "practical design", and the judgment of the design professional. Some

³ Traffic control devices consist of signs, striping, and signals.

Nebraska Board of Public Roads Classifications and Standards (NBCS)
March 24, 2023 Board Meeting
Request to Update 428 Nebraska Administrative Code (NAC)

of these design concepts are proposed for inclusion into the MDS, 428 NAC 2. This is allowed by Neb. Rev. Stat. §39-2113(7), passed into law in 2019. An example of practical design is bridge or culvert replacement projects, Program 22-1, approved by the Board on October 21, 2022. An objective of the changes is to add more design flexibility without compromising overall safety performance, driver expectancy and uniformity across the network. Changes will help achieve designs more appropriate for a roadway segment's context, situation, and safety record. This includes reducing project footprints, i.e. outer extents, and impacts (such as right-of-way acquisition and environmental). Limited public funding is put to use solving problems instead of having to needlessly and expensively meet controlling criteria which may have no appreciable or measurable safety benefit. Cost savings can be applied to other parts of the network, resulting in an improved roadway network statewide.

Justification. The justification for changes to the MDS is the result of by research and improved knowledge of the relationship between geometric design features and traffic operations⁴. It is a recognition that some design values are more appropriately determined by the design professional, and project development is more than applying prescriptive, controlling criteria.

Initial List of Changes Under Consideration for This Request

428 NAC 1

1. Make more consistent with the national functional classification system.
2. Remove language repeating what is already in state statutes.
3. Minor changes to Scenic Recreation, Remote Residential and Minimum Maintenance.

428 NAC 2 (state highways)

1. Elimination of criteria no longer considered "controlling criteria".
2. Redefine 3R and Maintenance in terms of life cycle instead of pavement thickness.
3. 3R for Freeways.
4. Certain practical design concepts.
5. Require relaxation of standards?

428 NAC 2 (county roads and municipal streets)

1. Elimination of criteria no longer considered "controlling criteria".
2. Clarifications and errata.
3. Relaxation of Standards process - clarifications and improvements.
4. Make more user-friendly with links to help navigating the document easier.
5. Review state highways changes (such as #2 and #4) for applicability.

⁴ *Traffic operations* refers to moving people and goods safely and efficiently through the transportation network. There are many strategies and tools, such as signage, traffic signals, and markings.

Nebraska Rules and Regulations

NDOR Government Affairs Presentation to NBCS 11/21/14

Background – Rules and regulations of Nebraska State Government have the force of law when authorized by statute and adopted with strict adherence to the requirements of the Nebraska Administrative Procedure Act (APA), N.R.S. §§84-901 – 84-932. Taken together, they comprise the Nebraska Administrative Code (NAC). The NAC is comparable in the sphere of Nebraska State Government with the Code of Federal Regulations (CFR) in the sphere of the Federal Government. A rule can be prevented from going into effect, or can be retroactively invalidated and actions taken by the regulatory body can be invalidated, if a procedural defect is identified (i.e. if the regulatory entity can be shown to have not fully complied with the APA).

A state agency or other statutory body owns, administers and enforces regulations within its purview as specifically authorized by state law. A state regulatory body may adopt regulations only if specifically authorized by statute and only within the specific scope and for a specific purpose(s) set out in statute. The Board of Public Roads Classifications and Standards (NBCS) has three broad kinds of rulemaking authority: setting standards; prescribing reporting procedures; and establishing rules of administrative procedure (for ensuring fair treatment, for providing clear warning on what constitutes an infraction, for applying penalties, for providing clear avenues for redress of grievances, and the like).

The terms “rules and regulations,” “rule and regulation,” “rule” or “regulation” are used interchangeably.

Process – The process of developing, adopting and implementing a new or revised regulation (or of repealing a regulation) includes six broad stages. It is important to note that the first stage, development, is not part of the formal process covered by the APA.

1. Development – The concept and specifics of a new or revised regulation usually are developed within the regulatory agency, board or commission. The process expands beyond the agency as outside groups are consulted and the proposed change (or the new rule) is vetted by experts and stakeholders. At some point the regulatory body becomes reasonably confident that its draft regulations are in good enough form to proceed to formal rulemaking. A quality control checklist at this point might include: a. conformance with statutory language and intent; b. clarity; c. completeness and effectiveness; d. avoidance of unintended consequences; e. congruence with

expectations of regulated entities and the public (i.e. unlikely to trigger surprise or significant opposition); etc.

2. Permission to Proceed to Rulemaking – The agency, board or commission seeks permission from the Governor’s Policy Research Office (GPRO) to proceed to rulemaking. This involves submitting a pre-hearing checklist memo laying-out the need for the rulemaking and laying out the pros and cons of the particular approach taken, as well as attaching a draft copy of the proposed regulations change. GPRO may respond with questions and a request for more information, give a go-ahead with or without directive for progress reports or other feedback, or convey serious concerns and disapproval.

In effect, GPRO provides a centralized quality control function for rulemaking. For a Code Agency (reporting to the Governor) or a statutory body like NBCS that is staffed by a Code Agency (NDOR), this is a “go – no go” checkpoint. (Independent agencies have more flexibility, but they still have to reckon with stage 5. below.)

3. Rulemaking – This is the official stage of the process; the APA kicks-in at this point. Rulemaking opens an official public record known as “the docket;” rulemaking also locks-down the text of the proposed new regulation or revision for the duration of this stage. This stage includes the following:
 - a. Scheduling a public hearing that is at least 31 days* away from the date the notice of rulemaking and the notice of the public hearing will be printed in a statewide newspaper and from the date the rulemaking will be officially filed and opened in the State Capitol. (* The statutory requirement is 30-days’ notice but courts have interpreted this to mean 31 days in actual application.) NDOR’s Government Affairs Office takes charge of this step, coordinating with the board or NDOR division owner of the regulation and with the NDOR Public Involvement Officer (all three should be represented at the hearing).
 - b. Filing with the Secretary of State (SOS) and the Executive Board (Exec Bd) of the Legislature. The SOS’ Rules and Regulations office opens a paper docket and sets one up on-line. The SOS also keeps the entire NAC in electronic form. Thus the SOS provides a central repository for anyone looking either for any existing regulation or any proposed revision (so long as the proposal has reached the formal rulemaking stage). Government Affairs handles this aspect for NDOR and the Boards. The Executive Board of the Legislature makes the revision available to senators; if a senator feels the revision or new rule does not meet the spirit of the law, the senator may file an objection.

- c. Making information available to the public at the agency itself and (though not required) on-line, particularly the text and also a Fiscal Impact Statement. NDOR also emails this same information to groups it knows are interested in, or believes might be affected by, the regulation. Government Affairs and the owning division share in this responsibility.
 - d. Keeping a docket open in the agency, in which *all* communications (letters, emails, telephone calls, other conversations) to the agency are kept until ten calendar days (10+ days if the tenth day falls on a weekend or holiday) after the public hearing. The transcript of the public hearing becomes part of the agency docket. The NDOR Public Involvement Coordinator in the Communications Division keeps this docket. Government Affairs, to the extent possible, makes everyone in NDOR (and on the board if applicable) aware of *the importance of relaying any such communication promptly to the Public Involvement Coordinator for inclusion in the docket.*
 - e. Holding the Public Hearing.
4. Adoption – following the conclusion of the ten-day open docket period after the hearing, the board or NDOR division owning the regulation must review all comments (including those received at the hearing) and then decide whether to adopt the regulations or to make substantive changes. *If the decision is to adopt,* Government Affairs prepares adoption documents for official signature by the NDOR director or the board chairman, as the case may be, and submits the executed documents to the Attorney General's Office. *If the decision is to make substantive changes,* the process is halted and returns to stage 1. or stage 2., resulting in publishing a revised notice and holding a new public hearing (thereby extending rulemaking by at least 45 days).
5. Review and Approval by Attorney General and Governor – The Attorney General reviews the adopted regulation to ensure it conforms with the authorizing statute and with the Constitution, and also verifies that all APA steps were strictly followed and correctly documented. Once the Attorney General's office has stamped its approval, the packet goes to the Governor's Policy Research Office for final review and presentation to the Governor for approval. (The APA does not guide or specify criteria for the Governor's review and approval.) The Governor conveys approval by stamping the documents and delivering them to the SOS.
6. Filing with the Secretary of State, effective date, and promulgation by the agency or board – The SOS Rules and Regulations Officer stamps the approved regulations upon receipt from GPRO, then returns a fully-stamped set of adoption and final filing

documents to NDOR Government Affairs. The new regulation, revision or repeal goes into effect five calendar after the date of recording by the SOS. It is up to the agency to promulgate the newly effective regulation. Although ignorance of the law – in this case, the newly effective regulation – is not an excuse, NDOR, like most agencies, will reach out to interested parties and regulated entities to make them aware that the changes are in effect and to remind them of the significance and impact of those changes.