

## **Chapter II - Environmental and Public Involvement Table of Contents**

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The purpose of Chapter II is to establish the procedures to be used in the development of project environmental and cultural studies by the author. This chapter has been prepared to satisfy the following requirements:

- To ensure that all work is accomplished according to policies, regulations, and requirements of NDDOT and FHWA.
- To provide guidance for the coordination and facilitation of environmental activities with other Design Sections, Divisions, Districts, FHWA, Consultants, and Local Governments.
- To provide a procedural guide for accomplishing Public Involvement.
- To provide a procedural guide for accomplishing the development of Environmental Documentation in compliance with the National Environmental Policy Act.
- To provide a procedural guide for accomplishing the review of Natural Resources and Cultural Resources.

### II-01.01 Guidance Materials

The following material provides guidance for processing and developing environmental studies and documents:

- Title 23 Code of Federal Regulations, 23 CFR 771, *Environmental Impact and Related Procedures*
- Title 23 Code of Federal Regulations, 23 CFR 772, *Procedures for Abatement of Highway Traffic Noise and Construction Noise*
- Title 23 Code of Federal Regulations, 23 CFR 774, *Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(f))*
- Title 33 Code of Federal Regulations, 33 CFR 330, Nationwide Permit Program (Section 404 Permit)
- Title 36 Code of Federal Regulations, 36 CFR 800, *Protection of Historic Properties*
- FHWA Technical Advisory T 6160.2, *Analysis of Highway Construction Noise*
- FHWA Technical Advisory T 6640.8A, *Guidance for Preparing and Processing Environmental and Section 4(f) Documents*
- FHWA Order 6640.23A *FHWA Action to Address Environmental Justice in Minority and Low-Income Populations*
- FHWA Highway Traffic Noise Analysis and Abatement - Policy and Guidance
- FHWA Highway Traffic Noise Prediction Model (FHWA-RD-77-108)
- NDDOT Traffic Noise Analysis and Abatement Guidance
- Programmatic Categorical Exclusion Agreement between FHWA-ND and NDDOT

## II-02.01 Classes of Actions

Federal aid highway projects are required to comply with the National Environmental Policy Act of 1969 (NEPA). NEPA identifies three classes of actions, Class I - Environmental Impact Statement (EIS), Class II - Categorical Exclusion (CatEx), and Class III - Environmental Assessment (EA), which require varying levels of documentation in the NEPA process. A brief review of each class follows. More discussion is found in 23 CFR 771. A summary of how to prepare these documents is found in FHWA Technical Advisory T 6640.8A. For all federal aid projects, the environmental document author should coordinate the need for environmental documentation with ETS. The three classes are as follows:

**EIS (Class I Actions)** - These are actions that may significantly affect the environment and will require an Environmental Impact Statement (EIS) (40 CFR 1508.27).

Examples of these actions include:

- Any new controlled access freeway.
- A highway project of four or more lanes on a new location.
- New construction or extension of fixed rail transit facilities (e.g., rapid rail, light rail, commuter rail, automated guide way transit).
- New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility.

**CatEx (Class II Actions)** – Actions that are excluded from the requirement to prepare an EA or EIS. These are actions which meet the definition contained in 40 CFR 1508.4 and 23 CFR 771.117 and based on past experience with similar actions, 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.

A specific list of CatEx are set forth in 23 CFR 771.117(c) for “c-list” FHWA actions. Additional “d-list” actions may also qualify as CatEx set forth in 23 CFR 771.117(d) when appropriately documented and approved by FHWA.

NDDOT and FHWA have entered into the “*Programmatic Categorical Exclusion Agreement Between Federal Highway Administration, North Dakota Division and North Dakota Department of Transportation Regarding the Processing of Actions Classified as Categorical Exclusions for Federal-Aid Highway Projects*” (PA). The PA can be found on the Reference and Forms at: NDDOT - Design Manual References and Forms

The PA authorizes NDDOT to assume CatEx approval authority on behalf of FHWA for “c-list” actions listed in 23 CFR 771.117(c) provided these actions do not exceed the thresholds identified in Section VI of the PA. The PA does not allow for NDDOT to assume CatEx

approval authority for “d-list” actions listed in 23 CFR 771.117(d) other than right of way disposal action specified in 23 CFR 771.117(d)(6).

CatEx is the most common type of environmental clearances used for NDDOT projects. A CatEx is documented and completed through one of the following types of NDDOT environmental documents: CatEx by Definition (CED) Checklist, Programmatic CatEx (PCE), or Documented CatEx (DCE).

**EA (Class III Actions)** - These are actions in which the significance of the impact on the environment is not clearly established. All actions that are not Class I or Class II are Class III and require the preparation of an Environmental Assessment (EA) to determine the appropriate environmental document required.

Multiple projects are often discussed in one environmental document and approved together. The environmental document author should note all related projects. Authors need to be conscious of the full scope of these projects when determining if the multiple projects can be documented together. If it is determined that multiple projects can be documented together, all relevant project numbers should be included with all the documentation.

Examples:

- Grading and surfacing of a project may be done in two different years with two different project numbers.
- Divided highways or interstates with separate project numbers for each roadway.
- Tied projects.

**II-02.01 Class I Actions - Environmental Impact Statements (EIS)****II-02.01.01 Notice of Intent (NOI)**

For those federal actions that are categorized as Class I projects, a Draft Environmental Impact Statement (DEIS) will be prepared and processed in accordance with the FHWA Technical Advisory Guidance Material and Section 6002 of SAFETEA-LU.

As soon as practical, after it has been determined to prepare a DEIS, NDDOT should submit to FHWA the information necessary to publish a NOI in the Federal Register. The NOI initiates the EIS process and summarizes the proposed project and scoping process.

The format, content, and processing of the NOIs are specific and must be strictly adhered to as provided in the FHWA Technical Advisory Guidance Material and Section 6002 of SAFETEA-LU. The NEPA practitioner in conjunction with ETS will prepare a NOI in accordance with FHWA Technical Advisory Guidance Material. A press release, prepared at the same time, will be sent to the Communications Division to make available to the local news media.

**II-02.01.02 Draft Environmental Impact Statement (DEIS)**

The DEIS contains a discussion of:

- Purpose and Need for Project
- Alternatives
- Study findings, reviews, consultation, and coordination
- Possible impacts which may have a significant effect on the quality of the human environment

The DEIS will include input from:

- Cooperating agencies
- MPO in urbanized areas
- NDDOT District Engineers and Central Office Divisions
- FHWA
- Local officials
- Other agencies, groups, or individuals

FHWA will review the completed DEIS for Legal Sufficiency. After the DEIS has been reviewed and adopted by FHWA, a press release should be issued to notify the public that it is available for public inspection. The press release concerning a Public Hearing will be utilized to inform the public of the availability of the DEIS. The DEIS, along with any applicable supplemental reports, must be made available for viewing at the NDDOT Central Office and District Office appropriate to the project location on the day the ad appears in the newspaper.

Additional viewing locations may include local libraries and city/county offices. FHWA will ensure that the required Federal Register public availability notice is printed which establishes a 45-day review period.

The DEIS is emailed to concerned local, state, or federal agencies as well as local interest groups or individuals who have expressed an interest in the project with a response requested in 45 days or less.

### **II-02.01.03 Final Environmental Impact Statement (FEIS)**

Comments received after circulation of the DEIS and from Public Hearings, when held, are considered in the preparation of a Final Environmental Impact Statement (FEIS) for adoption by FHWA.

The FEIS should identify the preferred alternative and basis of decisions, discuss substantive comments received on the DEIS and all reasonable alternatives considered, summarize citizen involvement, discuss selection of mitigation and enhancement measures, environmental findings, results of coordination, final Section 4(f) and 6(f) findings, and include, when appropriate, a description of the procedures to be followed to assure that all environmental mitigation measures are implemented.

If any additional studies are done or if any information is developed which would affect the project after circulation of the DEIS, such study, or information should be made a part of the FEIS.

The FEIS is circulated for comment according to the [Preliminary Engineering Distribution List](#) within the department and by divisions affected by the improvement and to the divisions with expertise in a particular field which is of importance to the improvements. FHWA will review FEIS for a Legal Sufficiency Finding. The FEIS will be filed with EPA and made available to the public through:

- Publication of a notice of availability in local newspapers and press release made available to the local news media.
- The FEIS, along with any applicable supplemental reports, must be made available for viewing at the NDDOT Central Office and District Office appropriate to the project location on the day the ad appears in the newspaper. Additional viewing locations may include local libraries and city/county offices.
- Furnishing the document to any person(s), organizations, or agencies that made substantive comments on the DEIS or requested a copy.
- An electronic copy at the State Library

### **II-02.01.04 Record of Decision (ROD)**

After the FEIS has been approved, the lead NEPA practitioner will prepare a draft ROD in accordance with FHWA Technical Advisory Guidance Material and Section 6002 of SAFETEA-LU and will submit it to FHWA for comment and finalization. The ROD will state what the decision is, alternatives considered, and practical means to minimize harm. The ROD may not be signed sooner than 30 days after publication of the FEIS notice in the Federal Register or 90 days after publication of the DEIS notice, whichever is later. However, MAP-21 does allow for the streamlining of the process by combining the FEIS/ROD if possible. Signing of the ROD will constitute FHWA concurrence in the project concepts as described in the FEIS. The ROD is distributed in accordance to the [Preliminary Engineering Distribution List](#).

After the ROD is signed, an informational press release will be prepared and sent to the Communications Division to make available to the local news media. A Legal Display Ad is also required. The ROD, along with any applicable supplemental reports, must be made available for viewing at the NDDOT Central Office and District Office appropriate to the project location on the day the ad appears in the newspaper. Additional viewing locations may include local libraries and city/county offices.

Environmental and other commitments contained in the ROD must be implemented. District Engineers and representative Divisions will be sent a copy of the ROD. The Lead Designer will be responsible for implementing commitments relating to preparation of construction plans. The District Engineer is responsible for implementing construction and post construction environmental commitments. The county will be responsible for implementing ROD commitments on county secondary or off-system projects.

The Lead Designer should assure, before requesting PS&E approval from FHWA that the final plans have not significantly changed from the original proposed action. Any substantial changes in the proposed action or environmental impacts should be reviewed.

The ROD normally consists of a cover sheet, summary of selected alternatives and basis of decision, summary of alternatives considered and basis of decision, summary of Section 4(f) and 6(f) basis of decision, summary of measures to minimize harm and environmental commitments, summary of monitoring and enforcement program, summary of agency and public comments received on FEIS and department responses, and a signature block. Refer to the FHWA Technical Advisory, SAFETEA-LU, and MAP-21 for detailed information and processing requirements.

### **II-02.02 Class II Actions - Categorical Exclusions (CatEx)**

NDDOT and FHWA have entered into the, "[Programmatic Categorical Exclusion Agreement Between Federal Highway Administration, North Dakota Division and North Dakota Department of Transportation Regarding the Processing of Actions Classified as Categorical Exclusions for Federal-Aid Highway Projects](#)" (PA). The [PA](#) can be found on the [Reference and Forms](#) page.

The PA authorizes NDDOT to assume CatEx approval authority on behalf of FHWA for "c-list" actions listed in 23 CFR 771.117(c) provided these actions do not exceed the thresholds identified in Section VI of the PA. The PA does not allow for NDDOT to assume CatEx approval authority for "d-list" actions listed in 23 CFR 771.117(d) other than right of way disposal action specified in 23 CFR 771.117(d)(6).

CatEx is the most common type of environmental clearances used for NDDOT projects. A CatEx is documented and completed through one of the following types of NDDOT environmental documents: CatEx by Definition (CED) Checklist, Programmatic CatEx (PCE), or Documented CatEx (DCE).

Regardless of environmental document type, all CatEx approvals require the [SFN 18878](#) Determination and Approval for Categorical Exclusion form to be completed. SFN 18878 can be found [References and Forms webpage](#). As required in the PA, the SFN 18878 form documents what "c-list" or "d-list" criteria the project meets, is signed by a NDDOT employee

acknowledging the environmental document is complete and compliant, and routed to FHWA for approval for “d-list” actions or “c-list” actions that exceed any of the PA thresholds. The identified thresholds are contained with Section VI of the PA.

#### **II-02.02.01 CatEx by Definition (CED) Checklist**

CED Checklist projects are typically preventive maintenance type projects, but can also include minor safety, structure, earthwork, right of way, and other various work. Only projects and work types listed within the CatEx by Definition (CED) Work Types may utilize the CED Checklist for environmental documentation, coordination, permitting, consultation, and approval. The [CED Checklist](#), [CED Checklist Instructions](#), and [CED Work Types](#) are found on the [References and Forms webpage](#).

CED Work Types listed are “c-list” projects that will typically not exceed any PA thresholds. Contact ETS Division for any questions with work types not listed within the CatEx by Definition (CED) Work Types.

#### **II-02.02.02 Programmatic Categorical Exclusion (PCE) and Documented Categorical Exclusion (DCE)**

Any project or work type not listed within the CED Work Types will typically utilize either a PCE or DCE for environmental documentation. PCEs are utilized when the PA thresholds are not expected to be exceeded, and DCEs are utilized when the PA thresholds are expected or may be exceeded.

Both PCEs and DCEs email Solicitation of Views (SOV) letters, contain an executive summary of the purpose and need, scope of work, alternatives, and executive decisions, as well as a summary of environmental issues, engineering issues, right of way needs, and estimated costs. PCEs and DCEs will attach a detailed list of environmental questions contained within the Environmental Impact Checklist which identify any additional supporting documentation to be included either in the appendix or appended by reference. The [Environmental Impact Checklist](#) leads the environmental document author to know when additional information is required, if mitigation is necessary, or if the impact category is not an issue; eliminating the need to draft a technical write-up for each impact category and streamlining the environmental review. PCEs and DCEs are nearly identical documents, and only vary in the amount of required questions within the Environmental Impact Checklist.

The PCE or DCE shall follow the instructions within the [PCE/DCE Template](#) for the various executive summary categories and will vary in length depending on the complexity and number of alternatives for the project. All questions within the Environmental Impact Checklist shall be completed and documentation attached as appropriate. Contact the ETS Liaison for any questions or discrepancies concerning any of the categories within the Environmental Impact Checklist.

The [PCE/DCE Template](#), [Environmental Impact Checklist](#), and SOV Letters and [mailing list](#) are found on the [References and Forms webpage](#).



**II-02.02.02.01 Draft Programmatic (PCE) and Documented (DCE) Categorical Exclusion**

A draft PCE/DCE is submitted to the NEPA Liaison for review. Allow for a 2-week initial review time. After the draft PCE/DCE has been reviewed by the NEPA Liaison, it is distributed according to the [Preliminary Engineering Distribution List](#) for comments. A 2-week comment/circulation period is desirable for most projects. Refer to the [CatEx Workflow](#), found on the [References and Forms webpage](#), for detailed instructions.

- Consultant Projects: Email a copy to the Technical Support Contact to distribute for comments. The Technical Support Contact will forward comments received to the Consultant, who will prepare responses to the comments, as necessary, and/or incorporate revisions into the final PCE/DCE.
- Bridge Division, Design Division, and District Projects: The environmental document author shall distribute a copy and request comments. The environmental document author will prepare responses to comments, as necessary, and/or incorporate revisions into the final PCE/DCE.

**II-02.02.02.02 Completed Programmatic (PCE) and Documented (DCE) Categorical Exclusion**

The PCE/DCE shall be signed and stamped using [DocuSign™](#) digital signature by a Registered Professional Engineer of Record (author or their direct supervisor). Any Design Exceptions shall be submitted for approval and signature along with the original PCE/DCE. All PCE/DCEs will be submitted for signature by ETS in accordance with the [CatEx Workflow](#).

**II-02.03 Class III Actions - Environmental Assessment (EA)**

An EA will be prepared for each project processed as a Class III action. For state projects, the NEPA Practitioner in conjunction with ETS, will prepare the EA in accordance with FHWA Technical Advisory Guidance Material and SAFETEA-LU and present it to FHWA Division Administrator for review and adoption. The Local Government Technical Support Contact will coordinate with ETS on any Local Entity developed EA. Field inspections may be conducted in the same manner as described for Class I actions. The EA should include most of the same information provided by a DEIS, following the FHWA Technical Advisory and SAFETEA-LU.

The EA will consist of a cover sheet, Table of Contents, Purpose and Need, Alternatives, Impacts, Comments and Coordination, Appendices, ROD, and Section 4(f) and 6(f) evaluations. The EA should be emailed to cooperating agencies for their review and comment. All responses will be incorporated into the document.

After the EA has been reviewed and adopted by FHWA (by signature), a press release will be utilized to notify the public of its availability. The EA, along with any applicable supplemental reports, must be made available for viewing at the NDDOT Central Office and District Office appropriate to the project location on the day the ad appears in the newspaper. Additional viewing locations may include local libraries and city/county offices. A 30-day review period should be established. The press release, concerning a Public Hearing or opportunity, should be utilized to inform the public of the availability of the EA.

### II-02.03.01 Finding of No Significant Impact (FONSI)

The final environmental document normally consists of a cover sheet, summary of agency and public comments received on the EA and department responses, errata to the EA, and request that a FONSI be made. The document should then be submitted to FHWA Division Administrator for evaluation, or determination of no significant impact. After the FONSI is signed, an informational press release will be prepared and sent to the Communications Division to make available to the local news media. A legal display is also required. The FONSI, along with any applicable supplemental reports, must be made available for viewing at the NDDOT Central Office and District Office appropriate to the project location on the day the ad appears in the newspaper. The FONSI is distributed according to the [Preliminary Engineering Distribution List](#).

Additional viewing locations may include local libraries and city/county offices.

### II-02.04 Recommended Content for EA or an EIS

#### II-02.04.01 Purpose and Need

The Purpose and Need of a project is essential in establishing a basis for the development of the range of reasonable alternatives required in an environmental document and assists with the identification and eventual selection of a preferred alternative.

**Purpose of Proposed Action** – Clearly state the purpose for the project. The first part of the Purpose and Need should explain where the proposed project is located. The limits of a project should be clearly described. For a highway improvement project, normally street names, stations, logical descriptions, and reference points are used. An area map will be included at the beginning of the report to show project location. Project limits should be based on logical termini. See FHWA "[Guidance for Preparing and Processing Environmental and Section 4\(f\) Documents](#)". Major roadways intersecting the proposed project should be noted.

This statement should be directed at the corrections needed, and not how it will be accomplished. Highlight the investment strategy and the outcomes and goals achieved by the project. Examples restoring ride quality, pavement preservation, service life, safety, department goals, etc.

**Need for the Proposed Action** – The need for the project must be explained. Highlight what problems or potential problems the proposed project intends to correct. Examples: correct failing pavement, reduce traffic congestion, eliminate hazard, etc. List applicable existing conditions and deficiencies such as pedestrian facilities, drainage, safety (crash history and guardrail), maintenance concerns, geometry, cracking and rutting, broken pipes, etc.

The following items may be listed and described in the Purpose and Need statements for a proposed action. These are by no means all-inclusive or applicable in every situation. They are intended as a guide.

- *Project Status* - Briefly describe the action's history, including measures taken to date, other agencies and governmental units involved, action spending, schedules, etc.

- *Capacity* - Discuss the capacity of the present facility and its ability to meet present and projected traffic demands. Discuss what capacity and levels of service for existing and proposed facilities are needed.
- *System Linkage* - Discuss if the proposed action is a "connecting link" and how it fits into the transportation system.
- *Transportation Demand* - Discuss the action's relationship to any statewide plan or adopted urban transportation plan. In addition, explain any related traffic forecasts that are substantially different from those estimates of the 23 U.S.C. 134 (Section 134) planning process.
- *Legislation* - Explain if there is a Federal, state, or local governmental mandate for the action.
- *Social Demands or Economic Development* - Describe how the action will foster new employment and benefit schools, land use plans, recreation facilities, etc. In addition, describe projected economic development/land use changes that indicate the need to improve or add to the highway capacity.
- *Modal Interrelationships* - Explain how the proposed action will interface with and serve to complement airports, rail and port facilities, mass transit services, etc.
- *Safety* - Explain if the proposed action is necessary to correct an existing or potential safety hazard. In addition, explain if the existing accident rate is excessively high and why, and how the proposed action will improve safety.
- *Roadway Deficiencies* - Explain if and how the proposed action is necessary to correct existing roadway deficiencies (e.g., substandard geometrics, load limits on structures, inadequate cross-section, high maintenance costs, etc.).

The following items may be described in the Purpose and Need section of the document and are intended as a guide. These are by no means all-inclusive, or applicable for every project. If items below are not applicable for the project, they shall be omitted from the document.

- **Project Construction History** - Discuss previous roadway construction within the proposed project limits. Explain when the existing roadway was constructed and repaired.
- **Function and Funding Classification** - Note roadway functional classification: interstate, arterial highway, arterial road, collector road, etc. Note roadway funding classification: interstate, primary regional system, secondary regional system, urban roads, county major collectors, etc.
- **Geometry** - Discuss the existing horizontal and vertical alignments. Note deficiencies and state whether the alignment satisfies minimum or desirable standards. Are sight distances adequate? What kind of superelevation is used in the curves?

- **Typical section** - Graphic typical section of the existing corridor showing all pavement layers, roadway width, various lane widths, ditches, right of way limits, and other pertinent features such as parking and sidewalks.
- **Pavement conditions** - Type and severity of the main pavement distress, ride scores, and rutting values are discussed as part of the major maintenance history.
- **Traffic Operations and Data** - Summarize traffic data and reference the traffic operations report. Discuss current and forecasted average annual daily traffic and equivalent single axle loads (ESALs). A table of current and future vehicle volume and ESALs should be provided. The average annual daily traffic (AADT) figure used in the table should be for the highest-volume intersection along the project. Generally, a twenty-year projection of traffic through the corridor is presented but will depend on the design life for the project.

Discuss posted speed limits. Does the speed limit change within the proposed project? Discuss traffic control systems - which intersections are stop sign controlled and which intersections are controlled by signals. Discuss pedestrian usage on the existing and future project. Discuss the crash history/analysis of the project and any contributing factors, as well as the potential for crashes. Note any areas of concern.

- **Safety Review and 90-1 Survey** - If conducted for the proposed project, summarize safety improvements noted in the safety review or 90-1 survey.
- **Drainage** - Discuss existing drainage system and any drainage deficiencies.
- **Structures** - An evaluation should be conducted of existing structures, including their condition and latest National Bridge Inventory (NBI) record, geometric capacity, load capacity, hydraulic capacity, scour analysis, and pedestrian access.
- **Right of Way** - Note right of way constraints.
- **Access Control** - Summarize the existing number and type of accesses controls and driveways.
- **Lighting** - The presence, ownership, and type of any lighting system should be noted.
- **Utilities** - All information about existing utilities, including but not limited to sanitary sewer, water, electrical, petroleum and gas lines, cable TV, and telephone lines.
- **Parking** - Discuss existing parking areas within the proposed project.
- **Railroad Crossings** - Note type and condition of the crossing surface material in place (wood plank-uses shims, full depth timber-sits on ties, timber-asphalt combination, asphalt only, rubber, or concrete). Note the number of tracks. Railroad Crossings should be reviewed at the field review using the [Railroad Crossing Review worksheet](#) found on the [References and Forms webpage](#).

- **Sidewalks, Multi-Use Trails, and Shared-Use Paths** - Discuss existing facilities as it pertains to American Disabilities Act (ADA) and movements of pedestrians, bicycles, etc.
- **Transit Facilities** - Discuss existing transit facilities such as bus stops.

#### II-02.04.02 Alternatives

The Alternatives section of the document discusses the methods to satisfy the Purpose and Need of the project. This section should include a discussion of alternate routes and improvement types, the feasibility and prudence of the proposed alternatives, the estimated cost differences, and the advantages and disadvantages of each alternative, and the no-build alternative.

Description of the No-Build Alternative - Describe the effects of the no-build alternative if one of the build alternatives is not selected such as: roadway or bridge would continue to deteriorate, continued maintenance, milling and microsurfacing at the driving lanes every 3 to 5 years to restore the pavement strength and provide a smooth and dense traveling surface, etc.

Description of the Proposed Build Alternatives - Describe the proposed build alternative improvements as well as the proposed improvements common to all build alternatives. The following items should only be addressed if improved with the alternatives proposed:

- **Geometry** - Discuss improvements to the horizontal and vertical alignments, sight distances, superelevations, turning movements, etc. Note, maintaining the existing roadway and changing lane assignments often creates a geometrical concern that should be documented.
- **Typical section** - Include graphic typical section of the proposed corridor showing all pavement layers, roadway width, various lane widths, right of way limits, and other pertinent features such as parking and sidewalks. A summary and findings of the soils, subgrade, and pavement thickness recommendation should be referenced.
- **Traffic Operations** - Summarize Traffic Operations Study recommendations. Discuss intersection layout changes (added driving and/or turn lanes, changed intersection traffic control and/or signals, etc.). Discuss speed limit changes.
- **Drainage** - Discuss drainage improvements. Always note roadway crowns and drainage paths.
- **Structures** - Recommendations for widening, strengthening, scour protection, etc. to address deficiencies or on National Bridge Inspection (NBI) records. For projects to be funded with federal Bridge Replacement funds, include selection, list eligibility, structure sufficiency rating, consideration of lower-rated structure in same jurisdiction, and rehabilitation vs. replacement. Structures replaced with federal Bridge Replacement funds must show cost comparison with rehabilitation or demonstrate non-feasibility of rehabilitation.

- **Right of Way** - Discuss the need to acquire any permanent right of way or construction easements for the project including the need to acquire borrow, participation in right of way costs, exceptions to right of way policy, and any encroachments.
- **Access Control** - Discuss any recommendations concerning the feasibility and extent of access control or revised access, based on crash history, potential for crashes, functional class, and access demand. Note the proposed removal and or replacement of driveways within the existing right of way along the project limits, as well as any concerns from the public about driveway widths.
- **Lighting** - If a lighting study has been done, recommendations should be incorporated. For most NDDOT developed projects, the Programming Division completes the lighting study.
- **Utilities** - Note any utility work necessary in this project, including all underground work, such as storm sewer, water, electrical and gas lines, cable TV and telephone lines. If relocation is necessary, coordinate with the utility companies and the NDDOT Utilities Engineer in the Design Division.
- **Parking** - Discuss all parking issues, including the type of parking proposed, the number of parking spaces lost because of turn lanes, the width of any parking lanes, etc. Federal funding is available for parking replacement on a case-by-case basis. Federal regulations must be followed when federal funds are used for parking replacement. ADA should be followed in providing parking.
- **Railroad Crossings** - Discuss proposed railroad crossing improvements which should include the type of material used for the crossing, the type of warning devices and whether signal gates should be installed, and the funding participation. NDDOT, cities, and counties should coordinate railroad crossings with the respective railroad.
- **Sidewalks, Multi-Use Trails, and Shared-Use Paths** - Discuss proposed improvements for pedestrians, bicycles, etc. Reference provisions to ADA when applicable.
- **Landscaping** - Note landscaping improvements such as trees and bushes.
- **Transit Facilities** - Discuss proposed accommodations for transit facilities such as bus stops.

**Traffic Control Work Zone Safety and Mobility (when applicable)** - Measures for work zone safety and mobility assurance should be discussed in this section.

**Work Zone Traffic Control** - A summary of work zone traffic control for the proposed alternative should be discussed. An outline of the project phasing for work zone traffic control should be discussed and which traffic control devices should be used.

**Summary of Estimated Costs** - A detailed preliminary estimate of the cost of the proposed improvements should be included in an appendix or appended by reference. A summary is given

within the body of the environmental document. Pay items should match the NDDOT specifications and code listing (Historical Fact Sheet), obtainable from NDDOT.

General programming details should be included in this subsection. Note the proposed bid opening and when the proposed construction is planned to begin and end. Also, note TERO requirements if applicable (project located within or near an Indian Reservation). Note the number of independent contracts proposed to build the project. For example, the construction of part of a divided highway where one contract is used for the northbound lanes, and another is used for the southbound lanes.

**Maintenance Responsibility Discussion** - This subsection should discuss the entities responsible for roadway maintenance after the project is completed. The degree of detail included here is dependent on how significant maintenance is to the selection of alternatives.

**Projects with ITS** - The following process has been developed and should be followed to ensure Intelligent Transportation Systems (ITS) applications are communicated early in the development stages and implemented efficiently and effectively.

Step 1 - Review ITS statewide plan (performed by Maintenance & Engineering Services).

Step 2 - Each project scoping report should include a decision item to determine if there should be a study done. \_\_\_YES \_\_\_NO

*(If yes, continue to step 3; if no, STOP).*

Step3 - Maintenance and Engineering Services should attend the field review and conduct a check list of ITS possible components (2 weeks to perform this step).

Step 4 - ITS Committee will make recommendations (2 weeks to perform this step).

Step 5 - Maintenance and Engineering Services submits proposal and its options with costs and impacts for inclusion into the Decision Document (1 week to perform this step).

Step 6 - Send out for comments.

Step 7 - Send to management for decisions.

Step 8 - Decisions should be incorporated into design.

ITS components should typically be considered for the following:

- Interstate surfacing or reconstruction projects
- Urban region system reconstruction projects
- Urban regional signal projects
- Inter-regional surfacing or reconstruction projects
- Major bridge replacement or repair

All ITS items will be included in the Decision Document. Include the ITS items in the Proposed Action in the Executive Summary if preparing a PCE/DCE. For EA/EIS, append the ITS Decision Document by reference.

### **II-02.04.03 Environmental Impacts**

This section describes in detail any impacts the project may have. The level of involvement will be dictated by the degree of impact. The impacts that should be discussed are contained in various FHWA Technical Advisory Guidance Material (see FHWA Technical Advisory T 6640.8A). The following impacts should be considered:

- **Land Use Impacts**
- **Farmland Impacts**
- **Social Impacts**
- **Relocation Impacts**
- **Economic Impacts**
- **Joint Development**
- **Considerations Relating to Pedestrians and Bicyclists**
- **Air Quality Impacts**
- **Noise Impacts**
- **Water Quality Impacts**
- **Wetlands**
- **Water Body Modification and Wildlife Impacts**
- **Floodplain Impacts**
- **State Scenic Rivers**
- **Threatened and Endangered Species**
- **Cultural Resources**
- **Hazardous Waste Sites**
- **Visual Impacts**
- **Energy**
- **Trees Impacts**
- **Temporary Construction Impacts** - The following items should be discussed:
  - Work Zone Traffic Control
  - Project Phasing
  - Detours and Alternate Routes
  - Air, Noise, and/or Water Quality Impacts
  - Adjacent Construction Projects
- **Environmental Justice (Low Income and Minority)** - [FHWA Order 6640.23A](#) and [Environmental Justice \(EJ\) Analysis Guidance](#)
- **Section 4(f)** - Note actual evaluation must be included in separate section or document.
- **Section 6(f)** - Note actual evaluation must be included in separate section or document.

#### **II-02.04.04 Environmental Commitments and Permitting**

This section should include a discussion and review of environmental commitments and required permits for the project. These commitments shall later be included in the environmental commitments page of the project plans.

#### **II-02.04.05 Comments and Coordination**

This section should include a discussion of SOVs, and a summary of any meetings with the public or representatives of environmental or public agencies. Any concerns or issues from any public meeting held should be summarized and any comment cards filled out by the public should be included in the appendix for reference. The SOVs letters and project mailing list shall be included in the appendix.



### II-02.04.05.01 Responding to Comments on an EA or EIS

A number of ways comments may be received on a project could include letters mailed to the project team, handwritten comment cards submitted at public meetings, and emails received thru the project website or thru the NDDOT information email. Regardless of format, comments need to be compiled and organized into a database system capable of sorting by topic, commenter, and keyword or issue. It is important to maintain the original version of each letter for the project record. A copy can be used to “code” the comments by bracketing each substantive comment; each comment then becomes the focus of the process for responding to comments. A standard response shall be provided for comments that raise similar issues. All responses should be respectful and courteous in tone.

A cross section of team members should be involved in reviewing the process to ensure accuracy and consistency that responses are substantive to the issues raised and all comments addressed. Responses need to be consistent with the environmental document. Refer to most current AASHTO Practitioners Handbook 02 for responding to comments on an EA/EIS.

### II-02.05 Supporting Documentation for Environmental Documents

#### II-02.05.01 Noise

The [NDDOT Noise Policy and Guidance](#), describes the Department’s implementation of the requirements of FHWA’s Noise Standard contained in 23 CFR 772, including: traffic noise prediction requirements, noise analysis, noise abatement criteria, and requirements for informing local officials. The policy applies to all Type I Federal highway projects receiving Federal-aid funds or are subject to FHWA approval.

The environmental document author must determine if the project is a Type 1 project by completing the highway traffic noise questions in the Environmental Impact Checklist or by completing the Type 1 Project Determination for an EA/EIS. If the project meets the definition of a Type 1 Project per 23 CFR 772.5, then a Noise Analysis is required for all build alternatives under detailed study and must include a twenty-year future build prediction. Prior to completing the noise analysis, the noise analysis study area must be determined and agreed upon with FHWA.

- The Consultant/Technical Support Contact will provide ETS with a brief description of the project scope of work, the Type 1 Project trigger, and an exhibit that clearly illustrates the project area, noise study area, land use categories, and the proposed noise receiver locations utilized for field measurement collection.
- ETS will submit the proposed noise analysis area to FHWA for review and approval. Once approval is received from FHWA, ETS will inform the Technical Support Contact that the noise study area is approved by FHWA, and the Consultant may proceed with completing the noise analysis.

Traffic noise impacts occur within the Type I Project’s study area when:

- Traffic generated noise levels are within 1 dBA of the FHWA Noise Abatement Criteria;  
OR
- An increase of 15 dBA is projected to occur (regardless of the absolute noise level)

If it is determined that traffic noise impacts occur within the Type 1 Project's study area, then NDDOT will consider traffic noise abatement. The Department will only construct abatement measures that are both reasonable and feasible. The Consultant will assist NDDOT to determine whether the proposed noise abatement measures are feasible and reasonable based on the following factors:

#### Feasibility of the Abatement Measure

- The noise abatement measures must provide at least a 5 dBA reduction in highway noise for 80% of first-row impacted receptors; AND
- It must be determined the noise abatement measure can be designed and constructed.
  - Engineering and site factors that may influence feasibility include safety, topography, drainage, utilities, barrier height, and maintenance.

#### Reasonableness of the Abatement Measure

- There are three reasonableness factors that must all be met for a noise abatement measure to be considered reasonable:
  - Viewpoints of the property owners and the residents of the benefited receptors;
  - Cost effectiveness; AND
  - Noise reduction design goal

The Consultant will submit a draft of the Noise Analysis Report to the Technical Support Contact, and the Technical Support Contact will submit the draft to ETS for review. Allow for a 2-week initial review time. The Technical Support Contact will forward all comments to the Consultant and ensure that all comments have been incorporated into the updated draft as necessary. ETS will notify the Technical Support Contact when the Noise Analysis Report is final and ensure that a copy of the report is uploaded to the project folder.

The environmental document author will ensure that the environmental document has a summary of the Noise Analysis Report's findings including identifying locations where noise impacts are predicted to occur, where noise abatement is feasible and reasonable, and locations with impacts that have no feasible or reasonable noise abatement measures. Associated documents should be appended by reference to the environmental document. A decision on the likelihood of the implementation of abatement will be made during the NEPA process.

#### **II-02.05.02 Section 7 Consultation (Endangered Species Act)**

Section 7 of the Endangered Species Act (ESA) requires that federal agencies and their non-federal representatives ensure that any action authorized, funded, or carried out by the respective agency is "not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat". Refer to [Section 7 ESA Guidance](#) for more information. A NDDOT Threatened, Endangered, Proposed, Candidate Species, and [Critical Habitat Affect Determination Table](#) (NDDOT Affect Determination Table) has been developed to facilitate the Section 7 consultation process.

CED/PCE/DCE projects: The Affect Determination Table should be completed by the environmental document author. If "NDDOT Biologist review" is not required for any species or critical habitat, the affect determination table should be included in the appendix of the CED/DCE/PCE. If "NDDOT Biologist review" is required for any species or critical habitat, a higher level of documentation will be needed.

- If a Section 7 Affect Determination Package is required, the signed document should be included in the appendix of the environmental document with the affect determination table and other pertinent information (maps/pictures, etc.) attached.
- If a biological assessment is required (either programmatic or project specific), the NDDOT/FHWA Programmatic Biological Assessment (PBA) project submittal approval page, project specific USFWS concurrence letter, or biological opinion should be inserted into the document in place of the affect determination table. Associated documents should be appended by reference.
- If “NDDOT Biologist review” is required for the Northern Long-Eared Bat, the FHWA/USFWS Programmatic Project Submittal Page or USFWS 4(d) Rule Streamlined Consultation verification letter should be attached to the affect determination table.
- EA/EIS projects: Typically, a biological assessment (either programmatic or project specific) will be required. The NDDOT/FHWA PBA project submittal approval page or project specific USFWS concurrence letter or biological opinion should be attached to the document as an appendix, and associated documents should be appended by reference.

Contact the ETS Biologist for further direction on what level of documentation is required for Section 7 ESA consultation for a specific project.

### II-02.05.03 Section 4(f)

Section 4(f) refers to part of the 1966 U.S. Department of Transportation Act, which gave specific protection to certain classes of public properties. These lands include entities such as public parks, recreation areas, wildlife and waterfowl refuges, and historic sites on or eligible for the National Register including those discovered during construction, except as set forth in 23 CFR 774.13(b). The use of Section 4(f) property is not to be approved, unless FHWA determines that:

- There is no feasible and prudent avoidance alternative to use of land from the property; AND
- The action includes all possible planning to minimize harm to the property resulting from such use; OR
- FHWA determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a de minimis impact on the property.

Whenever a project involves such properties, Section 4(f) documentation must be prepared for each location before the land use is approved. Dependent on the level of evaluation needed, this documentation may include letters and correspondence with the Officials with Jurisdiction (OWJ), Section 4(f) Evaluations or Determinations, and supporting maps/layouts/impact. These documents should be included in the environmental document as an appendix and referenced in the body of the environmental document.

The Section 4(f) document is the vehicle that demonstrates that the provisions of the law are met. A Section 4(f) document is completed by the environmental document author, along with ETS, with the author being responsible for providing the specific information, measurements, etc.

**II-02.05.03.01 Nationwide Programmatic Section 4(f) Evaluation**

The Nationwide Programmatic Section 4(f) Evaluations are a time saving procedural alternative to preparing individual Section 4(f) evaluations for certain minor uses of Section 4(f) property. Programmatic Section 4(f) evaluations were developed by FHWA based on experience with a specific set of conditions that include project type, degree of use and impact, and evaluation of avoidance alternatives. An avoidance alternative must be studied through this evaluation process.

"Programmatic" Documents which have been processed to date include:

- Projects with Net Benefit to a Section 4(f) Property.
- Projects with Minor Involvement in the Public Parks, Recreation Areas, and Wildlife and Waterfowl Refuges.
- Projects with Minor Involvement with Historic Sites.
- Projects with Minor Involvement with Historic Bridges.

An approved Programmatic Section 4(f) Evaluation may be relied upon to cover a particular project only if the specific conditions in the Programmatic Evaluation are met per 23 CFR 774.3. The templates for National Programmatic documents are found on the References and Forms webpage.

**II-02.05.03.02 Determination of a *De minimis* Impact to Section 4(f) Properties**

A *de minimis* impact is one that, after considering any measures to minimize harm (such as avoidance, minimization, mitigation, or enhancement measures), results in either:

- A Section 106 finding of “no adverse effect” or “no historic properties affected” on a historic property; OR
- A determination that the project would not adversely affect the activities, features, attributes, or activities qualifying a park, recreation area, or protection under Section 4(f).

A *de minimis* impact determination is made for the net impact on the Section 4(f) property. The environmental document must include sufficient supporting documentation for any measures to minimize harm that were applied to make the *de minimis* impact determination per 23 CFR 774.7(b). A use of Section 4(f) property having a *de minimis* impact can be approved by FHWA without the need to evaluate an avoidance alternative, however public involvement is a requirement of the *de minimis* process. A *de minimis* impact determination can be made for a permanent incorporation or temporary occupancy of the Section 4(f) property.

Prior to making *de minimis* impact determinations under [§ 774.3\(b\)](#), the following coordination shall be undertaken:

- For historic properties:
  - The consulting parties identified in accordance with [36 CFR part 800](#) must be consulted; AND
  - Written concurrence from the pertinent State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), and from the Advisory Council on Historic Preservation (ACHP) if participating in the consultation process, in a finding of “No Adverse Effect” or “No Historic Properties Affected” in accordance with 36

- CFR part 800. FHWA shall inform these officials of its intent to make a *de minimis* impact determination based on their concurrence in the finding of “No Adverse Effect” or “No Historic Properties Affected.”
- Public notice and comment, beyond that required by 36 CFR part 800, is not required.
  - For parks, recreation areas, and wildlife and waterfowl refuges:
    - Public notice and an opportunity for public review and comment concerning the effects on the protected activities, features, or attributes of the property must be provided. This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document.
    - FHWA, or NDDOT as their delegate, shall inform the OWJ of its intent to make a *de minimis* impact finding. Following an opportunity for public review and comment, the OWJ over the Section 4(f) resource must concur in writing that the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection. This concurrence may be combined with other comments on the project provided by the official(s).

See the detailed flow chart the [De Minimis Impact Determination Compliance Process Diagram](#).

### II-02.05.03.03 Exceptions to the Requirement of 4(f) Approval

FHWA has identified various exceptions to the requirement for Section 4(f) approval as set forth in 23 CFR 774.13. These exceptions include, but are not limited to:

- The use of historic transportation facilities in certain circumstances listed in 23 CFR 774.13(a).
- Archeological sites that are on or eligible for the National Register when it is concluded that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place.
- Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites that are made, or determinations of significance that are changed, late in the development of a proposed action. Except for the treatment of archeological resources in 23 CFR 774.9(e), a project may proceed without consideration under Section 4(f) if the property interest in the Section 4(f) land was acquired for transportation purposes prior to the designation or change in the determination of significance and if adequate effort was made to identify properties protected by Section 4(f) prior to acquisition. If it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section.
- Temporary occupancies of land that are so minimal as to not constitute a use within the meaning of Section 4(f) as set forth in 23 CFR 774.13(d).
- Projects for the Federal lands transportation facilities described in [23 U.S.C. 101\(a\)\(8\)](#).
- Certain trails, paths, bikeways, and sidewalks, in the following circumstances:

- Trail-related projects funded under the Recreational Trails Program, [23 U.S.C. 206\(h\)\(2\)](#);
  - National Historic Trails and the Continental Divide National Scenic Trail, designated under the National Trails System Act, [16 U.S.C. 1241-1251](#), with the exception of those trail segments that are historic sites as defined in [§ 774.17](#);
  - Trails, paths, bikeways, and sidewalks that occupy a transportation facility right of way without limitation to any specific location within that right of way, so long as the continuity of the trail, path, bikeway, or sidewalk is maintained; AND
  - Trails, paths, bikeways, and sidewalks that are part of the local transportation system and which function primarily for transportation.
- Transportation enhancement activities, transportation alternatives projects, and mitigation activities, where:
    - The use of the Section 4(f) property is solely for the purpose of preserving or enhancing an activity, feature, or attribute that qualifies the property for Section 4(f) protection; AND
    - The OWJ over the Section 4(f) resource agrees in writing.

#### **II-02.05.03.04 Temporary Occupancy Exception for Section 4(f)**

FHWA has identified several exceptions to the requirement for Section 4(f) approval as noted in 23 CFR 774.13. Temporary Occupancy is one of those exceptions and is defined as: temporary occupancies of land that are so minimal as to not constitute a use within the meaning of Section 4(f).

To document and ensure the temporary occupancy exception is apparent, a number of conditions must be met. The environmental document author will draft a letter and create any necessary exhibits to the OWJ explaining in detail the below conditions are being met. The environmental document author will send the draft letter to their ETS Liaison for review. Once the draft letter is reviewed, ETS will send it to the OWJ for their concurrence.

- Duration must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land.
- Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the Section 4(f) property are minimal.
- There are no anticipated permanent adverse physical impacts, nor will there be interference with the protected activities, features, or attributes of the property, on either a temporary or permanent basis.
- The land being used must be fully restored, i.e., the property must be returned to a condition which is at least as good as that which existed prior to the project; and
- There must be documented agreement of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.

Documentation added to the Project File: Include the letter sent to the OWJ and their concurrence, state “Letter to OWJ” and “Concurrence from OWJ”. Include a figure showing the Section 4(f) property(s) and where the “use” is then state “Section 4(f) Figure(s)”.

#### Permanent Use

Required for a permanent easement or permanent ROW from the Section 4(f) property:

#### De Minimis

1. Requires approval from FHWA allowing de minimis to be used for the Section 4(f) impact which can be used for temporary and/or permanent “uses”.
2. Public Involvement – need to document how this was completed, when, where, and the audience. Complete a Public Involvement Report using the template on the Design Manual References and Forms page.
3. Concurrence from the OWJ - Include a letter or email to the OWJ and OWJ letter or email back concurring with the impacts.

#### **II-02.05.04 Section 6(f)**

Section 6(f) is land that has received funding through the Land and Water Conservation Fund Act (LWCF). The LWCF provides grants to be used for acquiring or improving lands for recreational use. Section 6(f) applies to the entire parcel of land identified in the application for LWCF Funds. Under Section 6(f) it is prohibited to convert property acquired or developed with LWCF grant money to non-recreational purposes without approval from the North Dakota Parks and Recreation Department.

The State Liaison Officer (SLO), the Director of the North Dakota Parks and Recreation Department, manages the Section 6(f) projects for the State of North Dakota. Solicitation of Views (SOV) General Letter 1 is sent to the SLO for their review of the project. The SLO will determine if any Section 6(f) properties are located in the vicinity of the project. The SOV response will indicate if additional coordination is required for temporary easements, temporary easements resulting in a conversion of use, and/or permanent acquisition and conversion of use of the land. Projects that permanently impact LWCF lands are required to work with the SLO to replace the lands.

A Section 6(f) document must be prepared for each location before the land use is approved. The Section 6(f) document shows that the provisions of the law are met. The environmental document author should coordinate the need and preparation of Section 6(f) documentation with the Environmental Section.

#### **II-02.05.05 Environmental Justice (Low Income and Minority Impacts)**

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations, dated February 11, 1994, directed “each federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States...”



[FHWA Order 6640.23A](#) “FHWA Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” establishes and outlines policies and procedures to use in complying with Executive Order 12898. FHWA issued Order 6640.23A on June 14, 2012.

In addition to guidance provided within T6640.23A, the [Environmental Justice \(EJ\) Analysis Guidance](#) includes the procedure to identify and address possible disproportionately high and adverse human health or environment effect on minority and low-income populations. This document shall be used as an attachment to environmental documents to document EJ analysis for projects.

### **II-02.06 Reevaluations**

Sometimes there are changes to the proposed action, new information or circumstances, or there is a lapse of time between preparation of the environmental document and implementation of the action. This may trigger the need to revisit the NEPA analysis if there is a remaining Federal action. The Federal Highway Administration (FHWA), NEPA regulations (23 CFR part 771) contain a process in 23 CFR 771.129 for re-evaluating environmental documents or decisions to determine whether the original document or decision remains valid, or a supplemental or new analysis [e.g., supplemental environmental impact statement (EIS) or environmental assessment (EA)] is needed. FHWA issued [NEPA Re-Evaluation Joint Guidance](#) on August 14, 2019 to provide clarity and consistency to the re-evaluation process consistent with their regulations. Coordinate and discuss any reevaluations with FHWA for FEIS/ROD or EA/FONSI projects.

For CatEx projects (CED, PCE, and DCE), a reevaluation will typically be done every 3 years. CatEx Re-evaluations will generally consist of a cover sheet and a written summary of any changes to environmental impact categories or other environmental laws (such as Endangered Species) since the last approval. Any additional field studies, consultations, or changes to impact categories will be summarized updated, and addressed. The SFN 18878 form will be completed, and the “Re-evaluation” checkbox will be checked. If the original CatEx required FHWA approval, a courtesy copy of the CatEx Re-evaluation will be forwarded to FHWA with FHWA approval only required if any new PA thresholds are exceeded. If the original CatEx was approved by the NDDOT, the CatEx Re-evaluation will be approved by NDDOT (ETS Division) provided no PA thresholds are exceeded.

### **II-02.07 Addendums**

Coordinate and discuss any addendums/supplements for FEIS/ROD or EA/FONSI projects with FHWA. For CatEx projects (CED, PCE, and DCE), a CatEx Addendum will be completed for any additional actions or alternatives that are added after the original CatEx approval. The CatEx Addendum will generally consist of a cover sheet and a written summary of the added or proposed work. Any changes to the environmental impact categories, additional field studies, consultations, and coordination will be summarized and addressed. The SFN 18878 form will be completed, and the “Addendum” checkbox will be checked. If the original CatEx required FHWA approval, a courtesy copy of the CatEx Addendum will be forwarded to FHWA with FHWA approval only required if any new PA thresholds are exceeded. If the original CatEx was approved by the NDDOT, the CatEx Addendum will be approved by NDDOT (ETS Division) provided no PA thresholds are exceeded.



### II-03 Public Involvement & Coordination

The Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy of Users (SAFETEA-LU) includes guidance on linking planning and National Environmental Policy Act (NEPA) such that transportation decision-making considers environmental, community, and economic goals early in the planning stage, through project development and design, and ultimately construction. This process encourages greater public involvement and agency coordination on a broader, ecosystem-level perspective rather than on an individual basis. The NDDOT considers public involvement a key to a successful project. Public involvement begins in the planning phase and ends post construction. It is intended to assist in the understanding of the transportation facility and the proposed project, as well as any social, economic, and environmental effects that may be caused by the proposed project. It is also a tool to encourage input and provides the decision-makers valuable information to be considered in the process.

It is intended that the public involvement procedures be designed in a manner that will comply with Title VI of the Civil Rights Act of 1964. The purpose of Title VI is to eliminate race discrimination in federally funded programs by making sure that funds of the United States are not used to support race, color, sex, or national origin discrimination in programs receiving federal financial assistance.

Pursuant to 23 CFR 771.111(h) for the Federal-aid highway program:

- 1) Each State must have procedures approved by the FHWA to carry out a public involvement/public hearing program pursuant to 23 U.S.C. 128 and 139 and CEQ regulation.
- 2) State public involvement/public hearing procedures must provide for:
  - i. Coordination of public involvement activities and public hearing with the entire NEPA process.
  - ii. Early and continuing opportunities during project development for the public to be involved in the identification of social, economic, and environmental impacts, as well as impacts associated with relocation of individuals, groups, or institutions.
  - iii. One or more public hearings or the opportunity for hearing(s) to be held by the state highway agency at a convenient time and place for any Federal-aid project which requires significant amounts of right-of-way, substantially changes the layout or functions of connecting roadways or of the facility being improved, has a substantial adverse impact on abutting property, otherwise has a significant social, economic, environmental or other effect, or for which the FHWA determines that a public hearing is in the public interest.

The NDDOT has developed procedures, in conjunction with FHWA, and are described in this Section.

- For projects processed under a CatEx by Definition (CED), public involvement is not required. However, public involvement will be required by NDDOT if the project goes through, or is immediately adjacent to, a community of any size, either incorporated or unincorporated, utilizing two mechanisms. First, the District makes contact with the local city/county representative as described in the field review outline. Secondly, a SOV letter will be sent to the city/county offices to notify them of the project.
- For projects processed under a Programmatic CatEx (PCE), a Public Input Meeting may be required if the project goes through, or is immediately adjacent to, any community of any size, either incorporated or unincorporated. The decision to hold a Public Input Meeting will be done on a case by case basis, depending on the complexity of the project, and whether the project requires major road closures/detours.
- For projects processed under a Documented CatEx (DCE), a Public Input Meeting will be required if the projects goes through, or is immediately adjacent to, any community of any size, either incorporated or unincorporated. For projects that have an EA or EIS prepared pursuant to 23 CFR 771.111(h), a public hearing or an opportunity for public hearing(s), is required.

### **II-03.01 Solicitation of Views (SOV)**

The solicitation of views process ensures that the scope of the project is made known to other jurisdictions and government agencies. It ensures that they have an opportunity to comment on the project's impacts on the human, natural, and physical environment. The requirements for adequate planning and coordination exist in both state and federal regulations. SOVs are prepared for comment on projects processed under a Programmatic CatEx (PCE), Documented CatEx (DCE), EA, and EIS.

#### **II-03.01.01 SOV Form Letters**

The environmental document author should prepare a letter describing all ground disturbing activities associated with the proposed project, such as slope flattening, culvert extensions, and temporary bypasses. Detour routes and potential road closures should also be included. All solicitation letters should have a map of the proposed project including the section, township, and range. The attached map should delineate the project area and any expected area of disturbance. These letters are used to request comments on the proposed project from federal, state, local, tribes, and private agencies. Agencies should be given a minimum of 30 days to respond.

Presently there are 8 different kinds of solicitation letters. All SOV letters can be found on the web at <http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>.

Letter 1 (General Solicitation)

This is a general-purpose letter that can be used for almost all agencies.

Letter 2 (United States Army Corps of Engineers)

Letter 2 will be sent after the wetland delineation is completed. The letter will request a jurisdictional determination of all waters and wetlands within the project area and will contain the wetland delineation, wetland table, maps, data forms, and any other supplemental material that would assist the USACE in the jurisdictional determination. If it is determined no wetlands are present, Letter 2B shall be sent to USACE. The wetland table can be found on the web at <http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>.

Letter 3 (US Department of Agriculture)

This letter is used to solicit the views of the State Conservationist, specifically the identification of prime and unique farmland. A farmland impact rating form may be required and a completed form should be included in the environmental document if work will occur outside NDDOT right of way and involves disturbance of 10 acres or more per linear mile, or greater than 3 acres per bridge or interchange.

Letter 4 (State Health Department)

The solicitation of the North Dakota Department of Health requires traffic counts after project completion and forecast traffic 20 years after completion. It is directed towards air quality, but also requests information on water quality and solid/hazardous waste sites or spill locations.

Letter 5 (State Historic Preservation Officer)

Environmental document authors are asked to coordinate the completion of this letter through the Cultural Resource Section. An example is provided in the form letter. The SOV letters to Tribal Governments, Tribal Historic Preservation Office (THPOs), and Tribal Cultural Resource personnel will also be specific to their interests and needs.

Letter 6 (State Water Commission)

This letter is used to solicit specific information related to permitting from the State Engineer.

Letter 7 (US Fish & Wildlife Service)

This letter is used to solicit specific information related to USFWS easement lands and T&E species.

Letter 8 (Advocacy Group)

This letter is used to solicit comments and provide advance notice of upcoming highway projects for advocacy groups and their constituents. This letter is required for projects processed under a Documented CatEx that go through, or are immediately adjacent to, any community, either incorporated or unincorporated. This letter is also required for all EA/EIS projects.

The Designer or Technical Support Contact shall scan the signed letter, and email it to their respective Administrative Assistant. The Administrative Assistant shall forward the letter to the Advocacy Group using GovDelivery.

Notes: These letters are "form letters" and need to be merged with the Master SOV list to obtain the correct format. These letters can be found on the web at <http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>.

### II-03.01.02 Mailing Lists

The environmental document author needs to evaluate what information is going to be provided in the form letters and where these form letters are going to be sent. A list of agencies from which views will be solicited should be developed and documented. Authors should start this list from the master SOV list.

There are separate master SOV lists for PCE and DCE projects. PCE projects will deliver SOV's electronically via email, and DCE projects will utilize hard copy mailings for SOV's. The most current PCE and DCE project master SOV lists are located on the web at: <http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>.

The master solicitation of views list contains agencies, groups, associations and officials that NDDOT determines to have an interest in NDDOT projects. Interested individuals, groups or agencies may, at their request, be added to the NDDOT solicitation of views mailing list. A special effort should be made on projects to seek out and include the interests of minority groups or individuals.

Users should only print the mailing list when needed. This list will be updated frequently on the web. Users should always obtain a current master SOV list before selecting addresses. Please make recommendations to improve the master SOV list and send address revisions to the Environmental Section of the Environmental and Transportation Services Division.

A project specific mailing list should be created for each project from the master SOV list that requires solicitation of views. This list shall be included as an appendix in the environmental document.

#### II-03.01.02.01 Usage Codes

The agencies and interested parties on the master SOV list have been assigned a usage code. The usage code is a way of organizing the list. The date edited field is intended to help keep track of the last time an address was revised. The following information describes the usage code.

100 – These parties are always solicited for their views.

200 – The parties are not always solicited. The decision to solicit a view is dependent on the type of project.

300 – These parties are solicited when a project is within or adjacent to a municipality.  
(reference "*Directory of Government Officials*")

400 – These parties are always solicited.  
(reference "*County Officials Directory*")

500 – These parties are not always solicited. The decision to solicit is dependent upon the location of the project.

600 – All railroads and utilities located within the project limits and adjacent to the project shall be solicited. The environmental document author or technical support person should contact the NDDOT Utilities Engineer to make sure all required utility companies are solicited.

### **II-03.01.03 Printing, Signing and Distribution**

Once the final mailing list is established, the letters are distributed. Note that the solicitation of views for local entity developed projects should be signed by the local entity's project engineer or consultant engineer. The solicitation of views for district developed projects should be signed by the District Engineer or Assistant District Engineer. The solicitation of views for in-house developed NDDOT projects should be signed by the Design Engineer or by the Bridge Engineer if the project is developed in the Bridge Division. The solicitation of views letter should be signed by the project manager for consultant developed projects. For State highway projects, Letter #2 is signed by the Environmental Liaison and Letter #5 is signed by the Cultural Resource Specialist. For local entity developed projects, Letter #2 is signed by the Local Government Division Technical Support Contact. The environmental document author shall submit the Project Information Form (SFN 52748) to the Cultural Resource Section Leader to coordinate the Section 106 process. For PCE email SOV's process, the signatory agent listed above should utilize /s/ next to their typed their name when emailing SOV letters.

After the letters are signed, use one type of each form letter (without address when multiple addresses are solicited) and include the list of addresses solicited for that project. This should be scanned into FileNet and a copy kept for inclusion in the appendix of the environmental document. Consultants should submit a .pdf file of the information to the NDDOT Technical Support Contact. The Technical Support Contact shall then place the information in FileNet.

### **II-03.01.04 Comments**

Comments received in response to solicitation of views letters should be considered, and when appropriate, addressed in the environmental document. These comments should also be incorporated into an appendix to the environmental document.

For projects where an EA or EIS is prepared, the SOV letters and responses should be compiled at the end of the comment period and placed in FileNet. Consultants should submit a .pdf file of the information to the NDDOT Technical Support Contact. The Technical Support Contact shall then place the information in FileNet.

### **II-03.02 Public Meetings**

A public meeting is any meeting which the public is encouraged to attend. The meeting will include information about the proposed project as well as time for the public to voice concerns or ask questions. A few types of public meetings are Public Input Meetings, Public Hearings, and Public Information Meetings. Each type of public meeting will be discussed in the paragraphs that follow.

The following checklist can be used to help schedule and make arrangements for public meetings (Public Input, Public Hearing, and Public Informational):

- Review needed preparation time for information, pamphlets and exhibits, and adjust time frame accordingly.
- Determine desired individual representation at the meeting
- Determine time that will work with the local representation
- Clear with local calendar, check for other events that will influence public attendance (i.e. sporting events, religious holidays or activities)
- Reserve location (accessible to persons with disabilities)
- Make audio and visual equipment arrangements if necessary

Interested individuals may also be sought by a mailing within the project corridor. In addition, and as appropriate, use direct mail, a poster campaign, public service announcements, paid advertising, or other means of advertising to inform the public. Any interested agencies, officials, groups, or individuals that have expressed an interest in the proposed project shall be notified by mail.

The Distribution List should be used to determine additional people to be invited. The Distribution List can be found on the web at <http://www.dot.nd.gov/manuals/design/designmanual/designmanual.htm>.

### **II-03.02.01 Public Input Meetings**

Public Input Meetings provide an early opportunity for the public and other agencies to comment on the need for the project, suggest alternatives, and identify areas of concern. Projects processed under a Documented CatEx will require a Public Input Meeting if the project goes through, or is immediately adjacent to, any community, either incorporated or unincorporated. In addition, NDDOT strongly encourages holding Public Input Meetings for all projects processed under an EA or EIS, in addition to the public hearing. Projects processed under a Programmatic CatEx (PCE) may hold a Public Input Meeting, depending on the complexity of the project.

The environmental document author will coordinate meeting location and time, advertise the meeting, prepare informational handouts and exhibits, and conduct the input meeting. Input meetings may be held either jointly with other meetings such as city council, city planning commission, county commission, etc., or a special meeting called specifically to discuss a given project.

#### **II-03.02.01.01 Public Input Meeting Notification**

The public must be given an adequate opportunity to attend a Public Input Meeting. This can only be accomplished through proper notification. The following points will ensure adequate notification is given to the public:

- A Legal Display Advertisement of a Public Input Meeting is published **once** in the official county newspaper in the area of the project. Additional papers having a general circulation in the area of the project may also be considered for publication after a consultation with the contact for the Legal Display Advertisement. The contact person is defined on the following page under process for submitting Legal Display Advertisement. The publication must be 15 to 21 calendar days prior to the Public Input Meeting<sup>1</sup>. Examples can be found on the web at <http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>. The Legal Display Advertisement will also be posted to the NDDOT Calendar on the NDDOT website no later than the day of publishing in the county newspaper.
- A Press Release needs to be submitted for all Public Input Meetings. Templates can be found on the web at <http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>. The Press Release will be distributed 5 to 7 calendar days prior to the Public Input Meeting.
- The following must be considered when scheduling a Public Input Meeting.
  - The building in which the Public Input Meeting is held in shall be accessible to persons with disabilities.
  - Avoid holding meetings on Saturday, Sunday, or Wednesday nights, to avoid conflicts with religious activities.
  - Public Input Meetings should be scheduled for a minimum of two hours and the personnel conducting the meeting need to stay the entire time.
  - Where can the public view related maps, drawings, and proposed documents (if applicable)

**Follow the process below when submitting a Legal Display Advertisement for a Public Input Meeting:**

- Consultant Projects – Bridge and Design Division
  - Submit copy to the NDDOT Technical Support Contact 7 to 10 calendar days prior to the publication deadline
  - Technical Support Contact will review and provide comment to the consultant
  - The Technical Support Contact will coordinate with their respective administrative assistant to post the Legal Display Advertisement to the NDDOT Calendar on the NDDOT website. The contact person to list on the NDDOT Calendar shall be the same person listed to receive written comments in the Legal Display Advertisement.
  - The consultant will publish the Legal Display Advertisement with the newspaper(s), and will obtain affidavit of publication for inclusion in the Public Involvement Report (Documented CatEx) or environmental document (EA or EIS)
- Local Government (ND & US Highways) developed projects:
  - Submit copy to the Local Government Technical Support Contact 7 to 10 calendar days prior to the publication deadline
  - The Local Government Technical Support Contact will review and provide comment to the consultant

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<sup>1</sup> A public meeting must be advertised at least 15 days, but no more than 21 days prior to the meeting date. If this cannot be met, then the meeting must be rescheduled.

- The Local Government Technical Support Contact will coordinate with their respective administrative assistant to post the Legal Display Advertisement to the NDDOT Calendar on the NDDOT website. The contact person to list on the NDDOT Calendar shall be the same person listed to receive written comments in the Legal Display Advertisement.
- The consultant will publish the Legal Display Advertisement with the newspaper(s), and will obtain affidavit of publication for inclusion in the Public Involvement Report (Documented CatEx) or environmental document (EA or EIS)
- Local Entity (Urban & County Federal Aid Routes, and TAP) developed Projects:
  - Submit copy to the Local Government Technical Support Contact 7 to 10 calendar days prior to the publication deadline
  - The Local Government Technical Support Contact will review and provide comment to the Local Entity/Consultant
  - The Local Entity/Consultant will coordinate and publish the Legal Display Advertisement with the newspaper(s), and will obtain affidavit of publication for inclusion in the Public Involvement Report (Documented CatEx) or environmental document (EA or EIS)
- District Design Projects
  - If a District needs to conduct a Public Input Meeting, direction shall be taken from Design Division when scheduling and submitting Legal Display Advertisements
- Bridge and Design Division developed projects:
  - The environmental document author, after review by the appropriate Section Leader, will submit a copy to their respective Administrative Assistant 7 to 10 days prior to the publication deadline.
  - The Administrative Assistant will post the Legal Display Advertisement to the NDDOT Calendar on the NDDOT website. The contact person to list on the NDDOT Calendar shall be the same person listed to receive written comments in the Legal Display Advertisement.
  - The Administrative Assistant will coordinate and publish with the newspaper(s), and will obtain affidavit of publication for inclusion in the Public Involvement Report (Documented CatEx) or environmental document (EA or EIS)

**Follow the process below when submitting a Press Release for a Public Input Meeting:**

- Consultant Projects – Bridge and Design Division
  - Submit copy to the NDDOT Technical Support Contact 21 calendar days prior to the Public Input Meeting
  - Technical Support Contact will review and forward to the appropriate Administrative Assistant
  - The Administrative Assistant will submit to Director of the Communications Division
  - The Director of the Communications Division will review and send to the appropriate media and provide an email receipt to the Administrative Assistant to be included in the Public Involvement Report (Documented CatEx) or Environmental Document (EA or EIS)



- Local Government (ND & US Highways) developed projects:
  - Submit copy to the Local Government Technical Support Contact 21 calendar days prior to the Public Input Meeting
  - The Local Government Technical Support Contact will review and submit to Director of the Communication Division
  - The Director of the Communications Division will review and send to the appropriate media and provide an email receipt to the Local Government Technical Support Contact to be included in the Public Involvement Report (Documented CatEx) or Environmental Document (EA or EIS)
  
- Local Entity (Urban & County Federal Aid Routes, and TAP) developed Projects:
  - Submit copy to the Local Government Technical Support Contact 21 calendar days prior to the Public Input Meeting
  - The Local Government Technical Support Contact will review and submit to Director of the Communications Division
  - The Director of the Communications Division will review and send comments back to the Local Government Technical Support Contact
  - The Local Government Technical Support Contact will send comments to the Local Entity/Consultant for correction
  - The Local Entity/Consultant will send the press release to the appropriate media and include in the Public Involvement Report (Documented CatEx) or environmental document (EA or EIS)
  
- District Design Projects
  - If a District needs to conduct a Public Input Meeting direction shall be taken from Design Division when scheduling and submitting Press Releases
  
- Bridge and Design Division developed projects:
  - The environmental document author, after review by the appropriate Section Leader, will submit a copy to the appropriate Administrative Assistant 21 calendar days prior to Public Input Meeting
  - The Administrative Assistant will submit to the Director of the Communications Division
  - The Director of the Communications Division will review and send to the appropriate media and provide an email receipt to the appropriate Administrative Assistant to be included in the Public Involvement Report (Documented CatEx) or Environmental Document (EA or EIS)

### **II-03.02.01.02 Conducting a Public Input Meeting**

Public Input Meetings should be held at a time and place convenient for affected citizens. The meeting location should be accessible to persons with disabilities. The following are the two most common formats, but there are others that may be appropriate, and could include a combination of both.

- **Traditional format:** The traditional format is effective in presenting and gathering information, and especially in disseminating large amounts of data to a large, diverse audience. It is commonly used at meetings designed to introduce a project, present alternative alignments or designs, or discuss potential social, environmental, and

economic impacts. This format consists of an agency presentation, followed by a discussion period with the audience.

- Open-house format: The open-house format is becoming increasingly popular for dealing with the public on a one-to-one basis. It lets people express their thoughts about a plan without having to make a public speech. Participants are encouraged to:

- Read the meeting brochure
- Ask questions
- Review exhibits
- Send in a comment card or letter to formally express the oral communication made at the meeting
- Interact informally with each other and with agency representatives

Since this type of meeting is, by its nature, easy to conduct with no agendas, presentations, or other structured activities (except possibly for a brief, repeating video on the project); people can come and go at will.

- Combo format: During the meeting time, an open house could be held to allow for the public to view the materials in advance and ask questions prior to, and after the formal presentation. This approach has been very successful making meeting attendees feel comfortable but it also accommodates a presentation where one message is conveyed to the audience.
- The decision on which meeting format to use is made by: the local entity, on locally developed projects; NDDOT on all other projects.

Whether a traditional or open-house format is conducted, the following information should be presented at the Public Input Meeting:

- SFN 59531 NDDOT Sign-In Sheet and SFN 60149 NDDOT Title VI Public Participation Survey need to both be available at the meeting to collect information on the public meeting attendance. The SFN's and instructions are located on the web at: <http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>
- The project's purpose, need, and consistency with the goals and objectives of any local planning.
- The project alternatives under consideration and major design features.
- The social, economic, environmental, and other impacts of the project, including any floodplain and/or wetland impacts.
- The storm water poster should be on display, and the brochure "*After the Storm*" should be made available for attendees.
- The right of way acquisition process, to include the relocation assistance program if needed. Also a tentative schedule of acquisition will be presented, and a brochure describing the land acquisition process and the owner's rights, privileges, and obligation will be distributed.

- A description of the procedures for receiving both oral and written statements from the public. The participants should be informed that statements or exhibits may be presented for 15 calendar days following the Public Input Meeting and will be made part of the record.
- Provide a tentative schedule of construction.
- The source of project funding.
- The agency responsible for developing the project.
- The back of the comment cards should have space for land owners to write down if they have wetlands or borrow on their property that they would be willing to mitigate or sell.

#### **II-03.02.01.03            Public Input Meeting Response Period**

There is a 15 calendar day response period following the Public Input Meeting in which the public may send written comments to the local entity or NDDOT, depending on who developed the project.

Comments received during the Public Input Meeting should be compiled at the end of the comment period and incorporated into a documented titled Public Involvement Report for projects processed under a CatEx. For projects where an EA or EIS is prepared, this information should be contained in the appendices.

#### **II-03.02.02            Public Hearings**

Public Hearings are held to discuss the proposed improvements and their social, economic, and environmental impacts. Public Hearings are open discussions of the purpose and need for the project and any alternatives which are to be considered. A summary of any social, economic, or environmental impacts, or land use studies made in relation to the project are presented. Public Hearings will be held for certain projects where an EA or EIS is prepared.

As indicated at the beginning of this section, a Public Hearing or an Opportunity for a Public Hearing is required if a project:

- Involves the acquisition of significant amounts of right-of-way.
- Has substantial adverse impacts upon abutting property.
- Has a substantial change in roadway geometry or function of connecting roadways or of the facility being improved.
- Has a significant social, economic, environmental, or other impact.
- Is environmentally controversial.
- Involves a bypass or substantial change in traffic patterns.

In addition, there may be a few limited occasions where the NDDOT may conduct, at the Department's discretion, a Public Hearing, or an Opportunity for a Public Hearing for projects that may be processed under a Documented CatEx as follows:

- There is substantial interest in holding a Public Hearing.
- Another agency with jurisdiction over the actions has requested a Public Hearing.
- FHWA determines that a Public Hearing is in the public interest.

The Deputy Director for Engineering, in consultation with FHWA, where appropriate, will determine whether a Public Hearing or Opportunity for Public Hearing is required under the National Environmental Policy Act (NEPA). The Deputy Director for Engineering, in consultation with Office of Project Development, will determine:

- Whether a Public Hearing is held or an Opportunity for Public Hearing offered for those projects which NEPA requires formal notification to the public for an opportunity to request a Public Hearing.
- Whether or not a Public Hearing will be held for projects not requiring Public Hearings under NEPA.

On local entity developed projects, the Local Government Engineer will make this decision.

Additional Public Hearings, or Opportunities for Public Hearing, will be provided when there is:

- Substantial change in the proposal
- Substantial unanticipated development in the area affected by the proposal
- An unusually long lapse of time since the last Public Hearing
- Identification of additional social, economic, or environmental effects not previously considered at earlier Public Hearings

Comments received during the Public Hearing should be compiled at the end of the comment period and incorporated into the Public Involvement Report for projects processed under a CatEx. For projects where an EA or EIS is prepared this information should be contained in the appendices.

**II-03.02.02.01 Public Hearing Notification**

The public must be given an adequate opportunity to attend a Public Hearing. This can only be accomplished through proper notification. The following points will ensure adequate notification is given to the public:

- A Legal Display Advertisement of a Public Hearing is published **once** in the official county newspaper in the area of the project. Additional papers having a general circulation in the area of the project may also be considered for publication after a consultation with the contact for the Legal Display Advertisement. The contact person is defined on the following page under process for submitting Legal Display Advertisement. The publication must be 15 to 21 calendar days prior to the Public Hearing<sup>2</sup>. Examples can be found on the web at <http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>. The Legal Display Advertisement will also be posted to the NDDOT Calendar on the NDDOT website no later than the day of publishing in the county newspaper.
- A Press Release needs to be submitted for all Public Hearings. Templates can be found on the web at <http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>. The Press Release will be distributed 5 to 7 calendar days prior to the Public Hearing.
- The following must be considered when scheduling a Public Hearing.
  - The building in which the Public Hearing is held in shall be accessible to persons with disabilities.
  - Avoid holding meetings on Saturday, Sunday, or Wednesday nights, to avoid conflicts with religious activities
  - Public Hearings should be scheduled for a minimum of two hours; three hours for EIS projects
  - The personnel conducting the hearing need to stay the entire time, or longer to hear all comments
  - Where can the public view related maps, drawings, and proposed documents

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<sup>2</sup> A public meeting must be advertised at least 15 days, but no more than 21 days prior to the meeting date. If this cannot be met, then the meeting must be rescheduled.

**Follow the process below when submitting a Legal Display Advertisement for a Public Hearing:**

- Consultant Projects – Bridge and Design Division
  - Submit copy to the NDDOT Technical Support Contact 7 to 10 calendar days prior to the publication deadline
  - Technical Support Contact will review and provide comment to the consultant
  - The Technical Support Contact will coordinate with their respective administrative assistant to post the Legal Display Advertisement to the NDDOT Calendar on the NDDOT website. The contact person to list on the NDDOT Calendar shall be the same person listed to receive written comments in the Legal Display Advertisement.
  - The consultant will publish the Legal Display Advertisement with the newspaper(s), and will obtain affidavit of publication for inclusion in the Public Involvement Report (Documented CatEx) or environmental document (EA or EIS)
- Local Government (ND & US Highways) developed projects:
  - Submit copy to the Local Government Technical Support Contact 7 to 10 calendar days prior to the publication deadline
  - The Local Government Technical Support Contact will review and provide comment to the consultant
  - The Local Government Technical Support Contact will coordinate with their respective administrative assistant to post the Legal Display Advertisement to the NDDOT Calendar on the NDDOT website. The contact person to list on the NDDOT Calendar shall be the same person listed to receive written comments in the Legal Display Advertisement.
  - The consultant will publish the Legal Display Advertisement with the newspaper(s), and will obtain affidavit of publication for inclusion in the Public Involvement Report (Documented CatEx) or environmental document (EA or EIS)
- Local Entity (Urban & County Federal Aid Routes, and TAP) developed Projects:
  - Submit copy to the Local Government Technical Support Contact 7 to 10 calendar days prior to the publication deadline
  - The Local Government Technical Support Contact will review and provide comment to the Local Entity/Consultant
  - The Local Entity/Consultant will publish the Legal Display Advertisement with the newspaper(s), and will obtain affidavit of publication for inclusion in the Public Involvement Report (Documented CatEx) or environmental document (EA or EIS)
- District Design Projects
  - If a District needs to conduct a Public Hearing, direction shall be taken from Design Division when scheduling and submitting Legal Display Advertisements
- Bridge and Design Division developed projects:
  - The environmental document author, after review by the appropriate Section Leader, will submit a copy to their respective Administrative Assistant 7 to 10 days prior to the publication deadline.

- The Administrative Assistant will post the Legal Display Advertisement to the NDDOT Calendar on the NDDOT website. The contact person to list on the NDDOT Calendar shall be the same person listed to receive written comments in the Legal Display Advertisement.
- The Administrative Assistant will publish with the newspaper(s), and will obtain affidavit of publication for inclusion in the Public Involvement Report (Documented CatEx) or environmental document (EA or EIS)

**Follow the process below when submitting a Press Release for a Public Hearing (or FONSI or ROD):**

- Consultant Projects – Bridge and Design Division
  - Submit copy to the NDDOT Technical Support Contact 21 calendar days prior to the Public Hearing
  - Technical Support Contact will review and forward to the appropriate Administrative Assistant
  - The Administrative Assistant will submit to Director of the Communications Division
  - The Director of the Communications Division will review and send to the appropriate media and provide an email receipt to the Administrative Assistant to be included in the Public Involvement Report (Documented CatEx) or Environmental Document (EA or EIS)
- Local Government (ND & US Highways) developed projects:
  - Submit copy to the Local Government Technical Support Contact 21 calendar days prior to the Public Hearing
  - The Local Government Technical Support Contact will review and submit to Local Government Director of Communication Division
  - The Director of the Communications Division will review and send to the appropriate media and provide an email receipt to the Local Government Technical Support to be included in the Public Involvement Report (Documented CatEx) or Environmental Document (EA or EIS)
- Local Entity (Urban & County Federal Aid Routes, and TAP) developed Projects:
  - Submit copy to the Local Government Technical Support Contact 21 calendar days prior to the Public Hearing
  - The Local Government Technical Support Contact will review and submit to Director of the Communications Division
  - The Director of the Communications Division will review and send comments back to the Local Government Technical Support Contact
  - The Local Government Technical Support Contact will send comments to the Local Entity/Consultant for correction
  - The Local Entity/Consultant will send the press release to the appropriate media and include in the Public Involvement Report (Documented CatEx) or Environmental Document (EA or EIS)
- District Design Projects
  - If a District needs to conduct a Public Hearing direction shall be taken from Design Division when scheduling and submitting Press Releases

- Bridge and Design Division developed projects:
  - The environmental document author, after review by the appropriate Section Leader, will submit a copy to the appropriate Administrative Assistant 21 calendar days prior to Public Hearing
  - The Administrative Assistant will submit to the Director of the Communications Division
  - The Director of the Communications Division will review and send to the appropriate media and provide an email receipt to the appropriate Administrative Assistant to be included in the Public Involvement Report (Documented CatEx) or Environmental Document (EA or EIS)

### **II-03.02.02.02 Opportunity for Public Hearing**

The activity of providing an “Opportunity for Public Hearing” is used when a Public Hearing is required, but interest in the proposed project is limited and the project is not controversial. This activity is a tool that can be used in lieu of a Public Hearing if the lack of interest can be demonstrated and documented, or the interested parties can be addressed on an individual basis. This activity can be complicated and lengthen the project development process if used incorrectly. Often, directly conducting a Public Hearing is quicker than providing a notice of opportunity for a Public Hearing, determining that a Public Hearing is required, advertising for a Public Hearing, and finally conducting the Public Hearing.

Follow the Public Hearing Notification process found in Design Manual Section II-04.02.02.01 when publishing an Opportunity for Public Hearing. The notice should:

- Describe the location and types of the proposed improvements
- Contain a statement indicating where and when the plans and other documents are available for review
- Instructions for the public as to how they may request a Public Hearing
- Include the deadline for submission of a request for Public Hearing is 15 calendar days after the first publication
- Indicate that all requests on state and urban projects must be made in writing, addressed to the Director, North Dakota Department of Transportation (NDDOT), and will be acknowledged in writing by the NDDOT. City or county contact information shall be included in notices for city or county projects and the owner should acknowledge receipt of requests in writing.

If, after the deadline date has passed and no requests have been received, NDDOT forwards to FHWA, where appropriate, a copy of the published notice and a certification that no written requests for a Public Hearing were received.

If only one or two persons request a Public Hearing and the issues can be satisfactorily resolved by meeting with the individuals, the persons making the request may withdraw the request. The person making a request is allowed five days after the deadline for the submission to withdraw the request, in writing. No reason for withdrawal need be given. When a request is withdrawn,



it is treated as if no request was made. If, after the five days allowed for withdrawal, any bonafide request remains, a Public Hearing is held.

### **II-03.02.02.03 Conducting a Public Hearing**

Public Hearings should be held at a time and place convenient for affected citizens. The meeting location should be accessible to persons with disabilities. The following are the two most common formats, but there are others that may be appropriate, and could include a combination of both. The two settings start out the same with a formal presentation of the overall project information.

- Traditional format: The traditional format is effective in presenting and gathering information, and especially in disseminating large amounts of data to a large, diverse audience. It is commonly used at meetings designed to introduce a project, present alternative alignments or designs, or discuss potential social, environmental, and economic impacts. This format consists of an agency presentation followed by a discussion period with the audience. A Public Hearing should be recorded to include all comments in the Transcript.
- Open-house format: The open-house format is becoming increasingly popular for dealing with the public on a one-to-one basis. It lets people express their thoughts about a plan without having to make a public speech. Participants are encouraged to:
  - Read the Public Hearing brochure
  - Ask questions
  - Review exhibits
  - Send in a comment card or letter to formally express the oral communication made at the Public Hearing
  - Interact informally with each other and with agency representatives
- Combo Format: The Public Hearing Open House begins with an open house format to allow time for the public to view the materials in advance and ask questions prior to, and after the formal presentation. This approach has been very successful making meeting attendees more comfortable but it also accommodates a presentation where one message is conveyed to the audience.
- The decision on which Public Hearing format to use is made by the: local entity, on locally developed projects; NDDOT on all other projects.

Whether a traditional or open-house format is conducted, the following information should be presented at the Public Hearing:

- SFN 59531 NDDOT Sign-In Sheet and SFN 60149 NDDOT Title VI Public Participation Survey need to both be available at the meeting to collect information on the public meeting attendance. The SFN's and instructions are located on the web at: <http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>

- The project's purpose, need, and consistency with the goals and objectives of any local planning.
- The project alternatives under consideration and major design features.
- The social, economic, environmental, and other impacts of the project, including any floodplain and/or wetland impacts.
- The storm water poster should be on display, and the brochure “*After the Storm*” should be made available for attendees.
- The right of way acquisition process, to include the relocation assistance program if needed. Also a tentative schedule of acquisition will be presented along with a brochure describing the land acquisition process and the owner’s rights, privileges, and obligation will be distributed.
- A description of the procedures for receiving both oral and written statements from the public. The participants should be informed that statements or exhibits may be presented for 15 calendar days following the Public Hearing and will be made part of the record.
- Provide a tentative schedule of construction.
- The source of project funding.
- The agency responsible for developing the project.
- The back of the comment cards should have space for land owners to write down if they have wetlands or borrow on their property that they would be willing to mitigate or sell.

#### **II-03.02.02.04 Public Hearing Response Period**

There is a minimum 15 calendar day response period following the Public Hearing in which the public may send written comments to the city, county, or NDDOT, depending on who developed the project. Comments received during the Public Hearing should be compiled at the end of the comment period and incorporated into the Public Involvement Report for projects processed under a Documented CatEx. For projects processed under an EA or EIS, this information should be contained in the appendices.

#### **II-03.02.02.05 Post Hearing Meeting**

A Post Hearing Meeting should be conducted to discuss the project concept, alternatives, and public testimony approximately 30 calendar days after the Public Hearing is held. For projects processed under a Documented CatEx, it should be noted that very few projects will go to a Public Hearing, and therefore a Post Hearing Meeting, unless the project goes through a community, or is a special circumstance.

On local developed projects, the local agency determines who should attend the meeting. Included in the list of invitees should be the NDDOT District Engineer. For NDDOT developed

projects, the environmental document author will invite the attendees in accordance with the Distribution List. Each individual that receives a copy of the environmental document shall be invited to the Post Hearing Meeting.

For projects processed under a Documented CatEx, a draft copy of the document and a copy of the Public Involvement Report should be made available to meeting invitees seven calendar days prior to the post hearing meeting. For EA/EIS projects, a draft copy of the meeting materials for the appendices should be made available to meeting invitees seven calendar days prior to the Post Hearing Meeting. After the Post Hearing Meeting, for projects processed as a Documented CatEx, a preferred alternative and/or options may be selected, if applicable. In higher level NEPA documents (EA or EIS), a preferred alternative may have been recommended during the team meetings and with the executive management team, including city and county representatives.

### **II-03.02.03 Public Informational Meetings**

The purpose of Public Informational Meetings generally is to inform the public of project proposals, not to receive input from the public. This distinction should be made clear on Press Releases advertising the meetings. Since this is conducted after the Project Development Phase, just prior to construction, it is not related to the NEPA documentation portion of the project. Further, it needs to be very clear to the public that the project has been designed and is ready for construction, the message is about construction.

#### **II-03.02.03.01 Public Informational Meeting Notification**

The public must be given an adequate opportunity to attend a Public Information Meeting. This can only be accomplished through proper notification. The following points will ensure adequate notification is given to the public.

- A Legal Display Advertisement of Public Information Meeting is published **once** in the official county newspaper in the area of the project. Additional papers having a general circulation in the area of the project may also be considered for publication after a consultation with the contact for the Legal Display Advertisement. The contact person is defined on the following page under process for submitting Legal Display Advertisement. The publication must be 15 to 21 calendar days prior to the Public Information Meeting<sup>3</sup>. Examples can be found at <http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>. The Legal Display Advertisement will also be posted to the NDDOT Calendar on the NDDOT website no later than the day of publishing in the county newspaper.
- A Press Release needs to be submitted for all Public Information Meetings. Templates can be found on the web at <http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>. The Press Release will be distributed 5 to 7 calendar days prior to the Public Information Meeting.

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<sup>3</sup> A public meeting must be advertised at least 15 days, but no more than 21 days prior to the meeting date. If this cannot be met, then the meeting must be rescheduled.

- The following must be considered when scheduling a Public Information Meeting.
  - The building in which the Public Information Meeting is held in shall be accessible to persons with disabilities.
  - Avoid holding meetings on Saturday, Sunday, or Wednesday nights, to avoid conflicts with religious activities
  - Public Information Meetings should be scheduled for a minimum of two hours and the personnel conducting the meeting need to stay the entire time.
- SFN 59531 NDDOT Sign-In Sheet and SFN 60149 NDDOT Title VI Public Participation Survey need to both be available at the meeting to collect information on the public meeting attendance. The SFN's and instructions are located on the web at:  
<http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>

**Follow the process below when submitting a Legal Display Advertisement for a Public Input Meeting:**

- Consultant Projects – Bridge and Design Division
  - Submit copy to the NDDOT Technical Support Contact 7 to 10 calendar days prior to the publication deadline
  - Technical Support Contact will review and provide comment to the consultant
  - The Technical Support Contact will coordinate with their respective administrative assistant to post the Legal Display Advertisement to the NDDOT Calendar on the NDDOT website. The contact person to list on the NDDOT Calendar shall be the same person listed to receive written comments in the Legal Display Advertisement.
  - The consultant will publish the Legal Display Advertisement with the newspaper(s), and will obtain affidavit of publication for inclusion in the Public Involvement Report (Documented CatEx) or environmental document (EA or EIS)
- Local Government (ND & US Highways) developed projects:
  - Submit copy to the Local Government Technical Support Contact 7 to 10 calendar days prior to the publication deadline
  - The Local Government Technical Support Contact will review and provide comment to the consultant
  - The Local Government Technical Support Contact will coordinate with their respective administrative assistant to post the Legal Display Advertisement to the NDDOT Calendar on the NDDOT website. The contact person to list on the NDDOT Calendar shall be the same person listed to receive written comments in the Legal Display Advertisement.
  - The consultant will publish the Legal Display Advertisement with the newspaper(s), and will obtain affidavit of publication for inclusion in the Public Involvement Report (Documented CatEx) or environmental document (EA or EIS)
- Local Entity (Urban & County Federal Aid Routes, and TAP) developed Projects:
  - Submit copy to the Local Government Technical Support Contact 7 to 10 calendar days prior to the publication deadline

- The Local Government Technical Support Contact will review and provide comment to the Local Entity/Consultant
- The Local Entity/Consultant will publish the Legal Display Advertisement with the newspaper(s), and will obtain affidavit of publication for inclusion in the Public Involvement Report (Documented CatEx) or environmental document (EA or EIS)
- District Design Projects
  - If a District needs to conduct a Public Informational Meeting, direction shall be taken from Design Division when scheduling and submitting Legal Display Advertisements
- Bridge and Design Division developed projects:
  - The environmental document author, after review by the appropriate Section Leader, will submit a copy to their respective Administrative Assistant 7 to 10 days prior to the publication deadline.
  - The Administrative Assistant will post the Legal Display Advertisement to the NDDOT Calendar on the NDDOT website. The contact person to list on the NDDOT Calendar shall be the same person listed to receive written comments in the Legal Display Advertisement.
  - The Administrative Assistant will publish with the newspaper(s), and will obtain affidavit of publication for inclusion in the Public Involvement Report (Documented CatEx) or environmental document (EA or EIS)

**Follow the process below when submitting a Press Release for a Public Information Meeting:**

- Consultant Projects – Bridge and Design Division
  - Submit copy to the NDDOT Technical Support Contact 21 calendar days prior to the Public Information Meeting
  - Technical Support Contact will review and forward to the appropriate Administrative Assistant
  - The Administrative Assistant will submit the Press Release to the Director of the Communications Division
  - The Director of the Communications Division will review and send to the appropriate media and provide an email receipt to the Administrative Assistant to be included in the project record
- Local Government (ND & US Highways) developed projects:
  - Submit copy to the Local Government Technical Support Contact 21 calendar days prior to the Public Information Meeting
  - The Local Government Technical Support Contact will review and submit to Local Government Program Manager
  - The Local Government Program Manager will review and submit to Director of the Communications Division
  - The Director of the Communications Division will review and send to the appropriate media and provide an email receipt to the Local Government Program Manager to be included in the project record

- Local Entity (Urban & County Federal Aid Routes, and TAP) developed Projects:
  - Submit copy to the Local Government Technical Support Contact 21 calendar days prior to the Public Information Meeting
  - The Local Government Technical Support Contact will review and submit to Director of the Communications Division
  - The Director of the Communications Division will review and send comments back to the Local Government Technical Support Contact
  - The Local Government Technical Support Contact will send comments to the Local Entity/Consultant for correction
  - The Local Entity/Consultant will send the press release to the appropriate media and include in the project record
  
- District Design Projects
  - If a District needs to conduct a Public Information Meeting direction shall be taken from Design Division when scheduling and submitting Press Releases
  
- Bridge and Design Division developed projects:
  - The environmental document author will submit a copy to the appropriate Administrative Assistant 21 calendar days prior to Public Information Meeting
  - The Administrative Assistant will review and submit to the Director of the Communications Division
  - The Director of the Communications Division will review and send to the appropriate media and provide an email receipt to the appropriate Administrative Assistant to be included in the project record

### **II-03.02.03.02            Conducting a Public Informational Meeting**

Public Informational Meetings should be held at a time and place convenient for affected citizens. The meeting location should be accessible to persons with disabilities. The following are the two most common formats, but there are others that may be appropriate, and could include a combination of both.

- Traditional format: The traditional format is effective in presenting information, and especially in disseminating large amounts of data to a large, diverse audience. This format consists of an agency presentation, followed by a discussion period with the audience.
  
- Open-house format: The open-house format is becoming increasingly popular for dealing with the public on a one-to-one basis. Since this type of meeting is, by its nature, easy to conduct with no agendas, presentations, or other structured activities people can come and go at will.
  
- The decision on which meeting format to use is made by: the city, on urban roads program projects; the county, on county major collector program projects; NDDOT on all other projects.

**II-03.02.03.03 Public Informational Meeting Response Period**

The intent of an informational meeting is to inform the public of the project, therefore no input is gathered. A response period is not warranted.

**II-03.02.04 Public Involvement Report**

After the public comment response period has passed for Public Input Meetings and Public Hearings, the Public Involvement Report (PIR) is prepared by the environmental document author. The Public Involvement Report should include the following: when and where it was held; affidavit of publication including a copy of the Public Hearing Legal Display Advertisement; Press Release including a copy of the email distribution from Communications Division; an explanation of the Public Meeting(s); a copy of any handouts; a copy of the exhibits presented; the video script (if video was used); Power Point slides; a copy of the roster; transcript; a copy of all comments received and responses provided; and any other information about the Public Meeting(s).

For local entity developed projects, the consultant should coordinate with the Local Government Technical Support Contact for distribution of the Public Involvement Report. For NDDOT developed projects, the original copy of the Public Involvement Report is submitted to the administrative assistant in the Office of Project Development. Members of the public who request a transcript at the Public Meeting(s) should also be sent a free copy. The administrative assistant will make copies of the original and send a copy to the public who requested it and any other copies that are required.

Please note that the Public Involvement Report is prepared as a separate document for projects processed under a Documented CatEx only. For projects where an EA or EIS is prepared, this information should be contained in the appendices. For projects where a meeting is held after the project development phase prior to construction (Public Information Meeting), the Public Involvement Report will be placed in the project record.

**II-03.03 Citizen Advisory Committee Meetings**

Citizen advisory groups are established on complex projects to obtain early public involvement and input for the projects. The groups should be comprised of adjacent property owners, business people, the general public, or special interest groups, as appropriate for that project. Normally, the first meetings with the group are held before the completion of detailed engineering studies. The group should be involved throughout the project development process. The environmental document author will conduct citizen advisory meetings to provide review and comment of project development activities; prepare informational handouts and exhibits, as necessary; prepare and distribute written summary of comments received; and prepare and distribute project newsletters to participants, as necessary.

### II-03.04 Technical Advisory Committee Meetings

Technical advisory groups are established on complex projects to obtain early expert involvement and input on the projects. The group should be comprised of federal, state, and local representatives. Normally, the first meetings with the group are held before the completion of detailed engineering studies. The group should be involved throughout the project development process. The environmental document author will conduct technical advisory meetings to provide review and comment of project development activities; prepare informational handouts and exhibits, as necessary; prepare and distribute written summary of comments received; and prepare and distribute project newsletter to participants, as necessary.

### II-03.05 Virtual Public Involvement

During extenuating circumstances in which conducting face to face public meetings is not feasible or impossible (COVID-19 pandemic or other emergency), the following virtual public involvement procedures may be conducted in lieu of a physical Public Input Meeting or Public Informational Meeting.

For a required Public Hearing, virtual public involvement must be approved by FHWA on a case-by-case basis. A formal request must be made to FHWA to conduct virtual public involvement in lieu of a required Public Hearing. The request must include the specific plan and list of procedures to be followed and implemented.

Virtual public involvement procedures follow similar procedures for that of face-to-face public meetings. At a minimum, virtual public involvement:

- is facilitated on NDDOT website [www.dot.nd.gov](http://www.dot.nd.gov) through the “Public Events Calendar”
- same legal display and press release procedures and timelines as regular public meetings
- in addition to above, advertised on NDDOT social media
- is not required to be a live event
- facilitates the following project materials:
  - pre-recorded presentation (narrated PowerPoint, video-recording, etc..)
  - visual aids (project map, alternatives, typical sections, etc...)
  - Stormwater Poster and After Storm Brochure
  - Public Information for Highway and Street Projects brochure
  - Title VI Public Participation Survey
- provide opportunity for individuals without internet to receive hard copy materials
- commence with a Public Involvement Report (PIR) same as regular public meetings



Virtual public involvement is not required to be a live event, but may conduct a live event as appropriate or as availability of resources allow. Additionally, but not required, interested individuals may also be sought by direct mailing within the project corridor, a poster campaign, public service announcements, paid advertising, or other means of advertising to inform the public. Any interested agencies, officials, groups, or individuals that have expressed an interest in the proposed project shall be notified by mail or email.

The Distribution List shall be utilized to “invite” project related staff to the virtual public involvement event to keep project personnel informed. The Distribution List can be found on the web at <http://www.dot.nd.gov/manuals/design/designmanual/designmanual.htm>.

#### **II-03.05.01 Virtual Public Input and Virtual Public Informational Meetings**

The procedures for virtual public input meetings and virtual public informational meetings are identical, with the exception of collecting comments and producing a PIR. Similar to regular public meetings, virtual public input meetings solicit, assemble, and collect public comments and prepare a PIR. Virtual public informational meetings do not gather input and do not prepare a PIR.

The environmental document author will coordinate the Virtual Public Meeting date, advertise the Virtual Public Meeting, prepare informational materials and exhibits, and produce the pre-recorded presentation. The environmental document author will be responsible for posting and coordinating all project information and materials to the NDDOT Calendar Event website, as well as collecting and assembling comments. The environmental document author shall monitor the access and accuracy of the materials and website, as well as coordinate answers to any questions received from the public.

Even though most Virtual Public Meetings will not conduct an actual live meeting event, the official date of the Virtual Public Meeting will be the same date that a regular face to face meeting would have been held. This date represents the date project materials and pre-recorded presentation will be available on the NDDOT website and will begin the official comment period (if applicable).

If conducting a virtual live event, avoid live events on Saturday, Sunday, or Wednesday nights, to avoid conflicts with religious activities.

#### **II-03.05.02 Virtual Public Meeting Notification**

The following notification shall be utilized to advertise Virtual Public Meetings:

- A Legal Display Advertisement of the Virtual Public Meeting is published **once** in the official county newspaper in the area of the project. Additional papers having a general circulation in the area of the project may also be considered for publication after a consultation with the contact for the Legal Display Advertisement. The contact person is defined on the following page under process for submitting Legal Display Advertisement.

The publication must be 15 to 21 calendar days prior to the event date for the Virtual Public Meeting<sup>4</sup>.

- The Legal Display Advertisement templates “Virtual Public Input Meeting Advertisement” or “Virtual Public Informational Meeting Advertisement” shall be used and are available on the NDDOT website at: <http://www.dot.nd.gov/dotnet2/view/referencesandforms.aspx>
- The Legal Display Advertisement shall be posted to the “Calendar of Events” on the NDDOT website no later than the day of publishing in the county newspaper.
- A Press Release needs to be submitted for all Virtual Public Meetings. Templates can also be found on the web at: <http://www.dot.nd.gov/dotnet2/view/referencesandforms.aspx>  
The Press Release will be distributed 5 to 7 calendar days prior to the Virtual Public Meeting.
- Virtual Public Meeting information must be created and posted to the “Calendar of Events” on the NDDOT website. The Virtual Public Meeting should appear on the calendar date the physical public meeting would have taken place. The Legal Display Advertisement must be posted as an attachment no later than the day it is published the county newspaper. All other project materials must be posted as an attachment to the calendar event no later than the actual event date (beginning of comment period).

#### **Legal Display Advertisement and NDDOT Calendar Event for a Virtual Public Meeting:**

- Consultant Projects – Bridge Division, Design Division, and Local Government (ND & US highways):
  - Submit Legal Display Advertisement to the NDDOT Technical Support Contact 7 to 10 calendar days prior to the publication deadline
  - Technical Support Contact will review and provide comment to the consultant
  - The Technical Support Contact will coordinate with their respective Administrative Assistant to create a NDDOT Calendar Event on the NDDOT website and attach the Legal Display Advertisement. The contact person, phone number, and email to list on the NDDOT Calendar shall be the same person listed to receive written comments in the Legal Display Advertisement.
  - The consultant will publish the Legal Display Advertisement with the newspaper(s), and will obtain affidavit of publication for inclusion in the PIR for input meetings, or filenet for info meetings.
  - The consultant shall submit additional event materials, displays, and pre-recorded presentation to the Technical Support Contact 10 days prior to the event date for review and comment.
  - The Technical Support Contact will coordinate with their respective Administrative Assistant to attach the event materials, displays, and link the pre-recorded presentation to the NDDOT Calendar Event. The pre-recorded presentation shall be sent to

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<sup>4</sup> The Virtual Public Meeting must be advertised at least 15 days, but no more than 21 days prior to the meeting date. If this cannot be met, then the Virtual Public Meeting must be rescheduled.

Communications Division at least 5 business days prior to the event date to create a video link (YouTube, etc...) to be posted to the NDDOT Calendar Event.

- Local Entity (Urban & County Federal Aid Routes, and TAP) developed Projects:
  - Submit copy to the Local Government Technical Support Contact 7 to 10 calendar days prior to the publication deadline
  - The Local Government Technical Support Contact will review and provide comment to the Local Entity/Consultant
  - The Local Entity/Consultant will coordinate and publish the Legal Display Advertisement with the newspaper(s), and will obtain affidavit of publication for inclusion in the PIR for input meetings, or local project file for info meetings.
  - The Local Entity/Consultant will coordinate with Local Government Technical Support Contact to either house the Virtual Public Meeting on the NDDOT website or Local Entity website. At a minimum, a NDDOT Calendar Event will still be created by the Local Government Technical Support to link the Local Entity project website to view the materials and comment.
- District Design Projects
  - If a District needs to conduct a Virtual Public Meeting, direction shall be taken from Design Division.
- Bridge and Design Division developed projects:
  - The environmental document author, after review by the appropriate Section Leader, will submit the Legal Display Advertisement to their respective Administrative Assistant 7 to 10 days prior to the publication deadline.
  - The Administrative Assistant will create a NDDOT Calendar Event on the NDDOT website and attach the Legal Display Advertisement. The contact person to list on the NDDOT Calendar shall be the same person listed to receive written comments in the Legal Display Advertisement.
  - The Administrative Assistant will coordinate and publish with the newspaper(s), and will obtain affidavit of publication for inclusion in the PIR for input meetings, or file net for info meetings.
  - The environmental document author, after review by the appropriate Section Leader, shall submit additional event materials, displays, and pre-recorded presentation to the Administrative Assistant 7 days prior to the event date.
  - The Administrative Assistant will attach the event materials, displays, and link the pre-recorded presentation to the NDDOT Calendar Event. The pre-recorded presentation shall be sent to Communications Division at least 5 business days prior to the event date to create a video link (YouTube, etc...) to be posted to the NDDOT Calendar Event.

**Follow the process below when submitting a Press Release for a Virtual Public Meeting:**

- Consultant Projects – Bridge Division, Design Division, and Local Government (ND & US highways):
  - Submit copy to the NDDOT Technical Support Contact 21 calendar days prior to the Virtual Public Meeting
  - Technical Support Contact will review and forward to the appropriate Administrative Assistant
  - The Administrative Assistant will submit to Communications Division
  - Communications Division will review and send to the appropriate media and provide an email receipt to the Administrative Assistant to be included in the PIR for input meetings, or filenet for info meetings.
  - Additionally, the Communications Division will create a Facebook post to advertise the event on NDDOT social media.
  
- Local Entity (Urban & County Federal Aid Routes, and TAP) developed Projects:
  - Submit copy to the Local Government Technical Support Contact 21 calendar days prior to the Virtual Public Meeting
  - The Local Government Technical Support Contact will review and submit to Communications Division
  - Communications Division will review and send comments back to the Local Government Technical Support Contact
  - The Local Government Technical Support Contact will send comments to the Local Entity/Consultant for correction
  - The Local Entity/Consultant will send the press release to the appropriate media and include in the PIR for input meetings, or local project file for info meetings.
  
- District Design Projects
  - If a District needs to conduct a Virtual Public Meeting direction shall be taken from Design Division when scheduling and submitting Press Releases
  
- Bridge and Design Division developed projects:
  - The environmental document author, after review by the appropriate Section Leader, will submit a copy to the appropriate Administrative Assistant 21 calendar days prior to Virtual Public Meeting
  - The Administrative Assistant will submit to Communications Division
  - Communications Division will review and send to the appropriate media and provide an email receipt to the appropriate Administrative Assistant to be included in the PIR for input meetings, or filenet for info meetings.
  - Additionally, the Communications Division will create a Facebook post to advertise the event on NDDOT social media.

**II-03.05.03 Conducting a Virtual Public Meeting**

Even though most Virtual Public Meetings will not conduct an actual live meeting event, the official date of the Virtual Public Meeting will be the same date that a regular face to face meeting would have been held. This date represents the date project materials and pre-recorded presentation will be available on the NDDOT website, and will begin the official comment period (if applicable).

If conducting a virtual live event, avoid live events on Saturday, Sunday, or Wednesday nights, to avoid conflicts with religious activities.

Whether conducting a live event or pre-recorded presentation, the following information should be presented:

- The project's purpose, need, and consistency with the goals and objectives of any local planning.
- The project alternatives under consideration and major design features.
- The social, economic, environmental, and other impacts of the project, including any floodplain and/or wetland impacts.
- The right of way acquisition process, to include the relocation assistance program if needed. Also a tentative schedule of acquisition will be presented, and a brochure describing the land acquisition process and the owner's rights, privileges, and obligation will be available to view on the NDDOT website.
- A description of the procedures for receiving both oral and written statements from the public. The participants should be informed that the materials, exhibits, and pre-recorded presentation will be available for 15 calendar days following the Virtual Public Meeting and will be made part of the record.
- Provide a tentative schedule of construction.
- The agency responsible for developing the project.
- Inquire to land owners if they have borrow or wetlands on their property that they would be willing to sell or mitigate.

The following items should be attached/linked to the Virtual Public Meeting event on the NDDOT Calendar for dissemination to the public for the Virtual Public Meeting:

- NDDOT Title VI Public Participation Survey (SFN 60149)
- NDDOT Title VI Survey link (Survey Monkeys or Microsoft Forms)

- The Stormwater Poster for Public Meetings
- After the Storm brochure
- Public Information for Highway and Street Projects brochure
- Pre-recorded presentation link (YouTube link or other created by Communications Division)
- If holding a live event, a link or instructions for how to connect to the live event
- Exhibits, maps, or other relevant project materials

#### **II-03.05.04                    Virtual Public Input Meeting Response Period**

There is a 15 calendar day response period following Virtual Public Input Meetings in which the public may submit comments to the local entity or NDDOT, depending on who developed the project.

Comments received during the Virtual Public Input Meeting shall be compiled at the end of the comment period and incorporated into a documented titled Public Involvement Report (PIR).

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**Wetlands, Vegetation, & Environmental Permitting**  
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### **Purpose**

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This section outlines the process for which wetland and other water delineations are completed and the procedures to obtain the needed federal and state agency authorizations. The manual is designed to be a source of information relative to wetland and other water delineations, permitting for sovereign lands, floodplains, floodways, USFWS easement and fee title, 404 permitting, wetland mitigation, wetland monitoring, and mitigation procedure for woody vegetation. It is intended to be used by NDDOT personnel and consultants conducting wetland delineations and permitting. This manual can also be used by Local Government projects to maintain consistency throughout the permitting and authorization process. This manual is geared to individuals with a basic understanding of wetland hydrology, hydrophytic plants, hydric soils, and the permitting process.

## Section 1. Definitions

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### 1.1 Wetland

- 1.1.1** The United States Army Corps of Engineers (USACE)<sup>5</sup> and the Environmental Protection Agency (EPA)<sup>6</sup> jointly define wetlands as: Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- 1.1.2** The Federal Highway Administration (FHWA) includes wetlands as defined in 23 CFR 777.2<sup>7</sup>. The term "wetlands" means those areas that are inundated by surface or ground water with a frequency sufficient to support, and under normal circumstances does or would support, a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds.

### 1.2 Presidential Executive Order (EO) 11990<sup>8</sup>, "Protection of Wetlands",

Requires that federal agencies avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative and to take action to minimize the destruction, loss or degradation of wetlands and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities. EO 11990 defines wetlands as:

Those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction.

*Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds.*

FHWA's interpretation of EO 11990 is that the wetlands requiring protection are "natural" wetlands. Many of the wetlands impacted by highway projects are contained within existing right of way, and are the result of the ditches not draining properly as they were intended to do. These wetlands that are the result of highway construction are wetlands that could be

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5 Federal Register 1982 - 33 CFR Part 328: Definition of Waters of the United States -

<http://www.nap.usace.army.mil/Portals/39/docs/regulatory/regs/33cfr328.pdf>

6 40 CFR 230.3(s) <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>

7 23 CFR Highways, Chapter I, Subchapter H, Part 777 – Mitigation of Impacts to Wetlands and Natural Habitat

[http://www.environment.fhwa.dot.gov/ecosystems/laws\\_23cfr777.asp](http://www.environment.fhwa.dot.gov/ecosystems/laws_23cfr777.asp)

8 Executive Order 11990 – Protection of Wetlands: <http://www.archives.gov/federal-register/codification/executive-order/11990.html>

considered “artificially created.” Because these wetlands may not be considered natural, the NDDOT may not be required to mitigate for impacts to artificially created wetlands unless the USACE claims jurisdiction. However, impacts to wetlands created for mitigation purposes will need to be mitigated.

### 1.3 Wetland Determination

The process or procedure by which an area is determined to be a wetland or non-wetland.

### 1.4 Wetland Delineation

A survey conducted to determine the extent of the wetland boundary and type.

### 1.5 Jurisdictional Wetland

Term used by the USACE referring to wetlands that fall under the regulatory authority of Section 404 of the Clean Water Act for the purpose of permit issuance or other legal matters.

### 1.6 Limits of USACE Jurisdiction<sup>9</sup>

Jurisdiction is determined by connectivity to traditional navigable waters. The lateral limit of jurisdiction in non-tidal waters is the ordinary high water mark provided the jurisdiction is not extended by the presence of wetlands. Therefore, it should be concluded that in the absence of wetlands the upstream limit of USACE jurisdiction also stops when the high water mark is no longer perceptible.

### 1.7 Scope and Effect Determination

The process of determining the extent of hydrological manipulation to a natural wetland. Manipulation includes, but may not be limited to, surface and subsurface drainage, fill, sedimentation, and other man made features.

### 1.8 Natural Wetland

Wetlands naturally occurring on the landscape

#### 1.8.1 Lacustrine Wetland System<sup>10</sup>

Includes wetlands and deepwater habitats with all of the following characteristics: (1) situated in a topographic depression or a dammed river channel; (2) lacking trees, shrubs, persistent emergents, emergent mosses or lichens with greater than 30% areal coverage; and (3) total area exceeds 8 ha (20 acres). Similar wetland and deepwater habitats totaling less than 8 ha are also included in the Lacustrine System if an active wave-formed or bedrock shoreline feature makes up all or part of the boundary, or if the water depth in the deepest part of the basin exceeds 2 m

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<sup>9</sup> USACE Clean Water Act Guidance

<http://www.usace.army.mil/missions/civilworks/regulatoryprogramandpermits/relatedresources/cwaguidance.aspx>

<sup>10</sup> Cowardin, 1979

(6.6 feet) at low water. Lacustrine waters may be tidal or nontidal, but ocean derived salinity is always less than 0.5 ‰. Lacustrine wetlands may be considered Other Waters (OW) by USACE.

### 1.8.2 Palustrine Wetland System<sup>11</sup>

Includes all nontidal wetlands dominated by trees, shrubs, persistent emergents, emergent mosses or lichens, and all such wetlands that occur in tidal areas where salinity due to ocean-derived salts is below 0.5 ‰. It also includes wetlands lacking such vegetation, but with all of the following four characteristics: (1) area less than 8 ha (20 acres); (2) active wave-formed or bedrock shoreline features lacking; and (3) water depth in the deepest part of basin less than 2 m at low water; salinity due to ocean –derived salts less than 0.5 ‰.

### 1.8.3 Basin

A wetland that occurs in topographic depressions and is hydrologically isolated with little or no flooding from streams, rivers or tides.



Dominant water sources are precipitation, ground water discharge, and both interflow and overland flow from adjacent uplands. The direction of flow is normally from the surrounding uplands toward the center of the depression. Elevation contours are closed, thus allowing the accumulation of surface water. These wetlands may have any combination of inlets and outlets or lack them completely. Size and depth is highly variable. Prairie potholes are a common example of basin wetlands. Basins are typically classified as palustrine wetlands by the United States Fish and Wildlife Service (USFWS) National Wetlands Inventory (NWI). *See Appendix B4 for Wetland Classification Illustrations and Charts.*

### 1.8.4 Slope

Slope wetlands normally are found where there is a discharge of ground water to the land surface. They normally occur on sloping land; elevation gradients may range from steep hillsides to slight



<sup>11</sup> Ibid.

slopes. Slope wetlands are usually incapable of depressional storage because they lack the necessary closed contours. Principal water sources are usually ground water return flow and interflow from surrounding uplands, as well as precipitation. Hydrodynamics are dominated by downslope unidirectional water flow. Slope wetlands can occur in nearly flat landscapes if ground water discharge is a dominant source to the wetland surface. Slope wetlands lose water primarily by subsurface and surface flows and by evapotranspiration. Slope wetlands may develop channels, but the channels serve only to convey water away from the slope wetland. Slope wetlands are typically classified as palustrine wetlands by NWI. *See Appendix B4 for Wetland Classification Illustrations and Charts.*

### 1.8.5 Riverine

Riverine wetlands occur in flood plains and riparian corridors in association with stream channels. Dominant water sources are often out-of-bank flow from the channel or subsurface hydraulic connections between the stream channel and wetlands. However, sources may be interflow and return flow from adjacent uplands, occasional



overland flow from adjacent uplands, tributary inflow, and precipitation. At their headwater, riverine wetlands often are replaced by slope or basin wetlands where the channel is no longer present. Perennial flow in the channel is not a requirement. Riverine wetlands are typically classified as palustrine wetlands by NWI. Only the river or stream channel is considered Riverine by NWI and considered other waters (OW) by USACE. *See Appendix B4 for Wetland Classification Illustrations and Charts.*

### 1.8.6 Fringe

Lacustrine Fringe wetlands are adjacent to lakes where the water elevation of the lake maintains the water table in the wetland. In some cases, these wetlands consist of a floating mat attached to land. Additional sources of water are precipitation and ground water discharge, the latter dominating where fringe

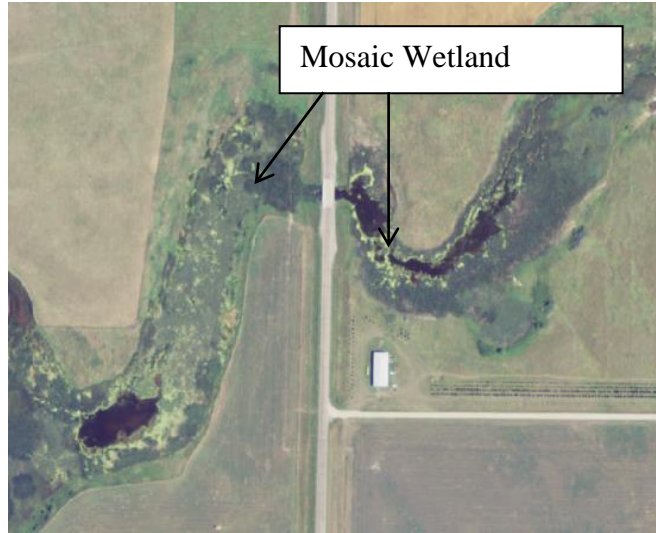




wetlands intergrade with uplands or slope wetlands. Surface water flow is bidirectional, usually controlled by water-level fluctuations such as seiches in the adjoining lake. Fringe wetlands lose water by flow returning to the lake after flooding, by saturation surface flow, and by evapotranspiration. Fringe wetlands are typically classified as Palustrine wetlands by NWI. *See Appendix B4 for Wetland Classification Illustrations and Charts.*

### 1.8.7 Mosaic

A "wetland mosaic" refers to a landscape where vegetated/unvegetated components are closely associated and should not be delineated or mapped separately. This patchwork of wetlands and non-wetlands is considered to be one special aquatic site. These mosaic wetlands areas are as usually associated with linear, palustrine stream type systems.



## 1.9 Artificial Wetland

Wetlands created where one did not exist before by excavation or diking/damming. NDDOT may not be required to mitigate for impacts to artificially created wetlands unless the USACE claims jurisdiction or the wetlands were created for mitigation purposes.



### 1.9.1 Preamble Wetlands<sup>12</sup>

Generally not considered “Waters of the United States” by the USACE including:

- non tidal drainage and irrigation ditches excavated on dry land.
- Artificially irrigated areas, usually constructed/excavated in upland and draining only upland areas with no connection to downstream waters, which would revert to upland if the irrigation ceased.
- Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- Water filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meeting the definition of waters of the United States.

Note: The USACE will determine if a water or feature is non-jurisdictional preamble water on a case by case basis.

### 1.9.2 Criteria for Identification of Artificial Wetlands in Road ROW

The following criteria to identify artificially created wetlands within existing right of way will be used by the NDDOT and have been concurred with by FHWA under E0 11990 and USFWS:

- **Backslope**



If there is a backslope and a portion of wetland basin does not extend outside of the highway right of way there is a very high probability that the entire ditch has been manipulated and any wetland found in the ditch at such a location may be identified as an artificially created wetland. Wetland basins in the road right of way where the ditch does not have a backslope are likely naturally occurring wetlands. If these basins are affected by highway construction activities mitigation may be required.

- **Original Plans**

Current wetlands located entirely in the ditches that are not identified on the original plans may be identified as artificially created wetlands.

Note: If the plan sheets clearly show a detention basin or stormwater pond, then it would not be considered jurisdictional.

- **Landscape**

If a wetland is entirely in the right of way, appears to be constructed and is not part of an adjacent natural wetland outside of the right of way, it may be identified as artificially created.

- **National Wetlands Inventory Maps (NWI)**

If the wetland type listed on the NWI maps ends with an “x”, the wetland is excavated. If the wetland is excavated and inside the existing right of way, the wetland may be identified as artificially created. Artificially created or excavated wetlands in the highway right of way are typically linear wetlands. Created wetlands in the highway right of way may be designated as temporary (PEMAx) or seasonal (PEMCx) wetlands on the NWI maps.

- a. **Historic Imagery**

If the site characteristics can be identified as outside a natural wetland boundary, the wetland can be classified as artificially constructed.

- b. **Soils** - In addition, when on-site wetland delineations are completed, a soil pit can be dug to determine if the original soil profile is intact or if the site has been modified to create a wetland.

## 1.10 Wetland impacts

**10.1.1** Wetlands that have developed on the roadway inslopes do not require compensatory mitigation. When determining permanent wetland impacts, wetlands which have been delineated on the roadway inslopes should be “clipped” at the originally designed toe of slope and removed from the wetland reference. The final plan cross sections should not show impacts to wetlands on the existing toe of slope. *See Appendix B5 Wetland Impact Example – Typical Cross Section and B7 General Mitigation Guidance.*

**10.1.2 Temporary** – Impacts to wetlands that are temporary in nature. In order to be considered temporary the wetland will revert to the same soil, vegetation, and water regime after the impact is removed (e.g. Excavation within a wetland that will not drain wetland or impact hydrology or change wetland class; fill placed in a wetland that is completely removed to original contour). NOTE: Temporary also depends on time. Impacts lasting longer than 180 days may not be considered temporary and may require compensation and a mitigation plan for loss of function. Temporary impacts associated with NDDOT projects are usually for the length of the project but may require additional coordination with the USACE, in order to determine the appropriate time frame relative to the proposed project on a case by case basis.

**10.1.3 Permanent** – Unavoidable wetland impacts that are converting the wetland area to non-wetland (e.g. fill converting wetland to upland; fill beyond the existing toe of slope; excavation or impounding water converting wetland to deep-water > 2.0 meters (6.6 ft. changing wetland class. Draining an existing wetland by lowering the natural outlet elevation reducing the wetland size or hydrology (inside or outside existing ROW) to any degree is considered a permanent impact, lasting longer than 180 days. In addition, any placement of fill that changes the bottom elevation and contours is also considered a permanent impact.

## 1.11 Wetland Mitigation

Actions taken to avoid, minimize, or deter the need to adversely affect existing wetlands. The process of mitigation sequencing is used to avoid impacts to wetlands, minimize impacts that cannot be avoided and compensate for unavoidable impacts. Mitigation sequencing will be used to mitigate impacts to all natural and/or jurisdictional wetlands (greater than 0.10 acre) permanently impacted by highway projects. Mitigation sequencing is completed through a 3 step process. Additional information on mitigation sequencing can be found on the USEPA - Compensatory Mitigation webpage<sup>13</sup>. See Section 4 for additional information on mitigation sequencing.

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13 USEPA Compensatory Mitigation Factsheet : <http://www.epa.gov/owow/wetlands/pdf/CMitigation.pdf>

### 1.11.1 Compensatory Mitigation

Compensatory mitigation includes in order of preference: restoration, establishment (creation), enhancement and preservation of a wetland. Compensatory mitigation will be based on the credit calculation using the ratios obtained from the *Wetland Mitigation Banking in North Dakota – Interagency Guidance for Mitigation Bank Sponsors. Appendix E6 Wetland Mitigation Banking in North Dakota, Interagency Guidance for Mitigation Bank Sponsors*

### 1.11.2 Wetland Mitigation Type

- **Restoration**  
The rehabilitation of a degraded wetland or the reestablishment of a wetland so that soils, hydrology, vegetative community, and habitat are a close approximation of the original natural condition that existed prior to modification to the extent practicable.
- **Creation**  
The creation of a wetland on a site that was historically non-wetland.
- **Enhancement**  
Enhancement methods are designed to improve the functions of restored and existing wetland basins without increasing their acreage.
- **Preservation**  
Preservation typically involves acquiring land in fee title or purchasing conservation easements to ensure existing wetlands will not be adversely affected in the future.

### 1.11.3 Mitigation Ratio

The ratio of restored or created wetland with adjacent buffer and upland compared to wetland area lost. Mitigation ratios are outlined in the *Wetland Mitigation Banking in North Dakota – Interagency Guidance for Mitigation Bank Sponsors. Appendix E6 Wetland Mitigation Banking in North Dakota, Interagency Guidance for Mitigation Bank Sponsors*

### 1.11.4 Regional Service Area (RSA)

A geographic area where mitigation can reasonably be expected to provide appropriate compensation for wetlands and other aquatic resources impacts. RSA's are used for mitigation banks, in-lieu-fee programs or other compensatory mitigation as designated in the banking instrument or umbrella agreement. Mitigation will often be located within the same RSA as the impacted wetland as per USACE mitigation guidance, however, on a case by case basis, mitigation may be located in an adjacent RSA. North Dakota has six service areas as outlined in the *Wetland Mitigation Banking in North Dakota – Interagency Guidance for Mitigation Bank Sponsors. Appendix E6 Wetland Mitigation*

***Banking in North Dakota, Interagency Guidance for Mitigation Bank Sponsors. 11990 impacts do not need to be mitigated in the same RSA.***

**1.11.5 Mitigation Sites**

Compensation developed in conjunction with specific project impacts are usually located adjacent to those impacts or within project limits within the same RSA. Wetland mitigation sites may be located within existing or newly purchased Right of Way (ROW) or permanently protected easement areas. Typically referred to as on-site mitigation or permittee responsible mitigation and need to be created prior to or concurrent with the wetland impacts.

**1.11.6 Mitigation Bank**

A wetland or a group of wetlands that have been restored, created, preserved or enhanced to provide compensation for unavoidable impacts to wetland resources. Prospective banks have an established number of mitigation credits available to offset or compensate for unavoidable wetland losses for multiple projects. Mitigation banks are developed independently from project impacts. Mitigation banks can be purchased in fee title or held by NDDOT as a perpetual (99 year) easement.

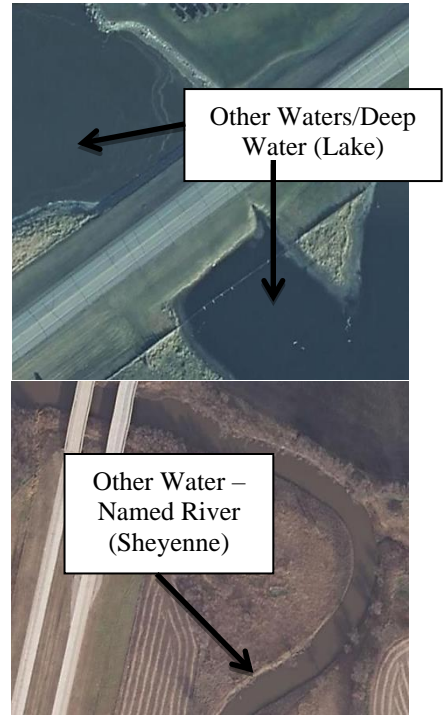
A mitigation bank can be established under the Umbrella Mitigation Banking Instrument approved by the USACE in 2013. Prospective banks are amended to the Umbrella Mitigation Banking Instrument.

A mitigation bank can also be developed for impacts to FHWA policy wetlands and/or impacts to USFWS wetland/grassland easements and fee title lands.

### 1.12 Other Waters (OW)

OW includes the following:

- Traditional navigable waters (named rivers, streams, and lakes)
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Lakes – Deepwater habitat (greater than 2 meters) not dominated by persistent, emergent vegetation. NDDOT determines deepwater at the time of design survey.
- Typically classified as riverine or lacustrine by NWI.
- NWI mapped palustrine wetlands will be delineated as wetlands even when the water depth exceeds 2 meters. OW areas will be determined during design and permitting. Note: Caution should be used with NWI maps as they are intended to be used as a planning tool and have a lower accuracy.



### 1.13 Ordinary High Water Mark (OHWM)

#### 1.13.1 USACE

The term ordinary high water mark means the line on the shore established by the fluctuations of water and indicated by physical characteristics. Physical characteristics of an OHWM: natural line impressed on the bank; sediment sorting; shelving; leaf litter disturbed or washed away; changes in the character of soil; scour; destruction of terrestrial vegetation; deposition; presence of litter or debris; multiple observed flow events; wracking; bed and bank; vegetation matted down, bent, or absent; water staining; or change in plant community. More information can be found on OHWM in the USACE Regulatory Guidance Letter (RGL) No. 05-05 from December 7, 2005<sup>14</sup>.

#### 1.1.1 State of North Dakota

Ordinary high watermark" means that line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable waters are considered to

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<sup>14</sup> USACE Regulatory Guidance Letter (RGL) No. 05-05 from December 7, 2005 at <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-05.pdf>

be below the ordinary high watermark in their entirety. (ND Century Code 89-10-01-03)

#### **1.14 Relatively Permanent Flow (RPF)**

Flow year-round or at least seasonally (e.g. typically three months). Term used to help determine extent of the USACE wetland jurisdiction for excavated ditches and other waters.

#### **1.15 Floodway**

ND Century Code 9 (Chapter 61-16.2-02) defines a floodway as the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot (.30 meter).

#### **1.16 Floodplain**

An area of land adjacent to a stream or river that stretches from the banks of its channel to the base of the enclosing valley walls and experiences flooding during periods of high discharge. It includes the floodway, which consists of the stream channel and adjacent areas that actively carry flood flows downstream, and the **flood fringe**, which are areas inundated by the flood, but which do not experience a strong current. In other words, a floodplain is an area near a river or a stream which floods when the water level reaches flood stage.

#### **1.17 Sovereign lands**

Those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams. (ND Century Code 61-33-01).

## Section 2. Wetland and Other Waters (OW) Delineations

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### 2.1 Applicability

Wetland and OW delineations are required for all projects that disturb the soil outside of the road surface. Wetland delineations are generally not required for the median of existing four lane divided highway projects. However wetland delineations may be required for medians exceeding typical design widths (84 ft. – 104 ft. from center of road to center of road) to avoid landscape features (e.g. Highway US 83 at the intersection with ND 23 or Interstate 94 at mile markers 95 and 96) or for four lane highways that split a wetland basin and the natural basin is present in the median (not part of the roadway profile).

### 2.2 Types of Other Waters

#### 2.2.1 Named Rivers

These areas generally exhibit an Ordinary High Water Mark (OHWM) and are bounded by uplands, wetlands and tributaries. They are usually delineated on USGS topographic map as a blue line stream and on NWI as part of a riverine wetland system. NOTE: The portions of the named river, stream or creek that have emergent hydrophytic vegetation are classified as palustrine or riverine wetland and are not included as OW. They are typically classified as Riverine by NWI. *See Appendix B4 for Wetland Classification Illustrations and Charts.*

#### 2.2.2 Tributaries to named rivers

Tributaries are bound by uplands or wetlands and generally have an ordinary high water mark (OHWM). Tributaries usually do not extend past the delineated wetland boundary. OHWM mark criteria needs to be documented beyond the delineated wetland boundary to be delineated as a tributary. They are usually delineated on USGS topographic map as a blue line stream and on NWI as part of a palustrine or riverine wetland system. NOTE: Tributaries that have emergent hydrophytic vegetation are classified as palustrine or riverine wetlands and are not included as OW. *See Appendix B4 for Wetland Classification Illustrations and Charts.*

#### 2.2.3 Lakes and ponds

Lakes and ponds are deep-water habitats that do not meet wetland criteria. They are found in topographic depressions or a dammed river channel and lack persistent emergent vegetation. Water depth exceeds 2.0 meters. They are bounded by upland or wetland. They are typically classified as Lacustrine. *See Appendix B4 for Wetland Classification Illustrations and Charts.*

### 2.3 Office Delineation

NDDOT Office Delineations are conducted to determine the presence or absence of wetlands and OW within the project corridor and may be used to facilitate project development due to seasonal limitations or scheduling constraints that prevent field

delineation from being completed. Office delineations are conducted off-site using available information to determine where wetlands and OW lie within the project area.

Office delineations will not be used to determine the location of on-site mitigation. Office delineations for mitigation purposes will require field verification prior to mitigation site design and permitting.

Office delineations may be considered appropriate for a project if the following criteria are met:

- The project is covered by a Nationwide 3 Maintenance Activity Permit.
- The project and impact area is confined to artificial tributary or wetland/aquatic areas.
- The footprint of the wetland or OW, (permanent and/or temporary impact) is anticipated to be 0.10 acres per aquatic resource or less. If impacts exceed 0.10 acres, a field wetland delineation will be required for naturally occurring aquatic resources.
- The wetland, OW, or tributary boundary must be clearly evident in the office delineation and defined by abrupt elevation changes, plant community changes, or ordinary high water marks.
- Existing drainage facilities and patterns will not be altered.
- Project has an emergency status as agreed upon by USACE.
- Field delineation is not practicable without delaying NDDOT project development as agreed upon by USACE. A field wetland delineation may be required to verify permanent impacts to natural aquatic resources.

For both office and field delineations, the wetlands shall be identified by location using latitude and longitude coordinates (decimal degrees) and the Cowardin Classification System.

### **2.3.1 Conducting Office Delineations**

The following is a list of resources to be used when conducting an Office Delineations:

- **Aerial photography**

Review current years of photography as outlined on page 120 section (f) of the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2.0)<sup>15</sup>. Areas meeting criteria will be labeled wetland.

- **National Wetland Inventory (NWI) maps**

Produced by the USFWS, NWI maps provide historical information on wetlands. NWI Maps can be found on the USFWS National Wetlands Inventory Webpage<sup>16</sup> or by contacting the local USFWS office. NWI maps were developed in the

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<sup>15</sup> Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2.0).  
[http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg\\_supp/gp\\_supp.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/gp_supp.pdf)

<sup>16</sup> USFWS National Wetlands Inventory Webpage <http://www.fws.gov/wetlands/data/index.html>



1980s and 1990s. Consideration should be given to the potential wetland changes (changes in hydrology due to drainage, climate, etc.) since the development of the maps.

Note: NWI maps are intended for planning purposes. The accuracy of the NWI is not sufficient for office or field wetland determinations or in lieu of field verification of mitigation.

- **USFWS Easement Wetland maps**

May be used to ensure that USFWS easement wetlands will be avoided. If there is potential for impacts to USFWS easement wetlands, office delineation will not be appropriate.

- **Natural Resources Conservation Service (NRCS) Web Soil Survey**

All hydric soils mapped as a single map unit will be considered wetland. Map units with hydric soil inclusions will not be considered wetland without other supporting data such as NWI or aerial photography.

- **USGS topographic maps**

Areas mapped with the marsh symbol will be considered wetland.

- **NDDOT PathWeb (NDDOT only)**

For areas adjacent to State roads review PathWeb to verify wetland signatures.

## 2.4 Field Delineation

A wetland or OW delineation conducted on-site. Field wetland and OW delineations are the preferred delineation method. Wetland and OW delineations will be completed in the field to the extent possible. Field delineations are used to verify findings of office delineations; mitigation sites, mitigation banks or where office delineations have questionable findings.

All field wetland and OW delineations will be conducted in accordance with USACE publication “Corps of Engineers Wetlands Delineation Manual” January 1987 – Final Report (87 Manual)<sup>17</sup>, the “Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2)” (Regional Supplement)<sup>18</sup>, and North Dakota Century Code 43-36 - Professional Soil Classifiers<sup>19</sup>, and any current USACE guidance.

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<sup>17</sup> US Army Corps of Engineers Wetlands Delineation Manual” January 1987 – Final Report (87 Manual)

<http://el.erc.usace.army.mil/elpubs/pdf/wlman87.pdf>

<sup>18</sup> Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2.0)” (Regional Supplement) [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg\\_supp/gp\\_supp.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/gp_supp.pdf)

<sup>19</sup> Pursuant to NDCC 43-36, “Professional Soil Classifiers”, when applicable, determination of hydric soils must be performed by a registered soil classifier in the State of North Dakota.

Delineations will be conducted to determine the extent of wetlands (location, type, acreage, etc.), OW areas of impact, and to identify potential mitigation locations within or adjacent to the project area.

Field delineations will begin after the growing season has begun and will end when the soil is frozen and a soil test hole can no longer be dug. Growing season is defined on page 70 of the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2.0)<sup>20</sup>.

Wetland delineations conducted outside the early part of the growing season will include boundaries of areas that meet hydrology and hydric soil criteria. USACE manuals identify potential for hydrophytic vegetation to be absent during the latter part of the growing season while still meeting definition of a wetland. Professional judgement and additional documentation; including but not limited to characterization of the residual or senesced vegetation, landscape position, and photo documentation, will aid USACE wetland and jurisdictional determinations.

### 2.1.1 Conducting Field Delineations

**The following is a list of resources to be used when conducting a Field Delineation:**

- **Aerial photography**  
Review current years of photography as outlined on page 120 section (f) of the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2.0)<sup>21</sup>. Areas meeting criteria will be labeled wetland.
- **National Wetland Inventory (NWI) maps**  
Are produced by the United States Fish and Wildlife Service (USFWS) and provide historical information on wetlands NWI Maps can be found on the USFWS National Wetlands Inventory Webpage<sup>22</sup> or by contacting the local USFWS office. Based on the field delineation, wetlands may need to be added or may need to be reclassified as compared to the National Wetlands Inventory maps.
- **Natural Resources Conservation Service (NRCS) Web Soil Survey**  
All hydric soils mapped as a single map unit will be considered wetland. Map units with hydric soil inclusions will not be considered wetland without other supporting data such as NWI or aerial photography.
- **USGS topographic maps**  
Areas mapped with the marsh symbol will be considered wetland.
- Any other applicable field or office records as required for documentation by the 87 Manual and Regional Supplement.

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20 Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2.0)" (Regional Supplement) [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg\\_supp/gp\\_supp.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/gp_supp.pdf)

21 Ibid.

22 USFWS National Wetlands Inventory Webpage <http://www.fws.gov/wetlands/data/index.html>

## 2.5 Delineation Report

The delineation report provides the needed wetland information for planners and designers to design projects to avoid and minimize impacts to wetlands, determine erosion and sediment control measures, and determine when compensatory mitigation is needed. The report also provides information to assist with the USACE jurisdictional determination for individual wetlands within the project area. Field delineation reports will provide justification for sites meeting offsite wetland conventions, such as, any mapped hydric soils or NWI wetlands that did not meet wetland criteria during an on-site investigation. The Delineation Report will provide justification for any mapped hydric soils or NWI wetlands that did not meet wetland criteria. ***Refer to Appendix A1 and A2 for an example of an Office and Field Wetland Delineation Report.***

### 2.5.1 Delineation Map Standard:-Wetland and OW Delineation Map(s):

Scale - Map scale can range from 1:2400 to 1:3600 depending on needed detail (when printed on an 11x17 page).

NDDOT Logo

Map Legend

Map

North Arrow

County Location depicted on state map

County Name

- *All polygons or hatch patterns will be overlaid on the most recent available aerial image where the aerial image is still visible and identified in a legend.*
  - Delineated wetland boundary polygons - hatched
  - NWI wetland polygons and linear wetland features - transparent
  - Project survey limits - hollow
  - Tree locations where applicable - hollow - See Section 9
  - Current visible riprap location – hollow
  - Section, Township, and Range – hollow
- *All points will be overlaid on the most recent available aerial image where the aerial image is still visible and identified in a legend.*
  - Tree locations where applicable
  - Highway Reference Points
  - Culvert Locations – roadway and approaches
  - Test hole locations

Additional Map(s)

- 1:24,000 USGS Topographical map
- Soils map based on NRCS Web soil survey or equivalent and map legend

***See Appendix A1 and A2 - Example wetland report map for more detail.***

### 2.5.2 Field equipment specifications

**GIS Standards** - Spatially rectified to UTM Zone 14; field equipment specifications; specifications for data will be provided to NDDOT as a shape

(shp) files as outlined in **Appendix A3 GIS Attribute Table**. Minimum GPS accuracy is <1.0 meters.

### 2.5.3 Wetland Numbering

All wetlands will be individually numbered. Wetlands (linear or depressional) segmented by road feature such as approaches, culverts, intersections, etc. will use an alpha numeric system. Segments of the same wetland will be labeled using alpha characters (e.g. 1a, 1b, 1c). Numbering will begin on the west or south ends of a linear project proceeding east or north, ensuring that when complete, you have collected information on both sides of the road.

#### **OW Numbering**

All OW will be individually numbered using an alpha numeric system. Each stream tributary will be labeled with its own number. To the extent possible OW numbers will correspond to abutting wetlands. Begin numbering with OW followed by the segment number (e.g. OW1). OWs that are segmented by road feature such as approaches, culverts, intersection, etc. will use an additional alpha character (e.g. OW1a, OW1b) to delineate the segment. Numbering will correspond to the abutting wetland whenever possible. Identify the waters by name, when applicable: Green River; Clear Creek; Kulmbach Lake; or tributary to Cedar Creek; etc.

### 2.5.4 Forms

#### **The following forms will be included:**

- USACE Wetland Determination Data Form – Documentation of wetland criteria will be documented on the Great Plains Region – Version 2.0 (USACE Form). At a minimum one data set will be completed per wetland. Additional forms may be required for wetland basins with complex boundaries or wetlands that are segmented by road features. Linear wetlands dissected by road features may need additional forms to document wetland criteria for individual wetland segments, especially for changes in wetland type, slope or width. Areas not determined wetlands but mapped as hydric soils or as NWI wetlands will require test-hole documentation on the USACE Form.

#### **Note:**

Add wetland number, where applicable, in upper right hand corner of paired data form. For upland test hole points not associated with wetlands, label “Upland” in upper right hand corner.

- **Waterbody Data Form**  
Will be completed for each waterbody or stream that meets OW criteria. Any additional information that will help determine jurisdiction will be recorded in the comments section of the Waterbody Data Form. Design Manual Section, Resources, Section and Forms

- SOV #2 for Submittal to the USACE. See Design Manual Reference and Forms Solicitation of Views Resources.

### 2.5.5 Test holes

A sufficient number of test holes will be made to understand the soil-hydrologic relationships at the site. Test holes will be dug for each wetland segment and where continuity of wetland characteristics is not evident. Test holes will be used to determine upland breaks within road ditches to help delineate the upper limits of USACE jurisdiction. This may require upland test holes to be dug on both the downstream and upstream side of the wetland. All test holes will be paired, i.e. wetland and corresponding upland test hole and numbered consecutively for the entire project. Odd numbers will be used for the wetland and even numbers for the paired upland. Test holes for non-wetland sites where a paired test hole is not required will be labeled as a miscellaneous point (e.g. NWI wetland determined to be non-wetland during the field delineation).

### 2.5.6 Table - Wetland Delineation and OW Tables

The wetland and OW attributes table will be developed based upon required attributes listed in *Appendix A4 Wetland OW Delineation Table Template*.

### 2.5.7 Photos

Representative photos of each wetland will be taken. NDDOT approved photo template will be used for description of photography. *See Forms # 2*. For linear stream or wetland systems, include photography depicting the upstream or downstream conditions **from the culvert invert location**. Photo points will include GPS coordinates along with cardinal direction of photo. Only one cardinal direction is required. *See forms section for photo template*.

### 2.5.8 Potential Mitigation Sites

Note in the report potential mitigation sites that may be needed for the project. Photos of potential mitigation sites will be taken at the time of the wetland delineation.

### 2.5.9 Contents

Cover page  
Table of Contents  
    Section I. Introduction  
    Section II. Methods  
    Section III. Results  
    Section IV. References  
    Section V. Delineators Credentials  
List of Tables (i.e. NDDOT Wetland Table; OW Table)  
List of Exhibits (i.e. Aerial photos with NWI data)  
List of Appendices (i.e. NDDOT Additional Information for Wetland Jurisdictional Requests)

## 2.6 Changes to Delineation Report

Changes may need to be made to delineation reports when the project scope is modified. Changes in project scope may cause additional wetland impacts to delineated wetlands or to wetland areas not originally delineated.

### 2.6.1 Originally delineated wetlands:

Changes to originally delineated wetlands will be documented using a memo to file noting the changes. E.g. wetland boundaries, types, project limit change, etc.

### 2.6.2 Impacts to wetlands not originally delineated:

New wetlands will be delineated using either an office or field delineation. Processes listed in section 2.2 or 2.3 will be followed. The Wetland Report will be documented using a memo to file noting the changes in project limits and the new impacts. **Wetland and test hole numbers will continue with last number from previous report.**

### Section 3. Wetland Impacts, Permits and Authorizations

#### 3.1 Environmental Transportation Services – ES Review

ES will coordinate all permit applications for impacts to Federal and State resources as outlined in this section. In addition, the checklists for each permit application and resource of concern will be completed with all required information provided to ES.

#### 3.2 Types of Wetland Impacts

- Permanent Wetland Impacts

Permanent wetland impacts change any of the existing wetland area into an upland area. E.g. Fill placed beyond the existing toe of slope or draining wetlands within and/or outside NDDOT ROW. A change in wetland class can also be considered a permanent wetland impact.

- Temporary Wetland Impact

Temporary impacts result from fill placed in the wetland during construction. All fill must be removed to original contour. E.g. Temporary stockpiles which will be removed and regraded to original contours and allow wetland vegetation to reestablish. Cofferdams, bypasses, and other temporary fill needs to be removed to original contours to be considered temporary. Temporary impacts also depend on time. Any impacts lasting longer than 180 days are not considered temporary and may require mitigation for loss of function.

#### 3.3 Determining Wetland Impacts

- Wetland impacts are determined by referencing the delineated wetland(s) and the construction limits. Areas of overlap identify locations of temporary and/or permanent fill. Impacts may also occur from culvert placements, excavation or dredging that deepens the wetland, etc. *See Appendix B5 Wetland Impact Example – Typical Cross Section.*
- All unavoidable permanent impacts to natural wetlands, regardless of size, require mitigation. Wetland mitigation sequencing will be followed. Compensatory mitigation will be used for unavoidable impacts that cannot be avoided or minimized.
- Impacts to artificial/non-jurisdictional wetlands created by previous road construction do not require mitigation. *See Appendix B7 General Mitigation Guidance.*

#### 3.4 Impact Tables

Separate tables will be developed depicting impacts to wetlands and OW based on the required attributes listed below or otherwise provided by NDDOT. *See Appendix A5 Wetland OW Impact Table Template.* ES staff will use the information to apply for and secure the needed permits from applicable state and federal agencies.

### 3.5 Checklists for Permits and Authorizations

The following checklists contain detailed information on the materials needed to complete a permit application, review, and authorizations. See **Appendix D**.

- Wetland Information To Environmental
- Coast Guard Permit Application
- Floodplain Permit Application to Environmental
- Floodway Authorization Request
- Special Use Permit Application
- Sovereign Lands Permit Information to Environmental
- Construction Permit Information to Environmental

### 3.6 Federal Highway Administration

Federal Highway Administration (FHWA) approval of the environmental document and plans includes the required mitigation under 23 CFR 777.

#### 3.6.1 Wetland Compensatory Mitigation

- Compensatory mitigation can occur at a mitigation bank or on-site. FHWA does not restrict use of a compensatory mitigation outside the RSA.
- All compensatory mitigation features will be shown in the project reports and plans.
- Projects requiring on-site mitigation must have a conceptual mitigation plan in the environmental document which consists of the following:
  - a. Aerial map with most recent aerial imagery available.
  - b. Proposed mitigation site(s) labeled as Site 1, Site 2 etc with acreage labels.
  - c. Delineated wetland(s) being expanded (if applicable) labeled with the wetland number.
  - d. Drainage area(s) identified that will feed the mitigation site with area labeled in acres.
  - e. County, Township, Section, and Range labels.
  - f. Highway and reference points labeled (if applicable).
  - g. A statement explaining/verifying:
    - i. The mitigation site(s) will fit on the landscape and would have the ability to pond water.
    - ii. There is sufficient hydrology to support the existing wetland and the mitigation site. General guidance is a 10 ac. watershed can support 1 ac. of wetland.
    - iii. There are no utilities in the way where the site(s) is proposed.

#### 3.6.2 Streams, Tributaries and OW



- Impacts to OW do not require mitigation.

### 3.7 US Army Corps of Engineers (USACE)

**NDDOT uses the following guidance for USACE wetland jurisdiction and 404 permitting.**

#### 3.7.1 Wetlands and OW Compensatory Mitigation

Section 404 of the Clean Water Act prohibits the discharge of dredged or fill material into waters of the United States, including wetlands, without a permit from the U.S. Army Corps of Engineers. USACE may require compensatory mitigation for unavoidable permanent impacts to jurisdictional wetlands and OW. Mitigation sequencing will be followed in order to compensate for unavoidable wetland impacts. Required compensatory mitigation can occur off-site at a USACE approved wetland mitigation bank within the RSA, on site or within project area and within RSA. Compensatory mitigation is **generally** not required for jurisdictional wetland impact <0.1 acres or if the impacts were mitigated for another agency such as the USFWS, i.e. easement wetland.

#### 3.7.2 Requesting a Jurisdictional Determinations (JD)23

- A request for a JD is made through the solicitation of views process.
- For projects that do not have wetlands with the project boundaries, SOV Letter 2b shall be submitted to the USACE to solicit comments.
- For projects with wetlands or OWs present, a request for jurisdictional determination shall be submitted to the USACE utilizing SOV Letter #2a, including the Delineation Report.
- The USACE will assert jurisdiction over the following waters:
  - Traditional navigable waters (TNW)
  - Wetlands adjacent to traditional navigable waters
  - Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
  - Wetlands directly abutting a Relatively Permanent Water (RPW) that flows directly or indirectly into TNWs.
- The USACE will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:
  - Non RPW
  - Wetlands adjacent to RPW that flows year round
  - Wetlands adjacent to RPW that flows year seasonally
  - Wetlands adjacent/abutting RPW

- The USACE *generally* will not assert jurisdiction over the following features:
  - Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
  - Ditches (including roadside ditches) that are classified as Preamble Waters if they meet the following criteria:
    - excavated wholly in uplands **and**
    - draining only uplands **and**
    - do not carry a relatively permanent flow of water (flow lasting longer than 3 months)Artificial wetlands found in road ditches meeting the above criteria are not regulated. These three criteria will be applicable to numerous artificial wetlands located in road ditches impacted by road projects.
  - Saturated artificial slope wetlands that do not carry a relatively permanent flow of water do not meet the criteria and therefore not regulated by USACE.

### 3.7.3 NDDOT wetland delineations

- Sufficient field Information will be collected to assist the USACE to accurately make a jurisdictional determination. The most difficult criteria to document will be the **relatively permanent flow of water** relative to artificial wetlands in NDDOT right of way. The delineator will look for indicators of ordinary high water mark to help determine if the relatively permanent flow of water criteria is met. In addition, photo documentation of the site is important to help the USACE determine jurisdiction. Delineators need to make a professional judgment on flow regime and support with documentation.
- The delineator will need to determine if there is a continuous or contiguous surface connection from wetlands/waters to waters of the United States (WOUS). Example: Wetland 1 was observed to have no connection to WOUS and appears to be confined by uplands... or Wetland 1 appears to flow into a manmade drainage ditch that flows directly into a tributary to Clear Creek. ...or Wetland 1 appears to overflow onto adjacent uplands and through a slight upland swale and eventually drains to Baker Slough.

### 3.7.4 NDDOT Review of the USACE Jurisdictional Determination (JD)

- **Preliminary JD**

At the request of the NDDOT, the USACE will provide a preliminary JD. If NDDOT concurs in the preliminary JD, a concurrence letter will be sent to USACE. **Approved JD**

If NDDOT does not concur in the preliminary JD, NDDOT will draft a letter to USACE requesting an Approved JD. USACE will provide an Approved JD. If NDDOT does not concur in the approved JD, NDDOT has 60 days to appeal the determination. If appealed, NDDOT will draft a letter, with supporting documentation, to USACE within the 60 day time period. An approved JD is also completed by the USACE if the project includes isolated waters with no discernible connect to Waters of the United States (WOUS). An approved JD is required for all non-jurisdictional waters. These are good for five years.

- **Appealing a JD**<sup>24</sup>

If the NDDOT does not concur in the Approved JD, consideration will be given to appealing the determination. USACE Administrative Appeals Process will be followed.

- The wetland table, shape files and attributes must be updated based on the USACE jurisdictional determination:

### 3.7.5 Determining Need for a 404 Permit

1. No jurisdictional waters lie within the project area; no further action is necessary by NDDOT.
2. Jurisdictional waters within the project area; further action is necessary by NDDOT
3. If jurisdictional waters are present, and there is wetland impacts a Nationwide or Individual Section 404 permit may be required.
4. A Nationwide Permit will be issued if the impacts meet the thresholds of a Nationwide Permit. See **Appendix E2 Summary of Nationwide Permits used by NDDOT**. Nationwide 3, 14 and 23 are the most common permits issued to the NDDOT. The USACE has 45 days to issue a Nationwide Permit after the permit is deemed complete by the USACE. If the impacts do not meet the threshold of a Nationwide Permit an Individual Permit will be issued. An Individual Permit requires the USACE to go through a public comment

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24 USACE Administrative Appeals Process - 33 CFR Part 331  
<http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/appeals/33cfr331.pdf>

period of 30 days (can be shortened to 15 days determined by the USACE).  
The typical turnaround time for an Individual permit is 90 to 180 days.

**Checklist** - All necessary data and information for an Nationwide and Individual 404 Permit is outlined in the *Wetland Information To Environmental Checklist*, *See Appendix D* and the permit application will then be forwarded by NDDOT designer or technical support to the ES for the necessary action to obtain the permit. ES, in consultation with the USACE, will decide what type of 404 permits applies.

### 3.7.6 Section 10 of the Rivers and Harbors Act

Approved March 3, 1899, section 10 of the Act (33 CFR 320.2(b)) states prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavating from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit.

A list of section 10 Waters for North Dakota<sup>25</sup> can be found on the USACE Omaha District webpage under Media/Fact Sheets, Section 10 of the Rivers and Harbors

### 3.7.7 USACE Wetland Mitigation Plan – 12 Components

The 12 component wetland mitigation plan will be developed per 40 CFR Part 230 - *Compensatory Mitigation for Losses of Aquatic Resources*; Final Rule<sup>26</sup>. Mitigation plan guidance is located in paragraph 230.94(c). **See Appendix C2 for an example of the 12 components of a mitigation plan. This example has been developed in conjunction with the Bismarck Regulatory Office of the USACE.**

### 3.7.8 Documentation

Final permitting information should be submitted to ES staff for review and permit application submittal.

- **Checklist** - The Wetland Information to Environmental Check List will be completed for all projects impacting wetlands. *See Appendix D.*
- **Impact tables** – Separate tables will be developed depicting impacts to wetlands and OW based on the required attributes listed below or otherwise provided by NDDOT. Impact tables will be developed as outlined in

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<sup>25</sup> A list of section 10 Waters for North Dakota can be found at <http://www.nwo.usace.army.mil/Media/FactSheets/FactSheetArticleView/tabid/2034/Article/2652/section-10-waterways.aspx>  
<sup>26</sup> 40 CFR Part 230 - Compensatory Mitigation for Losses of Aquatic Resources; Final Rule. Mitigation plan guidance is located in paragraph 230.94(c).  
[http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008\\_04\\_10\\_wetlands\\_wetlands\\_mitigation\\_final\\_rule\\_4\\_10\\_08.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_04_10_wetlands_wetlands_mitigation_final_rule_4_10_08.pdf)

Appendix A5. ES staff will use the information to apply for and secure the needed permits from applicable state and federal agencies.

### **3.7.9 Culvert Sinking**

Regional condition 6 for nationwide permits requires new culverts (round culverts and box culverts) to be lowered on perennial or intermittent streams. See Wetland Checklist **Appendix D1** for further information.

### **3.7.10 408 Permission**

Pursuant to 33 USC 408 (Section 408) Section 408 permission is needed from the USACE Secretary of the Army to make alteration to, or temporarily or permanently occupy or use, any USACE Corps of Engineers (USACE) federally authorized Civil Works Project, referred to as USACE Project. A USACE Project can consist of USACE owned lands, USACE flowage easements, USACE managed levees, USACE channel realignments..etc. If any construction activity impacts a USACE Project, temporarily or permanently, a Section 408 Permission will be needed.

### **3.7.11 Outgrant**

An outgrant is a real estate instrument that authorizes a non-USACE entity to access USACE controlled property. If any construction activity is proposed to acquire USACE controlled property, temporarily or permanently, an outgrant will be needed. Outgrant requests may require a section 408 Permission.

## **3.8 US Coast Guard**

Section 9 of the Rivers and Harbors Act of 1899 and the General Bridge act of 1946 preserve the public right of navigation and prevent interference with interstate and foreign commerce. These acts place navigable water of the US under control of the US Coast Guard. A Section 9 Coast Guard Permit is needed for any plans to construct or modify a bridge or causeway across a navigable waterway of the United States. This includes temporary bridges used for construction access or traffic detour.

A Section 9 US Coast Guard (USCG) permit is needed for any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States. Navigable streams and waters include waters that were navigable at the time of statehood including the Missouri River, Yellowstone River, and Red River north of Wahpeton to the Canadian border, James River, Upper Des Lacs Lake, and Devils Lake.

- For NDDOT projects, ES is responsible for obtaining the USCG permit. If it is a local entity project, the local entity completing the project is solely responsible.
- If the designer determines there are project impacts within any navigable streams or waters of the United States, a USCG permit is required.

- Upon confirmation for the need of a USCG permit, project details will be given to ES to be included in the permit application including the project location map and plan sheets.
- **Checklist** - The Coast Guard Permit Application Check List will be completed for all projects impacting wetlands. **See Appendix D.**
- ES will take the necessary action to obtain the permit.

### 3.9 US Fish and Wildlife Service (USFWS)

#### 3.9.1 USFWS Easement Land - Transportation projects, impacting USFWS wetland or grassland easements, are typically outside the existing ROW.

- For highway projects that will occur or will have impacts outside the ROW, NDDOT designer or consultant will notify the appropriate USFWS, Wetland Management District (WMD) office to determine if USFWS easements exist within the project area using Solicitation of Views (SOV) Letter #7. ***Please refer to E3 for map of WMD offices.*** The notification will include: the narrative describing the nature of the construction activities resulting in impacts to the affected easement; an aerial photograph(s) of the project site and location of the anticipated construction impacts.
- The USFWS WMD manager will provide an aerial photograph(s) identifying the protected wetlands indicated by points or grassland easement area polygon. For wetland easements, the WMD manager should ensure the aerial photograph provided by NDDOT is the best available representation of typical water levels.
- NDDOT will conduct field wetland delineations unless unusual circumstances require the initial determination to be conducted in the office. An on-site determination must be made if the project results in impacts that will require an easement exchange.
- NDDOT will avoid and minimize impacts to USFWS easements to the extent practicable.
- The NDDOT designer or consultant must include measures to avoid or minimize impacts to easement wetlands and grassland. Where avoidance and minimization do not mitigate for all impacts, NDDOT will calculate impacts and provide the information to the USFWS WMD manager for confirmation/concurrence. The determination of impacts is a collaborative process between NDDOT and the USFWS WMD manager. However, NDDOT will make the initial estimate.
- For unavoidable impacts to USFWS easements, NDDOT ES staff will work with USFWS WMD manager to complete an easement exchange.

**3.9.2 Checklist** - The USFWS Special Use Permit Application/Easement Exchange Application Check List will be used to assure all steps are completed. *Please see Appendix D.*

- Compensatory Compensation –
  - USFWS Easement Bank will be used if available.
  - If an Easement Bank is not available, NDDOT will work with USFWS to locate suitable wetlands or grassland to complete an easement exchange. Mitigation does not need to be within the same RSA.

### **3.9.3 USFWS Fee Owned Land**

In March of 2012, NDDOT and USFWS entered into a Memorandum of Understanding outlining the process for unavoidable impacts to USFWS Fee Owned land. NDDOT will avoid impacts to USFWS fee owned land to the extent practicable. When unavoidable impacts will occur, NDDOT will follow the process outlined in the MOU. *Please see Appendix E5 - Memorandum of Understanding between the U. S. Fish and Wildlife Service and the North Dakota Department of Transportation.*

## **3.10 State of North Dakota**

### **3.10.1 Drainage Permits**

- A drain permit is required from the North Dakota State Water Commission - Office of the State Engineer for wetlands with greater than 80 acres of drainage **and** only when the impacts include wetland drainage. North Dakota does not have any permitting requirements for fill placed in a wetland. Drainage permit forms can be found at the North Dakota State Water Commission website..

### **3.10.2 Sovereign Lands**

Sovereign lands consist of islands and beds of navigable streams and waters areas where vegetation is restricted by the action of water or where vegetation consists primarily of wetland species. *"Sovereign lands" means those areas, including beds and islands, lying within the OWHM of navigable lakes and streams.* Lands established to be riparian accretion or reliction lands pursuant to section 47-06-05 are considered to be above the OWHM and are not sovereign lands. For more information see North Dakota State Water Commission, Sovereign Lands Management<sup>27</sup>. Using the letter SOV #6, contact the North Dakota State Water Commission - Office of the State Engineer to find out if the project is located on sovereign land.

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27 North Dakota State Water Commission , Sovereign Lands: <http://www.legis.nd.gov/cencode/t61c33.pdf?20130320144101>

- Permit Needed – Sovereign Lands Permit is needed from the Office of the State Engineer when a portion of a transportation project lies partially or wholly below the OHWM of a navigable stream or water.
- NDDOT ES is responsible for obtaining the Sovereign Land Permit. If the designer determines there are any project impacts within a Sovereign Lands, then a Sovereign Lands permit is required.
- Information Required – Upon confirmation of sovereign lands within a project a detailed set of plans will be given to the ES to be included in the permit application including the project location map and plan sheets. ES will take the necessary action to obtain the permit. Permit applications can be found on the North Dakota State Water Commission Webpage<sup>28</sup>.
- Checklist – The Sovereign Lands Permit Information to Environmental Checklist will be used to assure all steps are completed. *Please see Appendix D.*

### 3.10.3 Construction Permit

North Dakota defines a dike as an embankment, including appurtenant works, constructed to protect real or personal property. See North Dakota State Water Commission, Article 89-08: Dams, Dikes, and Other Devices<sup>29</sup> for more information. Using the SOV letter #6, contact the North Dakota State Water Commission - Office of the State Engineer to find out if the project will impact a dike.

- Permit Needed – Any modifications to dikes will require a permit from the North Dakota State Water Commission - Office of the State Engineer.
- A Construction Permit for wetland restoration or wetland creation is generally not required if the wetland is restored to original size. However the North Dakota Water Commission will be notified after wetland restorations are completed using the following form: Application/Notification to Construct or Modify a Dam, Dike, Ring Dike, or Other Water Resource Facility<sup>30</sup>.
- ES is responsible for obtaining the Dike Modification permit. If the designer determines there are any project impacts, a dike permit is required Permit applications can be found on the North Dakota State Water Commission – Permits and Applications<sup>31</sup>.

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28 Application to construct a project within islands and beds of navigable streams and waters:

<http://www.swc.state.nd.us/4dlink9/4dcgi/GetContentPDF/PB-232/Sovereign%20Lands%20Application%202009.pdf>

29 North Dakota State Water Commission, Article 89-08: Dams, Dikes, and Other Devices:

<http://www.legis.nd.gov/information/acdata/pdf/89-08-01.pdf?20130320144927>

30 North Dakota State Water Commission – Permits and Applications:

<http://www.swc.state.nd.us/4dlink9/4dcgi/GetContentPDF/PB-76/Construction%20Permit%20Form%20Fillable.pdf>

31 North Dakota State Water Commission – Permits and Applications:



- Checklist – The Construction Permit Information to Environmental Checklist will be used to assure all steps are completed. *Please see Appendix D.*

### 3.10.4 Floodplain Development

- Permit Needed – For projects located in a regulated floodplain, a floodplain development permit must be received from the local floodplain coordinator before construction can take place. Using the SOV letter # 6, contact the North Dakota State Water Commission - Office of the State Engineer to find out if the project is in a regulated floodplain. The Office of the State Engineer can also provide the FIRM map and contact information for the local floodplain coordinator. If the Office of the State Engineer was sent a Solicitation of Views letter, they normally provide this information in their response. In some cases, they may need to be contacted. For more information see the North Dakota State Water Commission – Floodplain Management Webpage<sup>32</sup>.
- Permit Assumed Not Needed – NDDOT assumes the risk for minor maintenance improvements where the roadway surface elevations do not increase more than 3/8” or signing projects where no embankments or concrete bases are needed. Floodplain permits are assumed for not need for these project types unless within a floodway.
- If the designer determines there are project impacts within a floodplain, then a floodplain permit is required.
- Additional information may be required from the designer before ES can complete the permit application. If the project scope of work changes from that originally proposed in the environmental document, the author will advise and discuss the proposed changes with ES.
- Cities, counties, townships, and reservations are normally responsible for regulating floodplains within their boundaries. When a project involves a floodplain, the permitting community documents compliance by a signed floodplain permit.
- Floodplain Permit Application(s): Non-NDDOT entities working on NDDOT projects must submit a completed Floodplain Permit application to ES. This ensures that the completed permit application can be obtained prior to the project bid opening. Upon review and acceptance of the Floodplain Permit application, it will be sent to the appropriate Floodplain Administrator.

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<http://www.swc.state.nd.us/4dlink9/4dcgi/GetContentPDF/PB-76/Construction%20Permit%20Form%20Fillable.pdf>

32 North Dakota State Water Commission – Floodplain Management Webpage at:  
<http://www.swc.state.nd.us/4dlink9/4dcgi/GetCategoryRecord/Floodplain%20Management>

- Checklist – The Floodplain Permit Application to Environmental will be used to assure all steps are completed. Please see Appendix D. All necessary data, information, and, if applicable, the permit application will then be forwarded by NDDOT designer or technical support to the Environmental Section immediately for the necessary action to obtain the permit.

### 3.10.5 Floodways

ND Century Code 9 (Chapter 61-16.2-02) defines a floodway as the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot (.30 meter). Using the SOV #6 letter, contact the North Dakota State Water Commission - Office of the State Engineer to find out if the project is within a floodway.

- Authorization Needed – For all NDDOT projects within a floodway, authorization must be received from the local floodplain coordinator before construction can take place. Contact the Office of the State Engineer to find out if the project is in a regulated floodway. Office of the State Engineer can also provide contact information for the local floodplain coordinator. If the Office of the State Engineer was sent a Solicitation of Views letter, they normally provide this information in their response. In some cases, the Federal Emergency Management Agency (FEMA) may need to be contacted. For more information see the North Dakota State Water Commission – Floodplain Management Webpage<sup>33</sup>.
- If the designer determines there are project impacts to a floodway within a floodplain, then a floodway authorization is required.
- Additional information may be required from the designer before ES can complete the permit application. If the project scope of work changes from that originally proposed in the environmental document, the author will advise and discuss the proposed changes with ES.
- Checklist – The Floodway Authorization Request Checklist will be used to assure all steps are completed. *Please see Appendix D.* All necessary data, information, and, if applicable, the authorization application will then be forwarded by NDDOT designer or technical support to the Environmental Section immediately for the necessary action to obtain authorization.

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33 Ibid.

## Section 4. Wetland and Stream Mitigation Requirements

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### 4.1 Mitigation Sequencing

NDDOT is required by USACE and FHWA to mitigate certain wetland and stream impacts. Mitigation sequencing is completed through a 3 step process<sup>34</sup>: avoidance, minimization, and compensation.

Steps in mitigation sequencing

1. **Avoidance** - Adverse impacts to wetlands are to be avoided if there is a practicable alternative with less adverse impact.
2. **Minimization** - If impacts cannot be avoided, appropriate and practicable steps to minimize adverse impacts must be taken to the extent possible.
3. **Compensation** – Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts that remain after avoidance and minimization. The amount and quality of compensatory mitigation does not substitute for avoiding and minimizing impacts. Compensate for impacts that cannot be avoided or minimized. Appropriate and practicable compensatory mitigation will be completed for unavoidable adverse impacts which remain.

### 4.2 Wetlands

- 4.2.1 Mitigation sequencing** - The process of avoiding impacts to wetlands, minimizing impacts that cannot be avoided, and compensating for unavoidable impacts will be used to mitigate impacts to all natural and/or jurisdictional wetlands permanently impacted by highway projects.

**Examples of avoiding adverse wetland impacts could include:**

- Not placing road fill into a wetland or OW if there is a practicable alternative with less adverse impacts (e.g. adjusting the geometry or alignment of the road to avoid wetland impacts and steepening the inslopes past the clear zone).

**Examples of minimizing adverse wetland impacts could include:**

- Lowering the profile of the road;
- Steepening in slopes;
- Following existing land contours to minimize grading;
- Span as much of the wetland as possible

### 4.2.2 Compensatory Mitigation

Compensatory mitigation includes; in order of preference: restoration, establishment (creation), enhancement and preservation of a wetland. Except as outlined in 4.2.4, mitigation will be based on the credit calculation using the ratios

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<sup>34</sup> USEPA Wetlands Compensatory Mitigation Factsheet contains additional information on mitigation sequencing:  
<http://www.epa.gov/owow/wetlands/pdf/CMitigation.pdf>

obtained from the *Wetland Mitigation Banking in North Dakota – Interagency Guidance for Mitigation Bank Sponsors*.

#### 4.2.3 Location of Compensatory Mitigation

Compensatory mitigation can occur in the following areas: off-site at mitigation banks, in-lieu-fee or on-site within project boundaries and RSA.

##### 1. Off-site at Wetland Mitigation Banks

Unavoidable wetland impacts may be compensated with the use of approved mitigation banks. Withdrawal of credits from the bank will be equal to the acres impacted at a 1:1 ratio. Compensatory mitigation for unavoidable wetland impacts covered under FHWA policy is not restricted to RSA's. For USACE jurisdictional wetland impacts, the bank must be in the same RSA as the wetland being impacted. *See section 5.0 for further information on mitigation banks.*

##### 2. In-lieu-fee Wetland Banks

If available, use of in-lieu-fee wetland banks will be coordinated with the FHWA and USACE. For more information regarding in-lieu-fee banking see Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act<sup>35</sup>.

##### 3. On-site mitigation

Wetlands are mitigated within the project ROW

- a. On-site mitigation by expanding the impacted wetland into upland areas usually within the NDDOT ROW. On-site compensatory mitigation via creation at the same wetland being impacted can occur at a 1:1 ratio. *See Section 6.0 Wetland Creation*
- b. On-site mitigation within project area and within the same RSA but not at the same wetland as being impacted will follow the mitigation ratios as outlined in *Wetland Mitigation Banking in North Dakota – Interagency Guidance for Mitigation Bank Sponsors*. **Please Refer Appendix E6.** Mitigation may be outside of ROW. NDDOT will acquire mitigation site via easement or fee title purchase.
- c. On-site mitigation by removing existing roadbed within wetland usually within NDDOT ROW. Considered restoration at 1:1 ratio.

#### 4.2.4 Ratios

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35 Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 1- of the Rivers and Harbors Act. <http://www.fws.gov/habitatconservation/Corps%20In-lieu-fee%20guidance.pdf>

Wetland mitigation ratios will be followed as outlined in the Wetland Mitigation Banking in North Dakota – Interagency Guidance for Mitigation Bank Sponsors:

**RATIO MITIGATION METHOD**

- 1:1 Restoration of completely drained or filled wetlands by plugging the outlet and/or removing accumulated sediment, and implementing a revegetation plan.
- # Restoration of the outer, completely drained portion of a partially drained wetland, removing accumulated sediment, and implementing a wetland revegetation plan.
- 2:1 Restoration of the deeper portion of a partially drained wetland basin that continued to pond water after completion of the drainage project.
- 2:1 Restoration of an impaired wetland by removing the sediment accumulated in the basin.
- 2:1\* Creation of a new wetland by excavation, establishment of ditch blocks, or construction of small dams along non-wetland drainageways.
- 5:1 Enhancement of a wetland basin by establishing and maintaining a 50-foot vegetated, upland buffer around the perimeter of each mitigation wetland.
- 10:1 Preservation of existing wetland habitat as a minor component of a mitigation bank featuring restored and/or created wetlands.
- 20:1 Enhancement of a mitigation tract by establishing permanent grassland cover outside of the 50-foot buffer to square off the boundaries of a mitigation bank and develop a reasonable land use plan for the surrounding property.

*\*USACE and FHWA have agreed that creation at a 1:1 ratio can occur if the creation occurs at the same wetland being impacted. (E.g. excavating upland adjacent to the impacted wetland or expanding the existing wetland to create wetland hydrology conditions similar to the impacted wetland).*

**4.3 Streams and Tributaries**

**4.3.1** Examples of minimizing adverse stream impacts (other waters) could include:

- Span as much of the stream and associated wetlands as possible.
- Keeping existing bridge abutments by building new abutment behind the old abutment.
- Sinking box culverts for aquatic species passage – NDDOT, in consultation with FHWA, and NDGF, agree to accommodate aquatic species passage on streams and tributaries requiring box culverts. Accommodations may include lowering the box culvert and associated rip-rap 1.0 ft. below the natural channel elevation to allow for passage during low flow periods. Further consultation will occur when site conditions may not warrant these accommodations. See guidance in Appendix B7 for mitigation of any permanent impacts. Accommodations for wildlife passage - NDDOT agrees to give consideration to accommodate wildlife passage, within box culverts, by covering a portion or all of the rip-rap with suitable material, such as gravel, for safe wildlife passage through the box culvert.

- **Lowering Box Culverts and Riprap** - Lowering a box culvert and riprap 1 foot below the channel elevation may be considered minimization (a form of mitigation) since this practice allows for fish and invertebrates to pass in low flow situations and allows for sedimentation to occur within the box and on the riprap to better mimic stream substrate characteristics and regain some
- **Lowering Riprap Under Bridges** - Lowering riprap under bridges 1 foot below the channel elevation may be considered minimization (a form of mitigation) since this practice allows for fish and invertebrates to pass in low flow situations and allows for sedimentation to occur within the box and on the riprap to better mimic stream substrate characteristics and regain some functionality.

#### 4.3.2 Temporary Traffic By-Pass Culvert Sizing

When a temporary bypass culvert(s) is required to maintain flows and provide aquatic species movement for an extended period of time (greater than two weeks) the following criteria will be used (if these requirements cannot be met, contact NDDOT Bridge Division - Hydraulics Section):

- Set culverts 4" below existing streambed elevation. If more than one culvert is installed, only one needs to be installed 4" below existing streambed elevation.
- Size culvert for a 2 year peak discharge (Q<sub>2</sub>) event, and adjust size as needed to provide a velocity of 3 ft. /sec. or less at the Q<sub>2H</sub> discharge. Q<sub>2H</sub> will be calculated as (0.2 to 0.4)\*Q<sub>2</sub>. Typically, it is recommended that Q<sub>2H</sub> be calculated as 0.3\*Q<sub>2</sub>.
- Minimize streambed and streambank impacts to the extent practicable.
- Riprap will be placed on the temporary bypass embankment below the water line upstream and downstream.
- Other erosion and sediment controls will be used on the temporary bypass above the water line upstream and downstream.

#### 4.3.3 Maintaining Drainage

- Connectivity for aquatic life movements - No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.
- Management of water flows: To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open

waters must be maintained for each activity, including stream channelization and storm water management activities, except:

- 1.** The activity must be constructed to withstand expected high flows.
  
- 2.** The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows.
  
- 3.** The activity may alter the pre-construction course; condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

## Section 5. Wetland Mitigation Banks

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### 5.1 Policy

NDDOT will follow the mitigation banking process as outlined in the North Dakota Interagency Review Team (NDIRT) Wetland Mitigation Banking Guidance Document. ***Please Refer to Appendix E6 Wetland Mitigation Banking in North Dakota, Interagency Guidance for Mitigation Bank Sponsors.*** The goal of a mitigation bank is to provide a diverse wetland complex of temporary, seasonal and semi-permanent wetlands with associated grassland buffers and upland to replace unavoidable wetland losses with wetlands that provide similar functions. Mitigation banks are also developed to mitigate impacts to USFWS wetland and grassland easements and fee title land.

### 5.2 Interagency Review

NDDOT will provide for NDIRT the opportunity for review of the proposed wetland mitigation bank early in the development phase. Coordination will include but not limited to field review, site plan review, public meetings, etc.

### 5.3 Proposed Mitigation Banks

- The proposed mitigation bank location will preferably have a high ratio of restorable wetlands compared to created or existing wetlands. Restorable wetlands provide NDDOT with cost effective mitigation credits.
- The reviewer will inventory the offer based on possible restoration, creation and preservation of wetlands. Based on the review outcome, NDDOT will determine whether to pursue the proposed bank location. A short decision document will be developed for management's review. The decision document will outline the reasons to pursue or reject the offered area.

### 5.4 Criteria

The proposed mitigation bank will be evaluated based on the following criteria:

- Ratio of restorable wetlands compared to all other wetlands on the site.
- Potential of the site to establish wetland physical, chemical, and biological functions.
- Adequate source of water (i.e. sufficient ground water, surface flows, snowmelt, or rainfall) to support the development of wetland vegetation, hydrology and wetland soil characteristics.
- Landowner interest for NDDOT long term (99 year) easement, USFWS perpetual easement, or land purchase in fee title with management transfer to the North Dakota Game and Fish Department (NDGFD).
- Bank location relative to Regional Service Areas (RSA's).



- The presence of unique plant communities, cultural sites, and/or threatened and endangered species habitat.
- Restored wetland hydrology relative to site boundary.
- Amount of wetland not protected by site boundary.
- Ability to establish a minimum 50-foot grassland buffer around the perimeter of each wetland basin.
- Landowner interest in land use change from cropland to hayland or pastureland.
- Amount of ongoing maintenance needed to maintain wetland functions. Wetland restoration or maintenance will not rely on pumping, tile water outlets or other methods requiring ongoing maintenance. Wetland restoration will be designed to establish self-sustaining wetland conditions.

### 5.5 Procedure

- i. **Remote Sensing for the proposed mitigation bank:**
  - A. Review the soil survey via Web Soil Survey<sup>36</sup> to determine if the proposed bank includes hydric soils or hydric soil inclusions.
  - B. If provided by the landowner, review the NRCS certified wetland determination map(s).
  - C. Review USFWS National Wetland Inventory (NWI) maps to identify drained and existing wetlands.
  - D. Review Farm Service Agency (FSA) slides or ortho-imagery to determine preexisting man made drainage features.
  - E. Review USGS topography maps and LIDAR (Light Detection and Ranging) data if available for the site.
- ii. **Complete preliminary mitigation bank review:**
  - A. Estimate extent of drained vs. existing wetlands.
  - B. Estimate % upland vs. total wetlands.
- iii. **Decision point to determine if NDDOT should continue with offer:**<sup>37</sup>
  - A. Discontinue for offers meeting following criteria:
    - i. No restorable wetlands, or
    - ii. Offers where restorable wetland basins are less than 25% of total wetland basins, OR
    - iii. Greater than 4:1 upland to all wetlands ratio;
    - iv. If multiple landowners are involved and not all are interested restoring the wetland(s)  
\*Send letter or phone call notifying applicant – document phone call
  - B. **Obtain NDIRT support to continue for offers meeting minimum criteria**

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36 Web Soil Survey <http://websoilsurvey.nrcs.usda.gov/app/HomePage.htm>

37 Decision maker: ETS Division

- iv. **Complete on-site review to determine whether to continue with offer:**
  - A. Personal phone call with landowner to set up on-site visit.
  - B. Discuss procedure/options with landowner - Determine if landowner is interested in:
    - o NDDOT easement
    - o Sale in fee title with NDGFD management
    - o USFWS perpetual easement
  
- v. **Verify:**
  - A. Field review and verify potential wetland manipulation, drains, tile, fill, and labels as outlined in the WETLAND MITIGATION BANKING IN NORTH DAKOTA, Interagency Guidance for Mitigation Bank Sponsors Guidance Document. *Please Refer Appendix E6.*
  - B. Complete Scope and Effect Data Sheet for Drained or Partially Drained Wetland *See Forms Section.*
  - C. Provide records release form for applicant's signature enabling NDDOT to obtain current USDA/NRCS wetland information applicable to offer. *Please Refer Appendix F8.*
  - D. Determine acres of each category (wetlands, buffers and uplands).
- vi. **Complete map outlining wetlands, buffers and offered acreage.**
- vii. **Complete excel spreadsheet outlining wetland types, acres, mitigation, credits types (preservation, restoration, etc.).**
- viii. **Determine if NDDOT should continue with process:**
  - A. If no – contact landowner via letter or phone call, document phone call.
  - B. If yes - develop decision document for management decision.
- ix. **Develop decision document for management decision.**  
If management agrees proceed to step 9.
- x. **Review credits with NDIRT after decision document is signed and landowner expresses interest to continue to sell in fee title or easement.**
- xi. **Complete CED pending Cultural Resource Review.**
- xii. **Request Cultural Resources Review and USACE jurisdictional determination.**
- xiii. **Right of Way to begin acquisition process.**  
USFWS Easements

- Obtain ownership information and title insurance of the property to be acquired, including an endorsement on behalf of the USFWS covering clear title as of the date of signing the indentures that grant or convey easement rights by the landowner to USFWS.
- Prepare the survey and plat of the interests to be acquired.
- Prepare appraisals.
- Negotiate and acquire the necessary property rights.
- Prepare an agreement for the seller's signature stating the seller agrees to sell, at a specified price and provide to USFWS perpetual wetland and or grassland easement, as applicable.

**OR**

NDDOT Purchase or 99 year Easement:

- Obtain ownership information and title insurance of the property to be acquired.
- Prepare the survey and plat of the interests to be acquired.
- Prepare appraisals.
- Negotiate and acquire the necessary property rights.
- Prepare an agreement for the seller's signature stating the seller agrees to sell, at a specified price, and provide to NDDOT 99 year wetland and or grassland easement, as applicable.

*xiv.* **For USACE Mitigation Banks to be amended to the Umbrella Mitigation Banking Agreement (UMBI) (easement or purchase)**

- NDIRT field review
- Develop ledger
- Develop Mitigation Bank Addendum to UMBI
- Develop wetland restoration plan
- Submit to all NDIRT for formal review

**For USFWS Easements**

- Develop ledger for wetland easement.
- Develop Prospectus
- Request Cultural Resource Review
- Develop wetland restoration plan
- Develop MOA with USFWS and FHWA

**5.6 Performance Criteria**

Refer to *Section 6.3*

**5.7 Monitoring**

**5.7.1** Monitoring will be conducted annually for the first five years, unless performance criteria are obtained and the USACE agrees to discontinue annual monitoring.  
**Refer to A6 for NDDOT Monitoring Report and Success Criteria**

**5.7.2** Annual monitoring will consist of the following items:

1. First and second growing season monitoring will include a site visit with photo-points established to verify if the site was constructed per design and will not include a delineation or vegetation identification. This could be year one, or, first year following remedial action.
2. Third growing season until success criteria is met, documentation will be required according to the **following**:
  - a. Wetland success criteria documentation

**Hydric soils**

- i. Hydric soil determinations will rely on the original wetland delineations for wetland preservation and wetland restoration at the delineated hydric soil boundary. Boundary where criteria is met will be utilized as final credit value of bank.
- ii. Hydric soils determinations will be completed for wetland creations and enhancements ponding water beyond the original hydric soil boundary in accordance with USACE publication “Corps of Engineers Wetlands Delineation Manual” January 1987 – Final Report (87 Manual), the “Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2)” (Regional Supplement), and North Dakota Century Code 43-36 - Professional Soil Classifiers.

**Hydrophytic Vegetation**

- i. Hydrophytic Vegetation determinations will rely on the original wetland delineations for wetland preservation.
- ii. Hydrophytic vegetation determinations will be completed for wetland restorations, creation or enhancements in accordance with USACE publication “Corps of Engineers Wetlands Delineation Manual” January 1987 – Final Report (87 Manual), the “Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2)” (Regional Supplement), and North Dakota Century Code 43-36 - Professional Soil Classifiers.

**Hydrology**

- i. Hydrology determinations will rely on the original wetland delineations for wetland preservation and wetland restoration at the delineated hydric soil boundary.
  - ii. Hydrology determinations will be completed for wetland restorations, creation or enhancements in accordance with USACE publication “Corps of Engineers Wetlands Delineation Manual” January 1987 – Final Report (87 Manual), the “Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2)” (Regional Supplement), and North Dakota Century Code 43-36 - Professional Soil Classifiers.
3. Wetland Buffers and Additional Adjacent Upland – Monitoring will address success criteria as outlined in the Mitigation Site Plan applicable to the mitigation bank.
4. Ditch blocks, dikes, water control structures and other associated wetland restoration features – Monitoring will evaluate stability of structures and overall functionality.
5. Management – Monitoring will evaluate management of site including grazing, haying, noxious weed control, easement encroachment, etc. as outlined in Mitigation Site Plan.
  - ii. After performance criteria are met and annual monitoring is complete, monitoring will be completed once every 5 years, on a 5 year interval. Off-site photography will be used with on-site monitoring if issues are observed during the off-site review. No monitoring report will be generated unless Adaptive Management is needed as outlined in Section XI of the Mitigation Bank Site Plan.
  - iii. Site plan credit release dates will be reviewed annually to determine if release criteria have been met and additional credits can be requested.
  - iv. Monitoring Report Submittal - Monitoring reports, including ledgers, will be reconciled and submitted **annually to NDIRT members. Annual submittal to the NDIRT members will be discontinued after closure of the bank.** Refer to A6 for NDDOT Monitoring Report and Success Criteria

## Section 6. *On-Site Wetland Mitigation*

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Planning will be oriented toward reestablishment or creation of an ecologically, biologically and hydrologically functioning wetland. Consideration will be given to creating wetlands that can provide functions including: water storage, groundwater recharge, retain particulates, remove, convert and sequester dissolved substances, provide floral and faunal habitat and carbon cycling.

### 6.1 Agency Review

NDDOT will provide an opportunity for interagency review of proposed wetland mitigation projects during the development phase based on the following thresholds:

#### **Projects not requiring interagency review**

- Creation of wetlands wholly located in current ROW, unless requested by agency during the project development phase.

#### **Projects requiring the option for interagency review**

- Wetland mitigation where additional ROW will be purchased solely for mitigation purposes
- Wetland mitigation where NDDOT will acquire a 99 year easement

### 6.2 Creating Wetland Type

Wetland type should be based on impacted wetland being mitigated. At a minimum, surface and subsurface hydrology needs to be created and maintained at a frequency and duration to create anaerobic conditions typical of a wetland. Inundation or saturation must occur for a minimum of seven consecutive days during the growing season in most years. Hydrology can be created by containing surface runoff or by excavating into a water table. Hydrological goals must be consistent with the planned wetland type and the impacted wetland type. Following are ponding duration guidelines for various wetland water regimes from USFWS, Classification of Wetlands and Deepwater Habitats of the United States, Cowardin, Lewis M. 1979.<sup>38</sup>

- Temporary wetlands have surface water present for brief periods (>7 days but < 30 days) during the growing season, but the water table is well below the soil surface for most of the season.
- Seasonal wetlands have water present for extended (>30 days) periods especially early in the growing season, but is absent by the end of the season in most years.

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<sup>38</sup> United States Fish and Wildlife Service, Classification of Wetlands and Deepwater Habitats of the United States, Cowardin, Lewis M. 1979

- Semi-permanent wetlands have water persisting throughout the growing season in most years.
- In order to create these water regimes, water depths should range as follows:
  - Temporary wetlands - 0.5 to 1.5 feet
  - Seasonal wetlands - 1.5 to 2.5 feet
  - Semi-permanent wetlands - 2.5 to 5.0 feet

## 6.3 Construction

### 6.3.1 Embankments

An earth embankment (dam) may be constructed to create a pool storage volume consistent with water regime of impacted wetland. Soils must be capable of holding water for duration sufficient to create anaerobic conditions. Soils rated as severe for any of the factors for pond reservoir areas should not be considered for wetland creation. In most cases, soils rated as slight should meet the seepage criteria for a successful wetland creation based on soils. Soils rated as moderate for seepage should be investigated on-site prior to any wetland creations. Pond reservoir ratings can be found in NRCS Web Soil Survey<sup>39</sup>.

Consideration should be given to removing the topsoil prior to wetland creation to reduce the phosphorus loading within the created wetland. Topsoil removal is especially critical when the created wetland is located in cropland. Removing phosphorus will reduce the potential of cattail dominated wetlands.

Embankments will meet design criteria for Classification I dams in the North Dakota State Water Commission (SWC) North Dakota Dam Design Handbook<sup>40</sup>.

### 6.3.2 Excavations

Excavation can be used to pond water by capturing surface runoff or exposing the water table. A minimum of 10 acres of drainage area to support 1 acre of wetland can be used to determine hydrology. If hydrology is being provided by water table alone, depth to water table and the time of year the water table is apparent in the soil profile are the two main factors determining acceptable site soil conditions. As the apparent water table becomes deeper in the soil profile, the likelihood of a successful wetland creation decreases. Cost of excavation increases and wetland

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[http://www.fws.gov/wetlands/documents/gNS\\_DI/ClassificationWetlandsDeepwaterHabitatsUS.pdf](http://www.fws.gov/wetlands/documents/gNS_DI/ClassificationWetlandsDeepwaterHabitatsUS.pdf)

39 NRCS Web Soil Survey. <http://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx>

40 North Dakota State Water Commission (SWC) North Dakota Dam Design Handbook.

<http://www.swc.nd.gov/4dlink9/4dcgi/GetContentPDF/PB-77/damdesign.pdf>

aesthetics decrease as depth to water table increases. Depth to water table can be found in NRCS Web Soil Survey<sup>41</sup>.

#### **Excavations not adjacent to existing wetlands**

- The drainage area of the created wetland must be large enough to support the created wetland. Excavation must be 12 to 18 inches below the existing ditch bottom or any surrounding pipes/outlets to ensure a minimum 12 to 18 inches of ponding.

#### **Excavations adjacent to existing wetlands**

- The reestablished wetland should emulate the hydrology of the impacted wetland. Verify there is sufficient hydrology and soils to ensure that the creation is viable. The final elevation of the mitigation area should match the lowest elevation of the existing wetland or the final elevation be set to 1' below invert elevation of the pipe in the wetland to ensure enough hydrology to establish (consult with ETS for elevation). Consideration should be given to creating micro-topography within the wetland creation.
- If impractical to match the bottom of the wetland and no pipe exists, excavate to a minimum final elevation of 12 to 18 inches below the wetland perimeter elevation.
- Consideration will also be given to the ability of the soil to resist slumping. Natural regeneration of vegetative cover on created wetland sites will not provide adequate hydrophytic vegetation establishment.
- The created wetland must be over excavated to compensate for the placement of 6" of topsoil.
- All created wetlands will be seeded. Please refer to Standard Specifications for Road and Bridge Construction, 2014, NDDOT, Table 251-02, Page 183, Wetland Seed Mix for wetland seeding specifications.
- Vegetative plugs (prairie cordgrass) may be used in addition to seeding or donor topsoil. Special Provisions will be developed on a case-by case basis.

### **6.4 Performance Criteria**

- 6.4.2** Hydrologic criteria can be met with embankment or excavation type creation. Hydrologic criteria are met when any one primary indicator or two secondary indicators, are met as outlined in United States Army Corps of Engineers. March 2010. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2.0)*<sup>42</sup>. Wetland hydrology regime of

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41 NRCS Web Soil Survey. <http://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx>

42 United States Army Corps of Engineers. March 2010. Regional Supplement to the Corps of Engineers Wetland Delineation



created wetland will be based on the wetland being impacted. Every effort should be made to create the same hydrologic regime as the impacted wetland.

- 6.4.3** Hydrophytic vegetation criteria is met when the plant community meets the requirements as outlined in the United States Army Corps of Engineers, March 2010, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2.0)*.
- 6.4.4** Hydric Soils Criteria are met when the soils meet the requirements as outlined in United States Army Corps of Engineers, March 2010, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2.0)*<sup>43</sup>
- In many cases, hydric soils indicators will not be present within the first 5 year monitoring period. Recently developed hydric soils have morphologies that are difficult to interpret and in some cases there are no indicators to assist in the identification of hydric soils (NRCS (2010)). As long as the soil meets the definition of hydric soil, the lack of an indicator does not preclude the soil from being hydric (NRCS 2010). Therefore, hydric soils criteria are met when conditions of saturation, flooding, or ponding are long enough during the growing season to develop anaerobic conditions in the upper part.

## 6.5 Monitoring

Monitoring will be conducted in accordance with the project's 12 Component Mitigation Plan, Monitoring reports for USACE jurisdiction wetland mitigation sites will be submitted annually to USACE by December 31. ***Refer to A6 for NDDOT Monitoring Report and Success Criteria***

First growing season monitoring will include a site visit with photo-points established to verify if the site was constructed per design and will not include a delineation or vegetation identification. This could be year one, or, first year following remedial action. Second growing season until success criteria are met, documentation will be required according to the following:

### 6.5.2 Annual monitoring will include:

1. Wetland success criteria documentation outlined in the 12 component mitigation plan for the project included with the Section 404 Permit Application.

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Manual: Great Plains Region (Version 2.0).

[http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg\\_supp/gp\\_supp.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/gp_supp.pdf)

43 United States Army Corps of Engineers, March 2010, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2.0)*

[http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg\\_supp/gp\\_supp.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/gp_supp.pdf)

2. Wetland Buffers and Additional Adjacent Upland – Monitoring will address success criteria as outlined 12 Component Mitigation Plan applicable to the mitigation site.
3. Ditch blocks, dikes, water control structures and other associated wetland restoration features – Monitoring will evaluate stability of structures and overall functionality of wetlands.
4. Management – Monitoring will evaluate management of site including grazing, haying, noxious weed control, easement encroachment, etc. as outlined in 12 Component Mitigation Plan applicable to the mitigation site.

## Section 7. *Emergency Projects*

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### 7.1 Emergency projects

- Include repair work necessary to immediately protect remaining facilities, re-open roadways, and restore essential transportation needs.
- Initial emergency repair work will address only the work necessary to protect the remaining roadway or to re-open the roadway.
- For emergency repair work procedures and guidelines see NDDOT Emergency Relief Manual<sup>44</sup>.

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<sup>44</sup> NDDOT Emergency Relief Manual Procedures for Administering Federal Emergency Relief (Draft) Funds Section 7 – Regulatory Compliance and Environmental Guidelines: <http://www.dot.nd.gov/business/emergencyrelief.htm>

## Section 8. *Woody Vegetation*

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### 8.1 Impacts to woody vegetation

Impacts to woody vegetation will be determined to ensure that projects in urban areas, along riparian corridors, woody draws, and similar land form features are reviewed for potential impacts. Woody vegetation can include trees and/or shrubs.

### 8.2 Criteria

Impacts to the following will be considered for reclamation or mitigation and must be included in the delineation report:

- Urban trees – Impacted trees within city limits
  - If a wetland delineation is not needed, tree impacts should be included in other project reports/plans
- Native<sup>45</sup>, naturally occurring woody vegetation in riparian areas, draws, and forests<sup>46</sup>.

Impacts to farmstead, landscaping, shelterbelts, feedlot or field windbreaks will be reviewed with the landowner by ROW and do not need to be documented in the delineation report.

Impacts to woody vegetation in a prairie setting (not in a riparian area, draw, or forest) will not be replanted or mitigated.

### 8.3 Procedure

Impacts to native woody vegetation will be recorded in the wetland delineation. For projects completed by a consultant, the work will be coordinated through the NDDOT Technical Support Contact.

**8.3.1** Native, naturally occurring woody vegetation will be counted and classified at the time of wetland delineation. Information to be collected includes

- Deciduous trees – Number of trees with a diameter breast height (dbh) of tree 3 inches or more and the tree is 15 feet or more in height.
- Evergreen trees – Number of trees 5 feet or more in height.
- Shrubs – Number of all other native woody vegetation.

**8.3.2** If it is impractical or impossible to count each individual tree and/or shrub, document why it is impractical and the following methodology may be used:

- Choose a representative area(s)
- Measure the area(s) in whatever unit is most practical (square footage, acreage, etc.)

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45 For a list of native woody vegetation in North Dakota: Appendix E10

46 For a map of native forests in North Dakota: Appendix E11

- Count the number of trees or shrubs in the area
- Use this as a representative number of trees or shrubs for all other areas which are similar in characteristics to the area(s). Use the appropriate ratio of number of trees or shrubs to the size of the area.

**8.3.3** Delineation Map Standard - Woody vegetation information will be submitted in the following formats and standards:

- MS Word and MS Excel
- Adobe pdf
- ArcGIS
- Sub meter GPS Accuracy
- Collected using UTM Zone 14
- Shape files submitted as polygons, points or lines with project information
- Polygon location of representative areas used for area counts

#### **8.4 Reclamation and Mitigation**

**8.4.1** In urban areas, **urban** trees will be replaced per the local policy. In the absence of a local policy, NDDOT will coordinate tree replacement actions with the local public agency.

**8.4.2** Impacts to native woody vegetation on Federal or State owned lands will be determined and mitigated according to procedures outlined by the governing agency. (Example: USACE Guidance - SOP #14 – Garrison Project Tree/Vegetation Mitigation, January 20, 2015 - See Appendix E7)

**8.4.3** ES will review native woody vegetation impacts to determine if there is a need for reclamation or mitigation. Reclamation and/or mitigation for the loss of native woody vegetation along riparian corridors, draws, and natural forests:

**8.4.3.1** For temporary impacts, reclamation will take place on-site at a 1:1 ratio.

**8.4.3.2** For permanent impacts, impacts will be recorded in a ledger at a 1:1 ratio until there is: a) an opportunity to partner with another agency b) a sufficient quantity of woody vegetation mitigation to warrant a woody vegetation mitigation project. NDDOT will coordinate with NDGF regarding site locations, tree/shrub species, planting requirements, monitoring, etc.

**8.4.4** Reclamation and/or mitigation requirements will be incorporated into the environmental document for the project.

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**SECTION II-05  
Cultural Resources  
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***Purpose***

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NDDOT Cultural Resource Section (CRS) assists the agency in compliance with a variety of state and federal laws that apply to consideration of impacts and effects to:

- Archaeological And Stone Feature Sites
- Historic Buildings and Structures
- Culturally Important Areas
- Unmarked Burials

This section provides guidance to NDDOT Engineers and Consultant Engineering Firms on cultural resource processes and requirements.

***Section 1. Cultural Resource Section Services***

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North Dakota has a rich and diverse prehistory/history that has left evidence across the landscape. When NDDOT begins a project, federal and state laws and regulations/rules require us to follow a defined process to consider the effects to cultural resources/eligible historic properties. To assess potential impacts, cultural resource specialists work first to identify, then as needed evaluate, and finally plan to avoid, minimize and/or mitigate effects of an undertaking (project) to these cultural resources. As needed for archaeological sites that cannot be avoided subsurface evaluative testing may take place. Mitigation of eligible cultural resource sites may take place if avoidance is not feasible/prudent. Construction monitoring may take place as the cultural resources and projects require. The Cultural Resource Section (CRS) work includes addressing appropriate procedures with discovery of human remains. The CRS provides for tribal consultation, State Historic Preservation Office/Tribal Historic Preservation Office (SHPO/THPO) consultation, and other agency coordination and input into the process of considering the effects of transportation projects on important cultural resources.

**Section 2. National Historic Preservation Act (NHPA) Section 106 Review and Compliance****2.1 Overview of Section 106 within Transportation in North Dakota**

Section 106<sup>1</sup> of the National Historic Preservation Act requires that federal agencies consider the effects of their projects on Historic Properties. Historic Properties are typically historic and prehistoric sites, buildings, structures, or object 50 years old or older, which are fairly unaltered, are representative of a types or the work of a master, have important information potential, or are associated with historically significant persons or events. Implementing regulations ([36 CFR Part 800](#)) define a process for complying with the law. The process includes identification of cultural resources, evaluation of their eligibility to the National Register of Historic Places (NRHP), determination of project effects on these Properties, and if affected, resolution of adverse effects. This process requires input from the State Historic Preservation Office (SHPO) and/or Tribal Historic Preservation Office (THPO), involved government entities, Native American tribes that may attach religious or cultural value to Historic Properties in the project area, and other interested parties. The time needed to complete the Section 106 process varies dependent upon the complexity of the project, the type of Historic Properties located on the project, and the concerns of consulting parties and/or the public.

A NDDOT project requires a section 106 review if it:

- Has the type of activity with potential to cause effects on historic properties, and
- Has Federal Funding
- Requires A Federal Permit Or Approval (e.g., following FHWA NEPA process)
- Takes Place On Federal Or Tribal/Allotted Land

NEPA requires consideration of effects to cultural resources in a broader way than NHPA. It is possible to have significant cultural resources under NEPA that are not Historic Properties under NHPA. However, the NDDOT typically uses the results of the Section 106 process to address cultural resources in terms of NEPA compliance. Further, FHWA cannot fund an undertaking with potential to affect Historic Properties if Section 106 has not been completed. If consulting parties under NHPA , or the public under NHPA and/or NEPA, were to express concerns regarding a cultural resource which was not identified during the Section 106 process or did not qualify as an Historic Property, the resource may need to be reconsidered and could be found to be significant in terms of NEPA.

There are various types of projects and aspects of projects that are of concern. These include but are not limited to:

- New Roadways
- Reconstruction
- Rehabilitation
- Maintenance activities
- Material Sources

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<sup>1</sup> Effective December 19, 2014, Section 106 of the National Historic Preservation Act was moved from title 16 of the U.S. Code to title 54. The new reference is 54 U.S.C 306.108 (previously 16 U.S.C. 470f)

- Urban projects
- Bridge Replacements
- Environmental Mitigation
- Utility movements related to projects
- Shared Use Paths

The key is projects with ground disturbing activities have the potential to affect Historic Properties or Historic Districts and they are subject to Section 106 review.

Archaeological and stone feature sites have the potential to be impacted by any kind of earth work, including disturbance to existing backslopes. Occasionally existing roadbeds, foreslopes, or ditch bottoms with deeply buried archaeological resources or minimally impacted ground that contain intact buried archaeological resources may be impacted by transportation projects. Some of our thousands of bridges are Historic Properties. Other types of cultural resources include prehistoric campsites, resource procurement and processing areas, stone feature sites (e.g., stone circles, cairns, arcs, effigies), historic period homesteads/farmsteads either with or without standing structures, and buildings/structures and historic districts in our communities.

NDDOT in consultation with the FHWA, ND Division Office, consults with Native American tribes following our Programmatic Agreement. The NDDOT also consults with the SHPO/THPO, the Advisory Council on Historic Preservation (ACHP), as needed, and the public, through our National Environmental Policy Act (NEPA) public involvement process. NDDOT, Cultural Resource Section conducts SHPO/THPO and Tribal consultation for all projects whether being completed in-house or by an Engineering Consultant. Although much of the cultural resource work can be conducted by consultants, SHPO/THPO and tribal consultation cannot be delegated and must be conducted by NDDOT/FHWA.

To ensure the results of the Section 106 process are implemented on the project, these results are included in the NDDOT NEPA documentation. Any agreements or necessary actions become part of the environmental document "commitments" section.

## **2.2 Discussion of Types of Projects with Cultural Resource Concerns**

As stated previously, any project conducted by the NDDOT that involves Federal funds/approvals must take cultural resources into consideration to comply with NHPA and NEPA. Further, the CRS conducts all consultation with SHPO or THPO as needed (dependent upon project location) and the Native American Community. There are various types of projects that are of primary concern. These include: 1) new roadways (e.g. city bypass projects); 2) reconstruction; 3) resurfacing with safety aspects; 4) material source locations; 5) urban projects; 6) transportation alternatives projects; and 7) bridge replacement.

### **2.2.1 New Roadways**

City bypass projects and new county road routes, for example, can involve not only disturbance of new land adjacent to an existing highway, but intrusion into an area which may have been relatively undisturbed or not serviced to the proposed level. This may require consideration of effects beyond those which are

directly related to building a road. When looking at a bypass project, for example, we may need to consider the visual effects to historic buildings, archaeological sites, and landscapes in placing a highway in an area where one didn't previously exist, or consider the effects of commercial and residential development along the bypass which wouldn't take place but for the new roadway.

There will always be the need for a Class III cultural resource inventory with this type of project. These surveys are contracted/subcontracted out to cultural resource firms rather than being done by CRS. It is important for the CRS to understand project parameters, as much as possible given the early stage of project development, so that they know how to identify the area of potential effect and types of effects they may need to consider before contracting for the survey. In the case of Engineering subcontractors there may need to be discussions between the Prime, the subcontractor, and CRS.

Consultation with Native American Tribes which may value cultural resources in the project area is a necessary part of the Section 106 process. If concern is expressed for a particular project area, the tribes, through the FHWA/NDDOT Tribal Consultation Committee (TCC), is included in various aspects of the cultural resource decision-making process.

The product of the survey is a report explaining the cultural resource work completed. The report typically includes the following: 1) the results of the file and records search; 2) a description of survey methods and goals, 3) a description of any sites located; 4) an evaluation of site eligibility (to the extent possible at the inventory stage), 5) recommendations regarding potential effects, 6) maps delineating the survey area, 7) site forms with information essential in determining significance; and 8) photographs for future reference. The most important aspect of the report to the DOT is the location of the cultural resource site(s) in comparison to the project which allow us to work to assess effects.

CRS send the reports to the SHPO, or THPO if the project is on a reservation which has an established office, with NDDOT's determination of the effects of the project. A copy of the report is also provided to FHWA/NDDOT tribal partners who participate in the TCC and any other consulting party. The determination at this juncture can be, No Historic Properties Affected, No Adverse Effect, or Adverse Effect. The SHPO/THPO responds to the determination.

If there will be an adverse effect to a historic property then NDDOT needs to consider how NDDOT can avoid, minimize, or mitigate these effects. If the NDDOT cannot avoid the effect, then NDDOT needs to work through consultation with the SHPO, the TCC, and any other consulting parties, to resolve the adverse effect. Resolution of adverse effects is documented with a Memorandum of Agreement (MOA) which is signed by NDDOT, SHPO/THPO, and FHWA. The TCC or individual Native American tribes may be asked to be signatory to the document, as appropriate to the project and effects. FHWA notifies the Advisory Council when the NDDOT and SHPO concur in an Adverse

Effect. If the Council does not choose to be a participant FHWA sends them the signed MOA.

### **2.2.2 Reconstruction**

Reconstruction usually involves the realignment and widening of the existing roadway or the construction of a slightly new route. Most often the existing roadway over hills is flattened to increase sight distance and the angle of the slopes is decreased. With reconstruction comes the disturbance of many areas of virgin prairie or relatively undisturbed farmland; with some portions considered as having high potential for the presence of archaeological cultural remains.

Note that when moving utilities out of our ROW cultural resource issues are our responsibility. Work with CRS on any issues.

There will always be the need for a Class III cultural resource inventory with this type of project. The identification process, information needs, survey reporting, and Section 106 process documentation will be the same as discussed above for new roadways.

### **2.2.3 Rehabilitation and Maintenance**

These types of projects do not affect much ground that has not already been disturbed by previous construction. They frequently involve work to the existing roadway with little disturbance outside the surface or inslope of the roadway. However, safety work can be done as independent projects or in association with resurfacing and can require the modification of drive slopes, hills, drainage areas, and inslopes. Borrow for the modification sometimes is taken from the backslopes along the project route. Because the original construction of a highway may have bisected cultural resources, particularly prehistoric archaeological sites, there is a concern for protection of these sites, if they are important either in terms of archaeology or tribal values, from further disturbance.

If these types of projects are using the NEPA Categorical Exclusion by Definition Checklist and will result in work on an historic bridge, within an historic district, within reservation boundaries, or involve disposal or early acquisition of ROW, landscaping, or environmental mitigation, then CRS will become involved.

In most cases necessary identification surveys will be done by contract or subcontract with an archaeological firm. On rare occasions the NDDOT cultural resource staff will conduct the necessary surveys. The identification process, information needs, survey reporting, and Section 106 process documentation will be the same as discussed above for new roadways. The only difference is with small surveys a negative survey report format or a shortened report version for small surveys is acceptable.

#### **2.2.4 Urban**

Similar in procedure to those projects previously discussed but dissimilar in the usual type of cultural resource, urban projects have greater potential to affect standing historic structures. Where an urban project calls for street reconstruction, historic buildings/districts and their setting can be adversely affected. A historic or prehistoric site can be adversely affected if its integrity is modified in a way which affects or changes the reason it was evaluated as eligible to the National Register of Historic Places. An urban reconstruction project requiring widening outside the existing curb (including sidewalk work) can adversely affect the properties' integrity. Avoidance, minimization, or mitigation of adverse effects can vary widely, but may include extensive recording of a single property or a historic district through photography and researching of the history of the property, and sometimes this involves a structural analysis.

Fortunately, most towns and cities in North Dakota of 5,000 residents or more have had some cultural resource inventory conducted. Some have designated residential or commercial historic districts. Cultural resource inventory of these projects can vary from an extensive architectural survey to a Class III inventory which takes into account the potential for buried historic and prehistoric remains. The type of inventory needed varies dependent upon previous work in the area, known building dates and types, potential for significant buried archaeological remains, and project parameters.

Urban cultural resource inventories are contracted/subcontracted to private cultural resource firms. Reports of these inventories are handled similarly to those described for other types of projects above.

In other cases, an assessment of minimal potential to affect Historic Properties is made by CRS and no further cultural resource work is undertaken. This assessment may be documented through solicitation of views letters to SHPO. It is generally agreed (between the NDDOT, FHWA, and SHPO) that if there is no widening beyond the existing curbs or the project is through a newer area of town with low archaeological site potential, we can consider that there is no potential for the project to affect Historic Properties and no further Section 106 compliance activity is needed.

#### **2.2.5 Transportation Alternatives Projects**

These projects are reviewed by the CRS and appropriate recommendations are given. The CRS has completed inventories, advised on contracted inventories, communicated with SHPO, written determinations, reviewed and written interpretive display information, and consulted with Native American communities about interpretive efforts.

#### **2.2.6 Bridge Replacement**

NDDOT has completed two bridge inventories; one in 1992 and one finalized in 2004. The bridge inventory lists bridges surveyed during the inventory, their eligibility for inclusion on the National Register of Historic Places, and a context that can be used to evaluate bridges not included in the inventory. This is,

however, not a definitive source and eligibility issues should be considered by the consultant.

Note that eligible/listed bridges are 4(f) properties.

The ACHP has provided a Program Comment issued for streamlining Section 106 review for actions affecting post-1945 concrete and steel bridges. All post-1945 concrete and steel bridges are covered by the program comment except for the following:

32MH177	25-108-11.0
32ME2176 (Being Mitigated)	49-101.247
32CS4472	81-932.468
32GT296 (Replaced)	31-012.802
32LM210	23-130-18.0
32WD1613	0-MNO.T21
32GT293	19-134-08.0
32PB192	34-126-10.0
32SN343	47-143-37.0
32SL140	44-106-24.0

There are a number of ways of resolving adverse effects when it is not feasible to rehabilitate the existing structure. Smaller truss bridges are documented and an attempt is made to adopt them out for other functions such as use on a golf course or a small private road or a pedestrian walkway. Larger bridges are documented before demolition. This involves photography using large format cameras with prints on special archival quality paper. The written narrative includes a biography of those involved in building the bridge, fabricating the structural members, and those manufacturing the steel. Further documentation of the bridge puts it into historical context.

### **2.2.7 Bridge Adoption Program for Historic Bridges**

When a project involves the destruction or replacement of a historic bridge, the Bridge Adoption Program must be considered (23 USC 144). A bridge is considered historic when it is listed on or eligible for the National Register of Historic Places. Consult with the Cultural Resources Section (CRS) to determine a bridge's eligibility.

A historic bridge is adoptable if it can stay in place (e.g. if a roadway is being realigned) or if it can be moved and retain its historic aspects (integrity). If a bridge must be moved, a high potential cost of moving a historic bridge is not grounds for not offering the bridge for adoption. However, if a bridge cannot remain in place and moving the bridge will result in the destruction of its historic integrity, then it need not be offered for adoption. To determine whether a historic bridge can be moved and retain its historic aspects, consult with the CRS.

### **Historic Bridge Adoption Categories:**



Every National Register listed/eligible bridge scheduled for replacement can be described by one of the following categories:

1. The historic bridge will not remain in place and it cannot be moved and retain historical aspects. This category includes bridges that physically cannot be moved. Bridges in this category need not be offered for adoption.
2. The historic bridge may remain in place (e.g., the road is being realigned) and it cannot be moved and retain historical aspects. In this case the potential adopter must be willing to maintain the bridge at its current location.
3. The historic bridge may remain in place, and it can be moved and retain historical aspects.
4. The historic bridge will not remain in place, and it can be moved and retain its historic aspects.
5. Well known bridges (e.g. Four Bears, Rainbow Arch, Liberty Memorial).

The following table may help to conceptualize the above categories:

	<b>If moved, cannot retain integrity</b>	<b>If moved, can retain integrity</b>
<b>Will not remain in place</b>	Category 1	Category 4
<b>May remain in place</b>	Category 2	Category 3

<b>Method:</b>	<b>Categories to which methods are applied:</b>
Build into SOV	2, 3, 4, 5
Call County & offer them bridge (on-system)	2, 3, 4, 5
Discussion with other local contacts	2, 3, 4, 5
Post bridges available for adoption on our web site	2, 3, 4, 5
Contact from list of people wanting to adopt bridges	3, 4
Advertise in local newspapers	2, 3, 4, 5
Advertise state-wide	5
Advertise regionally/nationally	5

Bridges will be advertised for two weeks.

Local Government Division maintains a list of contacts interested in adopting bridges. They will continue to be the main resource for such information.

**Determining Who Gets the Bridge:**

If more than one entity would like to adopt a bridge, the determination of who gets the bridge is based on the following factors, in decreasing order of importance.

**Leave in place (when it is feasible that the bridge stay in place)**

- County/City
- Other public entity
- Private individual/organization
- Ability to pay & assume liability
- Interest in maintaining historic aspects

- Willingness to maintain public access

**Move to new location**

- County/City
- Other public entity
- Private individual/organization
- Distance to new location
- Ability to pay & assume liability
- Interest in maintaining historic aspects
- Willingness to maintain public access

**Miscellaneous:**

The environmental document author will inform the Cultural Resources Section (CRS) when a bridge has been adopted and its new location. The CRS will be responsible for informing SHPO of changes in bridge status and location.

When a county replaces a bridge without involving NDDOT, Bridge Division ultimately finds out through the normal bridge inspection process. When Bridge Division finds out a historic county bridge has been replaced, they should inform the CRS about the bridge. The CRS will be responsible for informing SHPO when a bridge has been destroyed.

When a bridge is adopted, the CRS will conduct a records search at the State Historical Society of the proposed new location and consult with SHPO on the need for additional work.

### **2.3 Consultant Inventory Requirements and Procedures for Archaeological Consultants**

**Note: The following applies to cultural resource consultants hired directly by the NDDOT and those hired as sub-consultants to Engineering Firms conducting work on behalf of the NDDOT**

**Those hired as sub-consultants may contact CRS directly at any point in the process for answers to technical questions and to discuss cultural resource issues, but they should summarize the contact to their Prime and the Prime to NDDOT Technical Support/CAS.**

#### **2.3.1 Classes of Identification Surveys in ND**

- **Class I Survey**

This is a literature review and files search to determine what sites have previously been identified in and near a project area and what work has been previously undertaken. NDDOT cultural resource reports and site forms become part of this records collection housed at the ND SHPO.

- **Class II Survey**

This type of inventory is not normally used by the NDDOT. Out tribal partners prefer Class III inventory of entire project corridors and it makes sense from a project perspective; we would not want to discover an important site during construction but rather do all we can to identify these resources up-front.

- **Class III Survey**

This is an intensive inventory which includes a pedestrian visual survey, and if needed, subsurface probing to identify all cultural resources within the project area. NDDOT intensive inventory also includes participation of the TCC through having a Traditional Cultural Specialist present on all inventory efforts on the State Highway System.

#### **Class III Survey Required**

- Must hold ND State Historic Preservation Office (SHPO) permit<sup>2</sup>
- File search:
  - Make sure Cultural Resource Field Supervisor has read the pertinent literature
    - If sites near/within ROW have been tested, read the reports
    - If previous surveys near/within ROW read the reports
- Meet SHPO Class III<sup>3</sup> standards
  - Shovel/auger probes are required when there is poor ground surface visibility (GSV) and high site potential (not in stone feature sites)
- Field Supervisor in field 100% of time and on SHPO Permit
- Survey both sides of roadway

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<sup>2</sup> [http://history.nd.gov/hp/PDFinfo/Permit\\_SF3639.pdf](http://history.nd.gov/hp/PDFinfo/Permit_SF3639.pdf)

<sup>3</sup> <http://history.nd.gov/hp/siguidelines.html>

- If right of way (ROW) equals the APE, then include ROW and land immediately adjacent in the inventory for better GSV opportunities (consider 10' adjacent to the ROW)
- Check plats for ROW dimensions (for highways these are on NDDOT Website<sup>4</sup>)
  - Printing of the plats may be very useful during the inventory
- Traditional Cultural Specialists (TCS) are required in field with the cultural resource professionals during cultural resource identification surveys
  - Follow TCS process (Section 2.4 below) through THPO contact list (to be provided upon required pre-field meeting with the CRS )
    - Provide maps and project information to the THPO so they can provide the information to and prepare their TCS
  - Make sure to begin notification of THPOs to request TCS as soon as you know when you would like fieldwork to begin as they too need to plan effective use of their personnel
- For state highway system projects, a meeting with CRS (701-328-4378; jborcher@nd.gov) is required prior to fieldwork (call with at least 1 week notice)

### **2.3.2 Site Recording Needs**

- Record entire site area, not a boundary based on the survey corridor (unless other considerations [e.g., really large site] then call Jeani Borchert @ 701-328-4378)
- Update all previously recorded site forms for sites within or partially within the Area of Potential Effect (APE) for the project, if even to report that nothing has changed
- Update previously recorded site forms for sites with noted changes when they are immediately adjacent to the APE for the project
- If previously recorded sites are not relocated in the field, complete a site form update explaining likely reasons, such as site lead is outside current APE, or the site appears to have been destroyed
- For Stone Feature sites record following the standards in Section 2.5 below
- Do not put probes in Stone Feature sites; define boundaries on feature distribution and landform
- Record features and site boundaries using GPS
  - Justify boundaries
- Do not extend boundaries unreasonably within existing ROW (e.g., we might have a meter depth potential within the upper portions of the backslope; if so record it accurately, especially important when updating a previously recorded site)
  - Site sketch maps must accurately show ROW boundaries
- Do not record culverts unless they are masonry
- Bridges
  - NDDOT has Historic Bridge Recording Standards that need to be followed.

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<sup>4</sup> [http://gis.dot.nd.gov/external/ge\\_html/?viewer=row](http://gis.dot.nd.gov/external/ge_html/?viewer=row).

- Note that most post 1945 bridges in ND are covered by the ACHP Program Comment. Even though many were recommended eligible by RTI as a result of their 1999-2000 work, these were not determined eligible by SHPO; the report was never accepted. We have a list of 10 bridges from the post-1945 era that will be considered under section 106 and are exceptions to the Program Comment. The list will be provided during the pre-field meeting and is available on our NDDOT [Website](#).

### **2.3.3 Project Reporting Needs**

- All newly or previously recorded sites, isolated finds, and site leads within the APE shall be discussed in the report Results and Recommendations Section
  - Make sure to understand the literature about previous survey and sites, particularly previous site testing
    - Do not rely only on site forms for previously recorded sites; read the literature
- Previously recorded sites not identified in the field must be included and addressed in the report
- Put [Reference Points](#) on your maps
- Shortened reporting form acceptable for small projects with few sites
- Negative reporting form acceptable for small projects with no sites
- Include discussion of Tribal involvement with names of TCS with a summary of their involvement
- When reporting on large survey include a separate section on results [The following gives us a clear understanding of each site and the eligibility potential with an understanding of project effects all in one spot in the report]
  - Discuss each site
    - What it is
    - Previous recording description with any updated information
    - Evaluation information whether formal or perspective
    - Effect from project as known at the time of reporting and as ascertained through discussion with the Prime/Project Engineer
    - Aerial or Sketch Map
    - Photos as needed
- When there are more than 5 sites to report on in the Management Summary or other titled ending use a table to list the sites with at least SITS #, Site Type, Eligibility (eligible, not eligible, unevaluated), and Project Specific Effects and Recommendations (Please do not recommend “Clearance.” You might rather say, “A finding of No Historic Properties Affected is appropriate for this project with ...” considerations of site avoidance or whatever actions you recommend.)
- No site forms in report
- Off Reservations submit a manuscript data record form with each report
- Submit GIS shapefiles of survey boundaries and site boundaries to the NDDOT (same as provided to SHPO)
- Submit reports electronically in pdf format with one hard copy for us to send to SHPO/THPO (same as provided to SHPO)

- If changes are requested you can resubmit electronically with one hard copy
- Submit all site forms and updates to the NDDOT electronically in pdf format
- Off Reservations Place electronically on your SHPO ftp site when you send to us electronically
- Update your SHPO ftp if report changes are requested
- Provide an incident report (example below) for issues involving TCS, Landowners, Law Enforcement, etc.

#### **2.4 TCS Process for Archaeological Consultants**

The NDDOT has agreed to incorporate Tribal Traditional Cultural Specialists (TCS) at the cultural resource identification level for state highway system projects. It is our hope that this process will benefit the Tribes by providing the opportunity to reacquaint themselves with the landscape and give them participation opportunity and confidence in the identification process. Further, this process will not delay or adversely affect NDDOT Project schedules and it will benefit the NDDOT by providing complete information in a timely fashion.

TCS are not usually included for Local Government projects or Material Source locations as part of this program. TCS on Local Government projects and Material Source locations will proceed on an individual basis for specific projects/sources. NDDOT will consult with the TCC any time prehistoric sites cannot be avoided.

Cultural resource consultants under contract with the NDDOT for state highway system projects will be required to facilitate the TCS involvement program. Consultants will provide for mileage and meals; provide lodging; and pay our negotiated rates for TCS payment. Method and timing of payment for mileage, meals, and fee will be discussed and agreed upon with THPOs when you contact them to provide TCS for NDDOT projects.

A list of Tribal Contacts will be provided by the NDDOT to the cultural resources consultants. Contact the THPOs as soon as you have a planned fieldwork date to line up a TCS, as the THPO offices need to time appropriately distribute their TCS personnel. There are times that a specific tribe or tribes have been identified for specific project interests during our tribal consultation process. Please contact the CRS (701-328-4378) prior to THPO contact to ensure these previously arranged agreements are being followed. If a TCS is not available for the proposed fieldwork day(s), the Consultant will contact another Tribal Contact to attempt to arrange for a TCS. The CRS may be aware of Tribes that have TCS available. If contact has been attempted/made with each Tribal Contact on the list provided, planned fieldwork is ready to be implemented, and no TCS is available, the Consultant will contact the NDDOT CRS (701-328-4378) to receive authorization to proceed without a TCS.

Participation of TCS in the cultural resource surveys will be facilitated by the Consultant, but these TCS will not be employees of the Consultant; they will remain independent. They will be expected to participate in the survey as they see fit, to offer their input on sites identified by the Consultant, and to notify the Consultant's Field Director when they have identified a cultural resource of potential importance to the Tribes – preferably as the crew is working in this site vicinity. Consultant will include the Tribal perspective, excluding confidential information, in their report. If there is conflict regarding any aspect of the TCS process on a specific project, the NDDOT and the TCC member(s) from the TCSs Tribe will be consulted (Contact CRS at 701-328-4378).

## **2.5 Stone Feature Recording Procedures for Archaeological Consultants**

Provide this section to the TCS and your cultural resource employees at the start of fieldwork. The NDDOT requires you to record stone feature sites on our projects in the following manner [NOTE that the TCC has agreed to this recording method and their TCSs should follow this directive]:

- Identify site in consultation with TCS or Tribal member with particular knowledge of stone features
- Use a metal walking stick with carbide tip hidden inside the rubber end cap (or a similar kind of metal probe) as needed to assist in identifying partially buried stone features, particularly problematic in our current moist environment with heavy vegetation
- Return to site with crew after survey of a segment for recording purposes
- Flag and number each feature identified by archaeologist or TCS
- Take GPS reading of a point on the side of each feature (not center – try to stay out of features)
- Make quick hand sketch (5 minute maximum) of each feature within the APE or within 10 feet of the APE
- Take brief notes on each feature including feature diameter, estimation of the number of stones in the feature, any rocks with notable color variation and where they are located within the feature, any perceptible gaps in stone circles and any configurations running out from the stone circle/arc. [An archaeologist may not see what stones to note/sketch, but they can note that there are rocks outside the circle that may be an extension of the feature.]
- Draw a boundary around the site features in consultation with the TCS and justify the boundary in recording the site. The boundary can be drawn on the topographic map in the field and mapped on GIS or mapped using a GPS and transferred to GIS for creating the site topographic map. Make sure your boundary is accurate and defensible.
- Tribal involvement shall be required for formal evaluation of all stone feature sites.

The NDDOT will provide the SHPO or THPO and each TCC member a copy of the site form.

Note: If there is disagreement between the archaeologists and the TCSs in regard to whether or not a particular identified feature is cultural or not, call Jeani Borchert (701-328-4378) and she will discuss the issue with the appropriate THPO and provide guidance.

When walking the project area for identification purposes and you see stones, use the probe to assist in determination of whether or not the visible stones are part of a cultural feature or a natural distribution of stones.

(Revised 10/3/11 as result of April and September 2011 TCC meetings)

## **2.6 Avoidance of Cultural Resource Sites**

It is the intent of the NDDOT to look first at ways to avoid adverse effect/direct impact to important cultural resources (avoid sites evaluated as eligible or those currently unevaluated). Design Engineers shall work directly with the CRS and their archaeological sub-consultant to ensure avoidance of cultural resource sites, if possible, and to create necessary commitments to be included in the Environmental Notes section of the NEPA document and the correlating

Plan sheets. If there are unevaluated or eligible sites on your project, the NEPA document may need to discuss a requirement to fence these resources during construction to ensure avoidance.

Fencing of sites within the ROW to ensure avoidance during construction/extraction activities

Procedures:

- Steel fence posts
- Snow fence (unless otherwise documented through CRS contact)
- On projects districts should coordinate fencing with CRS
- On Material Sources Contractor and/or District should coordinate fencing with CRS
- CRS is usually involved In Identification of fencing locations in the field
- Fencing will be maintained for the duration of construction activities on the project
- Fencing will not be removed until all construction/extraction activities have been completed or permanent fence has been installed which protects the avoidance area
- All material source avoidance measures shall be strictly enforced

## **2.7 Discoveries Identified During Construction**

For projects where we believe the potential for discoveries is high, the CRS prepares a Discovery Plan prior to construction. This Discovery Plan will become a Project Specification in the Plans and will be discussed at the Pre-Construction meeting. If you have a Discovery situation and a Discovery Plan is in-place, follow the procedures outlined in the plan. If you are unsure what to do, the following would always be appropriate:

### **2.7.1 Discovery of Potential Archaeological Significance:**

- **STOP** - Protect the discovery and contact CRS at 701-328-4539 or 701-328-4378.
- **RESUME:** The NDDOT will work with all involved to ensure the project can proceed in the discovery area as quickly as possible. Work in other areas of the project can continue while the discovery is being addressed.

### **2.7.2 Discovery of a Burial:**

- **STOP** - Protect the burial and contact Cultural Resources Section at 701-328-4539 or 701-328-4378. Always contact the County Sheriff's Office immediately upon discovery. Tell the Sheriff's Office if you suspect a crime scene, or if it is a prehistoric or settler burial.
- **NOTE:** The ND State burial law<sup>5</sup> has strict time and reporting requirements. It is imperative that your notification to the NDDOT CRS be prompt and that the burial is well protected.
- **RESUME:** The NDDOT will work with all involved to ensure the project can proceed in the discovery area as quickly as possible. Work in other areas of the project can continue while the discovery is being addressed according to State Law.

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<sup>5</sup> North Dakota State Burial Law, Century Code: [CC 23-06-27](#); [AC 40-02-03](#)



**2.8 Programmatic Agreement for Tribal Consultation**

The NDDOT worked with the FHWA (ND Division) and the regional Native American Tribes to create an agreement on a process for consulting together as partners in the identification, evaluation, effects determination, and resolution of adverse effects to cultural resources that may be important to the Tribes. This consultation process has resulted in changes to how the NDDOT approaches the cultural resource identification efforts of our Consultants. The agreement is available on the NDDOT website. All Tribal consultation on cultural resource issues must be completed with the direct involvement of the NDDOT CRS.

***Section 3. National Environmental Policy Act (NEPA) Cultural Resource Issues, and Material Source Cultural Resource Issues.***

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**3.1 Programmatic Categorical Exclusion Agreement between FHWA and NDDOT**

Based on this agreement, three different levels of categorical exclusions are proposed:

- **Categorical Exclusion by Definition (CED)**  
Projects where work is generally confined to the roadway surface but may include minor safety, structural, pedestrian facility, or miscellaneous work that does not require permanent right of way acquisition. Work types are defined in Appendix A of the Programmatic Categorical Exclusion Agreement. No further NEPA documentation is required, but some permitting, notifications, coordination, or consultation may be required. NDDOT approves the environmental document.
- **Programmatic Categorical Exclusion (PCE)**  
Projects where work is primarily on the roadway or roadbed, but may also include areas of earthwork. These projects may also require acquisition of minor amounts of right of way. NDDOT approves the environmental document.
- **Documented Categorical Exclusion (DCE)**  
Projects that involve substantial earthwork, regrading, reconstruction, structure replacement, or projects that exceed the thresholds in the agreement. FHWA approves the environmental document (unless below the thresholds, then NDDOT will approve)

The implementation of this new agreement will follow these general steps:

- Work out the process on several pilot projects (see list below).
- Finalize Design Manual Documentation, Forms, and Templates.
- Full roll-out for all projects.

### **3.2 Categorical Exclusion by Definition**

Use the CED checklist to determine whether or not any cultural resource work is required in conjunction with a particular project. FHWA and NDDOT are working with SHPO on a programmatic approach to Section 106 that will facilitate this CED process. In the interim contact CRS for any project with earth disturbing activities.

### **3.3 SOV to SHPO (Letter 5)**

Use SOV Letter 5 for the Programmatic Catex, EA and EIS. If 106 has already been completed in Milestone and you have a letter from SHPO concurring in a determination for the project, no formal SOV of SHPO is necessary unless the project has changed in a way that may affect that determination. The SOV to SHPO (Letter 5) letter is completed by the Engineer and the Cultural Resource Section. When you have completed your portion of the letter:

- Engineering Firms email it to your NDDOT Project Manager to forward to the CRS
- NDDOT Engineers email it to CRS

Note that for some projects with minimal potential to affect historic properties (e.g., CatEx by Definition) CRS uses an abbreviated consultation form ([SFN 52561](#)) with maps and basic project information for SHPO/THPO consultation. This form has also been used for face-to-face consultation and when project issues that require concurrence are needed in a short time frame.

### **3.4 Material Sources**

Any areas to be used in conjunction with NDDOT construction projects that are not listed in the plans must be approved through the NDDOT Material Source Approval process. These areas include material source locations, access routes to the source, stockpile locations, rock source locations including rock piles from cultivated fields, plant sites, processing and staging areas, waste locations, and any other areas to be used on an NDDOT project not identified in the plans. Information on requirements can be found in NDDOT Standard Specifications 107.04 and on the NDDOT Website:

<https://www.dot.nd.gov/divisions/environmental/materialsource.htm>

Appendix A: Forms

- Catex by Definition Checklist at:  
<http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>
- Incident Reporting Form (see following page)
- SOV Letter 5 at:  
<http://www.dot.nd.gov/manuals/design/designmanual/reference-forms.htm>
- Local Government Cultural Resource Contact Form  
<http://www.dot.nd.gov/forms/SFN52748.pdf>
- SFN 52561 S.106 Consultation Documentation Form (an abbreviated format for consultation with SHPO/THPO; used by CRS – see following pages)
- SFN 58466 Material Source Approval Request Form  
<https://www.dot.nd.gov/divisions/environmental/materialsource.htm>

**Incident Reporting Form:**

NDDOT Project # \_\_\_\_\_

NDDOT PCN: \_\_\_\_\_

Archaeological Consultant: \_\_\_\_\_

TCS Name and Tribe: \_\_\_\_\_

Incident: \_\_\_\_\_

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Result: \_\_\_\_\_

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Recommended Further Action: \_\_\_\_\_

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\_\_\_\_\_

Reported By: \_\_\_\_\_

Reported Date: \_\_\_\_\_

**S-106 CONSULTATION DOCUMENTATION**

Date	Project Number / Location
NDDOT Personnel	
SHPO/THPO Personnel	
Other Consulting Parties / Personnel	
Issue of Discussion	
Results of Consultation	
NDDOT Representative	Date
SHPO/THPO Representative	Date