

NDOT Environmental Review Guidance for Emergency Relief Projects



US-281 Bridge over Niobrara River, NDOT, March 2019

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NEBRASKA

Good Life. Great Journey.

DEPARTMENT OF TRANSPORTATION

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1.0 Overview of Guidance Document

This guidance document identifies the process for environmental compliance for the Nebraska Department of Transportation (NDOT) when implementing projects under the Federal Highway Administration's (FHWA) Emergency Relief (ER) program. This document should be used in conjunction with existing regulatory requirements and guidance for the ER program such as FHWA's [Order 5182.1](#), the FHWA [ER Manual](#), and the FHWA Emergency Relief Program Regulations ([23 CFR 668](#)). This guidance document is not intended to provide guidance on ER funding or define types of ER projects.

Documentation of analysis for applicable environmental laws is required for federally funded emergency relief actions. Depending on the impacts of the emergency relief action, consultation with one or more resource and/or regulatory agencies, such as the State Historic Preservation Office, U.S. Fish and Wildlife Service (USFWS), or U.S. Army Corps of Engineers (USACE), may be required. General guidance on the NDOT environmental review process is available on the [NDOT Environmental Guidance Library](#) webpage.

Emergency repairs and permanent repairs incidental to emergency repairs will undergo an expedited process using a Minor Categorical Exclusion (MCE) form described in Section 2.0. National Environmental Policy Act (NEPA) documentation may be completed after the work is finished for emergency repairs and permanent repairs incidental to emergency repairs (Figure 1).

Emergency repairs or permanent repairs incidental to emergency repairs that require permanent easements or right-of-way will follow the standard environmental review process documented in the [NDOT Environmental Procedures Manual](#) but may be completed after work is finished. The class of action for these projects will typically be limited to Categorical Exclusion (CE). NDOT NEPA Specialists will review the Detailed Damage Inspection Report (DDIR) and coordinate with Right-of-Way (ROW) Division to determine whether ROW is needed and whether plans are available.

Permanent repairs made necessary by the emergency event will follow the standard environmental review process documented in the [NDOT Environmental Procedures Manual](#). The class of action for permanent repair projects may be CE, Environmental Assessment (EA), or Environmental Impact Statement (EIS). The NEPA process for permanent ER projects will be completed prior to the start of work and prior to authorization in FHWA's Fiscal Management Information System (FMIS).

Information concerning if the project is an emergency repair and permanent repairs incidental to emergency repairs with or without ROW and Permanent Repairs will be contained within the DDIR to direct how the project will be processed under NEPA.

Per the [NDOT NEPA File Management and Documentation Guidance](#), all decision-making project and general administrative files will be included in OnBase (NDOT's document management system), although the Complete File Checklist will not be implemented if the NEPA documentation is an MCE.

2.0 Documenting NEPA and other Environmental Reviews

NEPA compliance is required for all federally funded ER activities. Typically, emergency repairs are reviewed as CEs, however the probable class of action is established based on the approved DDIR in coordination with NDOT Environmental Section staff. If the NEPA class of action is determined to be something other than an assignable CE, NDOT will coordinate with FHWA. When emergency repairs

are authorized, NDOT will complete NEPA documentation after the DDIR has been approved by FHWA.

NDOT's documentation of each ER project compliance with applicable environmental review requirements will be compiled in a project-specific record. However, review and analysis of environmental impacts may be completed in batches.

Based on the nature of emergency repairs and permanent repairs incidental to emergency repairs that are located within existing operational right-of-way and meet the other criteria outlined in [23 CFR §771.117 \(c\)\(9\)](#), NDOT does not anticipate negative impacts to natural, cultural, historic or recreational resources. Additionally, these activities do not negatively impact air, noise, water quality, hazardous materials, or travel patterns, and do not present any negative civil rights or cumulative impacts. NDOT experience has demonstrated that these types of activities do not generate public controversy on environmental grounds. These repairs will be documented using the Emergency Repair Projects MCE form (ER MCE) (Appendix A).

Temporary easements needed for temporary work outside of the operational right-of-way is allowed for projects using the ER MCE based on supplementary rulemaking information clarifying that the geographic reference in the CE is for the final project.¹ A project location map and memos from Threatened & Endangered Species, Section 106, and Wetlands Professionally Qualified Staff (PQS) will be attached to the ER MCE. In accordance with [Chapter 4.4.1 of the Environmental Procedures Manual](#), NDOT NEPA Specialists will approve the ER MCE.

Generally applicable commitments listed in the General Environmental Commitments for Emergency Repair (ER) Projects document (Appendix B) of this guidance will apply to all projects processed using the ER MCE. These general commitments will be attached to the ER MCE, but publication in this guidance is considered notice to Sponsors and these general commitments will thus apply to the maximum extent practicable when the project begins regardless of ER MCE approval status. Any additional project-specific commitments listed in the PQS memos will be attached to the ER MCE and distributed to the Sponsor through the NDOT Construction Division as they become available.

2.1 ER MCE Resource Review

The resource reviews described below are required for the ER MCE and will be documented in a PQS memo. The PQS memos will be attached to the ER MCE.

Wetlands and Waters of the US (WOUS)

NDOT PQS will review DDIRs for scope and description of work, and depending on the activity and potential impacts, perform analysis (desktop reviews, delineations, and/or determinations), and develop a permitting strategy (notifying/non-notifying Nationwide Permit or Individual Permit). Many repairs may be authorized under USACE's Nationwide Permit Program. Typically, the repairs will meet the criteria for a [Nationwide Permit 3](#) (NWP 3), which covers certain maintenance activities such as repair, rehabilitation, and replacement for previously authorized structures. For projects that do not qualify for a Nationwide Permit, NDOT will coordinate with the USACE to develop a permitting strategy.

¹ [Federal Register, Volume 79 Issue 8, p 2113 \(Monday, January 13, 2014\) \(govinfo.gov\)](#)

Endangered Species Act

NDOT will analyze potential impacts to threatened and endangered species under the Endangered Species Act (ESA) and the Nebraska Nongame and Endangered Species Conservation Act (NESCA). For permanent repair projects, NDOT uses a [programmatic agreement](#) (Matrix PA) among NDOT, FHWA, USFWS and Nebraska Game and Parks Commission (NGPC) that governs the consultation process for ESA and NESCA. This Matrix PA also stipulates the parameters for assessments and consultation that apply to emergency repair actions.

Section 106 of the National Historic Preservation Act

NDOT is a party to a [programmatic agreement](#) under Section 106 of the National Historic Preservation Act (Section 106 PA). Under this Section 106 PA, NDOT, the State Historic Preservation Office (SHPO), FHWA, and the Advisory Council on Historic Preservation (ACHP) have agreed to certain procedures addressing impacts to historic and cultural resources under Section 106. Section IX of the PA describes procedures applicable during emergency situations consistent with [36 CFR § 800.12](#). The PQS memo will specify the applicable procedure (e.g., email/documentated phone call or standard Section 106 process) and document Tribal Nation coordination.

Floodplains

Floodplain PQS will review NFIP FIRM/FHBM maps to determine whether the project overlaps upon one or more Base Floodplains and/or Regulatory Floodways. Certifications will be completed for projects within floodplains that confirm that the project conforms to floodplain regulations. Certifications and permit applications will be submitted to the local floodplain administrator for projects that are located within Base Floodplains and/or Regulatory Floodways. Projects that do not overlap upon any Base Floodplain or Regulatory Floodway will be checked off within the ER DDIR application as proof of review. State Minimum standards apply to projects that are located within unmapped and/or non-participating communities, and a determination will be made identifying Potential Base Floodplains. Projects identifying Potential Base Floodplains will be certified, but no floodplain permit will be required. Because the emergency repair projects are restoring the highway facilities back to original conditions, and because the risks of the emergency repair actions are extremely low, no risk analysis or discussion of the 23 CFR 650.111(c) factors are necessary and are not required for repairs made with emergency funds.²

PQS memos will only be included for emergency repair projects that involve out-of-kind replacement of a bridge or culvert.

2.2 Permits and Authorizations

NDOT may be required to consult with, or obtain permits and authorizations from, specific agencies for ER funded projects. NDOT will obtain the necessary permits and authorizations for ER projects as described in Section 2.1.

² [23 CFR 650.107\(a\)](#)

3.0 Additional Resources

[Council on Environmental Quality Guidance on Emergencies and NEPA](#)

[Detailed Damage Inspection Report](#)

[Emergency Relief Fund Statute](#)

[FHWA ER Guidance](#)

[FHWA ER Program Regulations](#)

[Federal Aid Highways Emergency Relief Manual](#)

[FHWA Order 5182.1](#)

[Section 106 Programmatic Agreement between NDOT, FHWA, SHPO, and ACHP](#)

[Nebraska DOT Emergency Relief](#)

[Nebraska DOT Hazardous Material Review Guidance Manual](#)

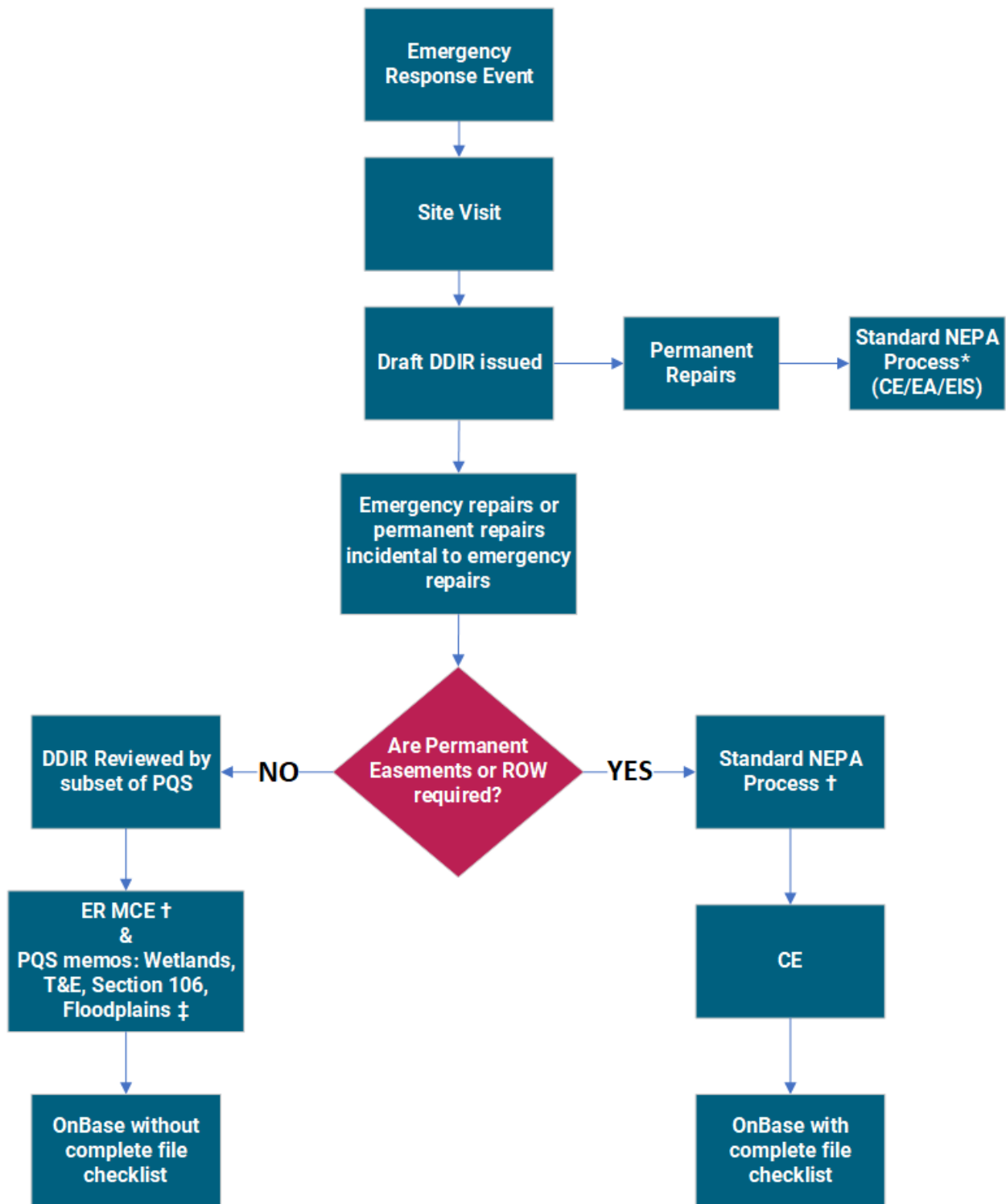
[Nebraska DOT Programmatic Biological Assessment](#)

[Nebraska Emergency Management Agency](#)

[NDOT Environmental Procedures Manual](#)

[U.S. Army Corps of Engineers Clean Water Act Section 404 regulations](#)

[U.S. Army Corp of Engineers Nationwide Permit 3](#)



* NEPA will be completed prior to the start of work and FMIS authorization

† NEPA may be completed after work is finished

‡ Floodplain PQS memo only required for out-of-kind replacement of a bridge or culvert

Figure 1. Emergency Relief NEPA Review Flow Chart

Appendix A

**Minor Categorical Exclusion
For
Emergency Repair Projects – 23 CFR §771.117(c)(9)**

Under the current *Memorandum of Understanding Between Federal Highway Administration, Nebraska Division and the Nebraska Department of Transportation, State Assumption of Responsibility for Categorical Exclusions*, as authorized by 23 USC §326 (herein referred to as the CE MOU and CE Assignment), the Federal Highway Administration (FHWA) has delegated approval authority of certain Categorical Exclusion (CE) actions to the Nebraska Department of Transportation (NDOT).

NDOT has developed this programmatic Minor Categorical Exclusion (MCE) to document review and approval of certain activities listed under 23 CFR 771.117(c)(9) that, based on past experiences with similar actions, do not involve significant environmental impacts to natural, social and economic resources.

NDOT has determined that technical resource reviews from the following Professionally Qualified Staff (PQS) are required for actions that comply with the terms and conditions of this MCE: Wetlands and Waters of the United States, Threatened and Endangered Species, Historic Properties, and Floodplains (if out-of-kind replacement of a bridge or culvert). Activities addressed by this MCE, which are not part of a larger undertaking, shall be administered in accordance with following criteria to satisfy NDOT's CE assignment responsibilities.

SCOPE OF WORK – Emergency Repairs and Permanent Repairs Incidental to Emergency Repairs

This MCE includes the repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, or transit facility (such as a bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged.

The above activities must occur within the existing right-of-way. Temporary easements needed for temporary work outside of the operational right-of-way would be permitted for projects using this MCE, based on supplementary rulemaking information clarifying that the geographic reference in the CE is for the final project.¹ The above activities must also occur 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).

These activities must be commenced within a 2-year period beginning on the date of the emergency declaration.

Based on the nature of emergency repairs and permanent repairs incidental to emergency repairs as described above, NDOT does not anticipate negative impacts to natural, cultural, historic or recreational resources; these activities do not negatively impact air, noise, water quality, hazardous materials, or travel patterns, and do not present any negative civil rights or cumulative impacts. These activities do not affect listed species, historic properties, wetlands or Waters of the United States (WOUS), nor do they use Section 4(f) properties. NDOT experience has demonstrated that these types of activities do not generate public controversy on environmental grounds.

¹ [Federal Register, Volume 79 Issue 8, p 2113 \(Monday, January 13, 2014\) \(govinfo.gov\)](#)

Individual project actions approved under this MCE shall be reviewed to ensure unusual circumstances as outlined by 23 CFR 771.117(b) do not exist. If an unusual circumstance is identified, a project-specific NEPA document, in compliance with NDOT's Environmental Procedure Manual (EPM) and Nebraska Categorical Exclusion (NECE) guidelines shall be developed to approve the action.

Use of this MCE is only allowed if all criteria set forth herein are met.

NDOT PROJECT SPECIFIC VERIFICATION

Date:

Project Name/Activity:

DDIR ID:

Control Number:

List of Attachments:

- Site Map
 - PQS determinations from Threatened & Endangered Species, Historic Properties, and Wetlands/WOUS
 - Other (as needed):
-

The above listed project has been determined to comply with the terms and conditions of this MCE and NDOT has verified the following:

- The Project Sponsor has verified the project activities are not part of larger undertaking.
- The Project Sponsor has verified the project does not require permanent easements or right-of-way.
- The NDOT NEPA Specialist has verified that no unusual circumstances have been identified.
- The NDOT NEPA Specialist has verified these Activities are consistent with 23 CFR 771.117(c)(9).

Sign: _____ Date: _____
Project Sponsor

This is a stand-alone NEPA determination for this project; no further environmental analysis is required. If there is a change in environmental conditions or scope of work, coordination with NDOT Environmental is required to determine if this determination remains valid.

The State has determined that this project has no significant impact(s) on the environment and that there are no unusual circumstances as described in 23 CFR 771.117(b). As such, the project is categorically excluded from the requirements to prepare an environmental assessment or environmental impact statement under the NEPA. The State has been assigned, and hereby certifies that it has carried out, the responsibility to make this determination pursuant to 23 U.S.C. §326 and a Memorandum of Understanding executed between FHWA and the State.

Sign: _____ Date: _____
NDOT NEPA Specialist

Appendix B

General Environmental Commitments for Emergency Repair (ER) Projects

Below are the environmental commitments that shall be followed by the Sponsor to the maximum extent practicable for emergency repair or permanent repair incidental to emergency repair projects that do not require permanent easements or right-of-way. All conditions and regulations of any permit obtained for this project shall also be followed by the Sponsor.

Threatened and Endangered Species:

The Sponsor shall reference the [Nebraska Game and Parks Commission guidance](#) for identification of potential federal and state listed species that may occur in the project vicinity.

If federal or state listed species are observed during emergency repairs and permanent repairs incidental emergency repairs, the Sponsor shall stop work and contact Nebraska Department of Transportation (NDOT) Environmental section to determine action required prior to resuming work.

The following project activities shall, to the extent practicable, be located within the operational right-of-way.

- Construction debris waste disposal areas
- Haul roads
- Stockpiling areas
- Staging areas
- Material storage sites

Construction waste/debris shall be disposed of in areas and manner which will not adversely affect state and/or federally listed species and/or designated critical habitat.

The Sponsor shall exercise all reasonable precautions to avoid a "Take" of nesting migratory birds by following guidance in the [Avian Protection Plan](#) to comply with the Migratory Bird Treaty Act.

Wetlands and Waters of the United States:

The Sponsor shall not stage, store, waste or stockpile materials and equipment in known/potential wetlands and/or known/potential streams that exhibit a clear "bed and bank" channel. Potential wetland areas consist of any area that is known to pond water, swampy areas or areas supporting known wetland vegetation or areas where there is a distinct difference in vegetation (at lower elevations) from the surrounding upland areas. Please see the attached Wetland Fact Sheet for more information regarding the identification of wetlands.

The Sponsor shall conduct refueling only within non-wetland and non-stream locations. Areas adjacent to wetlands and/or streams will be avoided. The Sponsor shall be responsible for cleanup of spilled fuel or any other Hazardous Materials, such as engine oil, hydraulic fluid, antifreeze, etc. used during emergency repair operations. The Sponsor is required by [NDOT's Standard Specification Section 107](#) (Legal Relations and Responsibilities to the Public) to

handle and dispose of contaminated material in accordance with applicable laws. The Sponsor shall follow Nebraska Department of Environment and Energy (NDEE) notification procedures for all spills in excess of a reportable quantity as defined by [NDEE Title 126, Chapter 18](#).

Stormwater:

Temporary water pollution prevention practices (including sediment and erosion control measures) are required by [NDEE Title 119](#). The Sponsor shall exercise every reasonable precaution to prevent sedimentation within rivers, streams, impoundments (lakes, reservoirs, etc.), the project site, and adjacent property.

Hazardous Materials:

If contaminated soils/groundwater or unexpected wastes are discovered, The Sponsor shall stop all work within the immediate area. The Sponsor shall limit access to authorized personnel within the area of the discovery and notify the NDOT Highway Project Manager (HPM). The Sponsor shall not re-enter the discovery area until notified by the HPM. At the time of discovery, the HPM and Sponsor shall utilize the NDOT Unexpected Waste Action Plan (UWAP) to coordinate appropriate actions. The Sponsor is required by NDOT's Standard Specification section 107.11 (Hazardous Material Discoveries) to handle and dispose of regulated material in accordance with applicable laws.

Any items that may contain hazardous materials, such as lead-based paint or mercury, must be properly handled and disposed of as outlined in the standard specifications.

Historic Properties/Section 106:

The Sponsor shall comply with the [Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act, Sections 12-1201 – 12-1212](#). If human skeletal remains or burial goods associated with an unmarked human burial in the ground or on the ground are discovered, then all work in the immediate area of the discovery shall stop and the Sponsor shall contact the NDOT Environmental. NDOT Environmental will then comply with Section 12-1205, notification of local law enforcement in the county in which the remains or burial goods are found. NDOT Environmental will promptly consult with the appropriate federal, state, and tribal agencies to determine if further field investigations are required before the project may resume. Pertinent legal authorities covering such discoveries include: the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, the Archeological Resources Protection Act, the Nebraska Unmarked Burial Sites and Skeletal Remains Protection Act, and the Nebraska Archeological Resources Protection Act.

Any discovered archeological or paleontological objects or deposits are not the property of the Sponsor or Contractor. NDOT Environmental will consult with appropriate federal, state, or tribal agencies to determine the proper disposition of such remains. Archaeological and Paleontological discoveries are addressed in [NDOT Standard Specification](#) 107.10.

Wildlife and Public Recreation Properties/Section 4(f):

The Sponsor shall not complete work, stage, stockpile or store materials within the boundaries of public parks, recreation areas and wildlife refuges and access shall be maintained to the maximum extent practicable.

Site Restoration:

Following emergency repair work that requires grading or earthwork, the operator shall restore the area as described in the [NDOT Roadside Vegetation Establishment and Management Manual](#). The following stages of restoration should be followed:

- Roadside Stabilization Practices
 - Temporary: silt fence, contour tillage, cover crop seeding
 - Permanent: seeding, erosion control products, sediment control products
- Seeding including use of the suggested seed mixtures

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