PROGRAMMATIC AGREEMENT
AMONG THE FEDERAL HIGHWAY ADMINISTRATION,
US FISH AND WILDLIFE SERVICE,
NEBRASKA DEPARTMENT OF ROADS, and
NEBRASKA GAME AND PARKS COMMISSION
FOR THE DETERMINATION OF EFFECTS TO STATE AND FEDERALLY LISTED SPECIES FROM THE FEDERAL-AID HIGHWAY PROGRAM

Purpose: The purpose of this Programmatic Agreement is to provide an efficient, consistent, streamlined approach to regulatory compliance for fish, wildlife, and plant resources in Nebraska by implementing a standardized analysis, documentation and concurrence procedure for use by the participating agencies for constructing and improving transportation facilities with a nexus to the Federal Highway Administration Nebraska Division (FHWA).

WHEREAS, FHWA has determined that the construction and improvement of highways and bridges with Federal Aid Highway Funds (Federal-aid) may have an affect on state and federally listed species; and,

WHEREAS, the Nebraska Department of Roads (NDOR) is the primary recipient of federal-aid for transportation within Nebraska and by stewardship agreement is responsible for ensuring compliance with pertinent environmental regulations for both state and local federal-aid projects; and,

WHEREAS, the US Fish and Wildlife Service (USFWS) administers the Endangered Species Act (ESA) (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq*), the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703-712: Ch. 128 as amended), Fish and Wildlife Coordination Act (FWCA), and Bald and Golden Eagle Protection Act (the Eagle Act) (16 U.S.C. 688-688d (a and b)); and,

WHEREAS, the Nebraska Game and Parks Commission (NGPC) administers the Nebraska Nongame and Endangered Species Conservation Act (NESCA) (Neb. Rev. Stat. §37-801-11); and,

WHEREAS, FHWA is required to comply with the aforementioned laws and regulations; and,

WHEREAS, NDOR is required to comply with the aforementioned laws and regulations, either through FHWA as a nexus or requirements placed upon states; and,

WHEREAS, this Agreement supersedes the previous Agreement of the same name, executed in January 2012; and,

WHEREAS, all parties agree the 2012 Agreement was executed and monitored as intended, greatly streamlining the program while also providing protection of listed species, and therefore serves as the basis of this new agreement; and,

WHEREAS, FHWA, USFWS, NDOR, and NGPC have concurred that the commitments, tools, effects determinations, and conservation conditions as outlined in this Programmatic Agreement (Agreement) are appropriate; and,

WHEREAS, all parties agree that the Biological Evaluation Process (Process), as outlined below, can also be used for state-funded actions and state funded actions on federal or tribal lands if approval from the federal land managing agency or tribe is granted; and,

WHEREAS, NDOR maintains a staff of trained biologist(s) qualified to implement this Agreement; and,

WHEREAS, NDOR participated in the consultation and has been invited to execute this Agreement,

NOW, THEREFORE, FHWA and USFWS agree that the consultation requirements of the ESA shall be administered in accordance with the following stipulations. In addition, FHWA, NDOR, and NGPC agree that the consultation requirements of the NESCA shall also be administered in accordance with the following stipulations.

STIPULATIONS

I. Applicability

A. The following federal-aid activities have no potential to affect listed state or federal species pursuant to ESA and NESCA (hereafter referred to as listed species). For such activities, a memo to the file will be written, stating the scope of work, noting that there will be no effect to listed species, and noting that no rare or unusual circumstances exist to warrant further review (if accurate).

a. A "no effect" determination is categorically given for these activities, provided NDOR reviews the action to ensure a rare or unusual circumstance does not exist that would warrant further review:

i. grants for training;
ii. federal-aid system revisions which establish classes of highways on the Federal Highway system;
iii. acquisition of scenic easements with no ground disturbance;
iv. improvements to existing truck, weigh stations and rest areas with no ground-disturbing activities;

v. ridesharing activities;
vi. bus and railcar rehabilitation;
vii. rehabilitation of historic buildings;
viii. alterations to buildings or vehicles to make them accessible for elderly or handicapped persons;
ix. purchase of vehicles;
x. acquisition of land for hardship or protective purposes; and
xi. at-grade railroad crossing safety improvements with no ground disturbance outside the hinge point of the rail line or roadway.

b. In addition, based on the experience of the signatory agencies since the implementation of this program, the following activities also have no potential to affect listed species, regardless of where they occur in the State. A "no effect" determination is categorically given for these activities, provided NDOR reviews the action to ensure a rare or unusual circumstance does not exist that would warrant further review:

i. pavement marking
ii. rumble strip, stripe and bar installation
iii. installation or improvements to auto gates, cameras and Dynamic Message Signs (DMS), provided all work and trenching occur within the roadway hinge point.
iv. survey and staking

c. Based on the experience of the signatory agencies since the implementation of the original 2012 Agreement, projects limited in scope to only the following activities also have no potential to affect listed species when they occur within entirely urbanized areas (provided no rare or unusual circumstances exist):

i. Driving surface restoration/resurfacing activities occurring within the existing confines of the roadway and shoulders that is entirely within urbanized areas. This includes, but is not limited to: Armor coat, crack seal, fog seal, joint seal, milling and inlay, concrete repair, joint repair, and paving existing shoulders. For roadway restoration/resurfacing activities that include bridge structures within the project limits, only bridge deck pavement restoration/resurfacing and rail removal/replacement is allowed with this programmatic "no effect" determination.
ii. Curb work, sidewalk installation or repair, bike lane installation or repair, and multi-use pathway installation or repairs occurring entirely within urbanized areas.
iii. Landscaping within urbanized areas.

iv. Installation, repair or replacement of traffic signals, railroad crossing signals and lighting (including trenching or boring for utility connection) that occur entirely within urbanized areas.

B. For excess right-of-way disposals, NDOR shall review the property using county lists, species life history information, and the Nebraska Natural Heritage Database to determine if the disposal will impact listed species or critical habitat, or if protection of the parcel would be beneficial to a listed species. If a "no effect" determination is made, and there is no potential species benefit to preserving the parcel, NDOR shall note that determination through a memo to the file. If there is a potential to have an affect to species, or a benefit to the species by preserving the parcel, NDOR will follow the Process (as defined in Section II. A., below), and shall coordinate with FHWA.

C. All other federal-aid activities shall follow the parameters and requirements as outlined in this agreement, and shall follow the Process as outlined below.

II. The Biological Evaluation Process:

A. For this Agreement, the Process refers to the standardized analysis, tools, and concurrence procedures developed in this Agreement. Tools developed as part of this Agreement include: Species Evaluation Parameter Form (SEP), see Tab 7; State and Federal Species Matrices (Matrix), see Tab 10; Federal and State Listed Species Conservation Conditions (CC), See Tab 8; the Sources of Impacts Definitions (Definitions), see Tab 2, the Overview of Effects and Required Conservation Conditions form (OERCC), see Tab 14; and the Individual Project Level Evaluation (IPLE, when needed), see Tab 12; and the Individual Biological Assessment (IBA, when needed), see Tab 13. For a glossary of terms and acronym list, see Tabs 1 and 15. For each individual project, the collective use of the pertinent tools and resulting documentation will be referred to as the Biological Assessment (BA). In the future, appendices to the Process will be developed to address other biological considerations. See Section II. D, below.

B. For projects meeting the criteria under Section I. C., the SEP form shall be completed to identify the species that may be of concern for the project based upon the habitat present and the location of the project.

i. The species identified by the SEP form as having suitable habitat within the project area shall be carried forward to the Matrix. See Section II C, below.
ii. For each species identified by the SEP form as having no suitable habitat present within the project area, a "no effect" determination is made for those species.

iii. If through the use of the SEP form it is determined that no suitable habitat exists for any species, then, a "no effect" determination is made for all listed species and for the project as a whole. The SEP form is kept as part of the administrative record to document ESA and NESCA compliance, and the OERCC form is completed. Completion of the Matrix and written analysis are not required for listed species compliance.

C. For those species carried forward from the SEP form to the Matrix, the Matrix identifies the effect determination for the species based upon each activity identified as being part of the scope for the project. The Matrix classifies a project as either a "no effect", a "may affect, not likely to adversely affect" with conservation conditions or a "may affect".

i. For species and action types identified as a "no effect" by the Matrix, the analysis is complete for that category and no activity specific species conservation conditions or additional written analysis is required for that species/activity.

ii. For species and action types identified as "may affect, not likely to adversely affect" with conservation conditions, if all conservation conditions identified by the Matrix for that species/activity can be met, further written documentation is not required for that species/activity.

iii. For species and action types identified as "may affect", or determinations of "may affect, not likely to adversely affect" where the conservation conditions can not be met, either an IPLE or IBA shall be completed.

D. The Process also includes procedures for compliance with other applicable fish, wildlife and plant laws and regulations, which have been or will be outlined in appendices to this agreement. Such appendices include compliance procedures for the MBTA, the Eagle Act, FWCA, and Platte River Depletions. Appendices may also be created for noxious weed compliance, habitat connectivity, and others, if deemed appropriate. Appendices shall be developed in coordination with the appropriate resource agencies.

E. Due to the complexities of habitat fragmentation, the matrix identifies any habitat fragmentation as a "may affect" condition. NDOR shall review individual projects to determine if habitat fragmentation concerns or opportunities to improve connectivity may exist, based on the listed species with suitable habitat within the project area, the scope of the project, habitat types within the project area, and the life history of the species in question. If NDOR determines there may be a habitat connectivity concern for a project under review, a consultation with FHWA and the signatory agencies will occur. Upon future reviews of the tools and PA, the concept of habitat connectivity will be re-addressed and clarified, as appropriate.

F. NDOR is the responsible party for the completion of project-specific BA's. NDOR Environmental Section qualified biologists will either directly complete the

BA, or will provide guidance, oversight, and quality review of the BA completed by a local government or consultant.

III. Project Level Consultations:

A. Projects listed under Section I. A. require no further consultation with the USFWS or NGPC, unless a rare or unusual circumstance is identified.

B. Projects listed under Section I. C. shall follow the parameters below to determine if consultation with the USFWS and/or NGPC is required:

i. For each species identified by the SEP form as having no suitable habitat present within the project area, a "no effect" determination is made for those species. No consultation is required with either FHWA or the resource agencies for affects to listed species and/or designated critical habitat.

ii. If the SEP form and Matrix process together determine that all activities associated with the project will either have "no effect" to all listed species or designated critical habitat, or "may affect, is not likely to adversely affect" listed species or result in adverse modifications of designated critical habitat and the required conservation conditions can and will be met, then no additional consultation is required with either FHWA or the resource agencies for affects to listed species and/or designated critical habitat.

iii. For listed species/critical habitat and action types identified as "may affect", or determinations of "may affect, not likely to adversely affect" where the conservation conditions cannot be met, project specific consultation with the USFWS and NGPC is required through FHWA; if the effect is only to state listed species, which are not federally listed, then consultation is conducted only with NGPC, with a courtesy copy of the BA sent to USFWS. In the absence of appropriate conservation conditions for "may affect" determinations, or at any time as deemed necessary, FHWA or NDOR may contact the USFWS and NGPC to discuss the project prior to submitting the consultation materials.

C. For projects that require a consultation with or request for concurrence from the USFWS and NGPC, FHWA will be the lead agency consulting or requesting concurrence.

i. For projects requiring consultation or concurrence, NDOR Environmental staff will inform FHWA Environmental as early as practical to determine the affect determination (i.e., "may affect, not likely to adversely affect", "may affect, likely to adversely affect", or adversely modify Critical Habitat) for the project. In addition, NDOR

Environmental may informally coordinate with FHWA Environmental, the USFWS, and the NGPC to discuss the impacts of the action to listed species and/or critical habitat and appropriate avoidance or mitigation measures prior to an official submittal to the USFWS and NGPC.

ii. When the informal FHWA, NGPC, and USFWS coordination and BA are complete, NDOR shall submit the BA and an electronic draft concurrence or consultation letter to FHWA Environmental for FHWA use. The cover letter will include a brief description of the scope of work, the project location, a statement of whether or not species-specific surveys were completed and a summary of results, and the affect determination. After review and approval of the material, FHWA environmental will submit the information to NGPC and USFWS to initiate the official consultation or the request for concurrence.

D. The USFWS and NGPC will respond to a request for concurrence within 30 calendar days from receipt of the request letter. The response may be a concurrence, request for time extension, or a non-concurrence with a written justification. If additional information is needed, USFWS and NGPC will request that additional information within 15 days of the receipt of the request for concurrence letter, when possible. If 25 days have passed since submittal of the documentation to the resource agencies and a response has not been received, NDOR will request a status update from the agency.

E. The USFWS and NGPC will respond to a request for formal consultation within the timeframes outlined in ESA (for USFWS) and NESCA (for NGPC), unless other arrangements are agreed to by all parties.

IV. Reporting and Monitoring

A. Every 12 months NDOR will develop a report that includes all the projects obtaining BA approval within the previous 12 month period that met the criteria of "no effect" or "may affect, not likely to adversely affect" with no project-specific consultation required. This report will include both NDOR and local government federal-aid projects.

i. For "no effect" projects, including those projects outlined in I.A., Applicability, the report will include: the project name, federal-aid number, control number, location of project (County and township, range and section), a brief description of the project, and the project proponent (NDOR or local government name). The report will also specify which projects were classified as a "no effect" based on I.A., Applicability.

ii. For "may affect, not likely to adversely affect" projects with no project-specific consultation required, the report will include the same information as required for "no effect" projects (IV.A.i), but will also

include the species that the project "may affect, not likely to adversely affect" for which the conservation conditions were applied.

iii. For the "no effect" projects where NDOR wrote an IPLE to justify why the matrix determination didn't fit the project and FHWA approved, include the same information as in item IV.A.i., but will also include the species for which the determination was changed, and a brief justification for why.

B. NDOR shall provide the report described in Section IV. A., above, to FHWA, USFWS and NGPC within the month of July each year.

C. Annual Meeting: An Annual Meeting will be conducted by NDOR, FHWA, USFWS, and the NGPC in response to the annual report to discuss any emerging issues, trends, new information or regulatory changes. Any recommendations that arise from the meeting shall be documented, and an action plan shall be developed (if necessary), with deliverables and timelines, to address any program changes.

D. Monitoring:

i. Biennially, a random sample of projects will be reviewed for assurance that the program is properly functioning. The size of the sample will be determined by the signatories prior to the review. Any findings or recommendations that arise from the review shall be documented, and an action plan shall be developed (if necessary), with deliverables and timelines, to address any issues.

ii. ii. FHWA, NGPC and USFWS may request a copy of any project BA at any time and NDOR shall provide a copy. The agencies may request clarifications from NDOR if needed. If any issues are identified that need escalation, the party concerned will request the signatories convene to resolve the issue as outlined in Section VI. B., below.

V. Additional Provisions

A. New traffic interchanges outside build-out urban areas and new roadway on new alignment that provide access to undeveloped lands that previously had no readily available access require an Individual Biological Assessment. The SEP and Matrix will not be used for these projects. FHWA will determine if this stipulation applies if project-specific applicability is questionable.

B. If NDOR identifies federal-aid projects that do not fit within this Agreement and associated Process, NDOR will coordinate with FHWA Environmental to obtain guidance for documentation and affects determinations, if needed. FHWA will determine if coordination with the resource agencies is needed. The documentation may include the use of an IPLE, IBA, a modified IBA, or an assessment in a memo format.

C. For projects requiring a NEPA Reevaluation or a supplemental EIS, the Process may or may not be applicable.

i. If there is any potential for new species affects or Critical Habitat impacts, either from a new listing, change in scope or change in existing conditions, then NDOR will follow the Process and associated consultation requirements as outlined in this Agreement.
ii. If NDOR determines that there is no potential for new species affects or Critical Habitat impacts, then NDOR will document the determination within the project record.

D. In the early phase of NEPA or the planning process, NDOR will either request a meeting or send a scoping/technical assistance letter to the USFWS and NGPC to notify the agencies that the environmental studies for the following types of projects are beginning and to invite their general input: projects requiring an EA/EIS, and projects that may affect habitat connectivity (both listed and non-listed species). The scoping letter or meeting will include a description of the scope of work, the location, the reason for the coordination, and the anticipated season and year construction may start (if known). Within 30 calendar days of receipt of the letter (when a letter is sent), the USFWS and/or NGPC will notify NDOR and FHWA in writing if additional early coordination is requested. If a response is not received within 30 calendar days, NDOR will call or email the agency contact to ensure they received the letter. This coordination does not supersede the agencies ability to participate under NEPA. These early coordination letters will be attached to the BA documentation, once it's written. This early coordination does not satisfy the concurrence/consultation requirements as outlined in this PA.

E. For projects that occur on tribal and/or federal lands, NDOR will submit the BA documentation, along with a cover letter to FHWA. The cover letter will include a brief description of the scope of work, the project location, a statement of whether or not species-specific surveys were completed, and the affect determinations. FHWA will send the documentation to the tribal and/or federal agency for a 30-day review. The signatory agencies will be copied on the submittal letter.

F. In the event a new species is listed, proposed for listing, or is a candidate for listing as threatened or endangered, or Critical Habitat is listed, the parties to this Agreement will re-convene to add the species to the Process and Matrix. This will be complete within 60 days of the change in status posting in the federal register. In addition, USFWS and/or NGPC will notify FHWA and NDOR as soon as feasible regarding changes in species' status. In the interim, NDOR will address potential project-specific impacts to the newly listed species or designated Critical Habitat through the use of an IPLE for the species (or within the IBA, if one is being used for the project) and will request FHWA concurrence with their effect determination.

G. In the event a change of scope or a modification of conservation conditions is needed during or just prior to the construction of the project, said changes will not occur until NDOR evaluates the affect to listed species and/or critical habitat and obtains any necessary agency concurrences. If there is any potential for new species or Critical Habitat impacts, either from a new listing, change in scope or change in existing conditions, then NDOR shall provide a written description of the change, justification as to why the change is needed, an analysis of how the change may or may not impact species, an affect determination, and any recommended conservation conditions to minimize or avoid additional species/critical habitat impacts to FHWA for approval. FHWA will coordinate with the concurring parties, as needed.

VI. Administrative Stipulations

A. Amendments and Noncompliance: If any party to this Agreement determines that its terms will not or cannot be carried out or that an amendment to its terms must be made, that party shall immediately consult with the other parties to develop an amendment. The amendment will be effective on the date a copy is signed by all the parties. If the parties cannot agree to appropriate terms to amend the Agreement, any party may terminate the Agreement in accordance with item Section VI. C., below.

B. Dispute Resolution: Should any party to this Agreement object at any time to any action proposed or the manner in which the terms of this Agreement are implemented, the following escalation process shall be followed:

Length of time	FHWA	NDOR	USFWS	NGPC
Resolve within 1 week or escalate	Env. Specialist	Hwy Env. Biologist	USFWS Biologist	Env. Analyst
Resolve within 1 week or escalate	Env. Specialist	Technical Documents Unit Mgr./Env. Sect. Mgr.	USFWS Biologist	Fish and Wildlife Specialist
Resolve within 1 week or escalate	Prog. Delivery Team Lead	Env. Sect Mgr./P&PD Mgr.	USFWS Biologist	Planning and Programming Administrator
Resolve within 2 weeks	ADA/DA	Deputy Director/Director	NE Field Supervisor	Deputy Director/Director

Issues will be resolved at the lowest levels first. Agencies will not escalate to higher levels without offering lower levels the opportunity to resolve within their designated timeframe. If a disagreement occurs where the escalation process may need to be used, the party planning to use the escalation process will notify the applicable parties at their level of their intent to escalate in writing (email is sufficient), and the pertinent timeframe

starts. If a person is not available during an escalation (ex, on vacation) then their designee or the next person within the escalation chain may step in. If affected parties agree, the item may sit idle waiting for the person to return, and if affected parties all agree, an issue can be escalated in a shorter period of time.

C. Termination: Any party to this agreement may propose to terminate this Agreement by providing thirty days written (on agency letterhead) notice to the other parties and explaining the reason for the proposed termination. The parties will consult during this period to seek agreement on amendments or other actions that would avoid termination.

D. Duration: This agreement shall become effective upon execution by the signatories and expires 5 years from the date of the last signatory on this agreement.

E. Option to Renew: The parties will convene to determine interest in renewing this Agreement 6 months prior to expiration. The Agreement may be extended for additional terms upon written agreement of the parties.

Execution of this Agreement and implementation of its terms evidences that FHWA has considered the effects of its Federal-aid program on Nebraska's State and Federally listed species. This agreement does not absolve parties of other applicable state or federal regulations.

SIGNATORIES

Federal Highway Administration:

_____ Date: 1/18/2017
Nebraska Division Administrator

US Fish and Wildlife Service:

_____ Date: 1/11/2017
Nebraska Field Supervisor

Nebraska Game and Parks Commission:

_____ Date: 1/18/2017
for Director

Nebraska Department of Roads:

_____ Date: 1/12/17
Director