

**Memorandum of Understanding
between
North Dakota Department of Transportation
and
North Dakota Department of Environmental Quality**

This Memorandum of Understanding (the "Memorandum") is made by and between the North Dakota Department of Transportation (NDDOT) and the North Dakota Department of Environmental Quality (NDDEQ) to promote interagency cooperation relating to the efficient implementation of erosion and sediment control on highway construction projects in North Dakota. NDDOT and NDDEQ are referred herein collectively as the "Agencies."

1. Background

NDDOT regulates the construction of roads pursuant to the authority identified in the North Dakota Century Code (N.D.C.C.) § 24-03-02. NDDOT's regulatory authority includes reporting, operational procedures and appropriate corrective action requirements in cases of environmental damage. NDDOT is responsible for the design and construction oversight, contract administration, and maintenance of the state highway system.

NDDEQ is tasked with protecting the environmental resources of the state through several state statutes, including the statutory authority defined in N.D.C.C. Ch. 61-28 Control, Prevention and Abatement of Pollution of Surface Waters. NDDEQ's regulatory authority includes the promotion of non-degradation policy for surface and ground water resources. NDDEQ has been delegated authority to administer the National Pollutant Discharge Elimination System (NPDES) program within the state of North Dakota, except for Indian Country. The state program rules are outlined in North Dakota Administrative Code (N.D. Admin. Code) Ch. 33.1-16-01, North Dakota Pollutant Discharge Elimination System. N.D. Admin. Code Ch. 33.1-16-01 incorporates the federal stormwater discharge rules by reference, 40 Code of Federal Regulations (CFR) § 122.26. The U.S. Environmental Protection Agency (EPA) maintains the NPDES program within Indian Country.

2. Purpose

The purpose of this Memorandum is to identify the coordination of efforts between the Agencies with respect to the requirements of the North Dakota Pollutant Discharge Elimination System (NDPDES) stormwater discharge general permit associated with construction activities. The framework described herein is intended to improve communication and the transfer of information, avoid duplication of effort, promote the efficient use of personnel, and to assure compliance with the construction general permit by all parties involved with highway construction.

Stormwater discharges from construction activities are regulated as a point source of pollutants under the NPDES program provided in section 402 of the Clean Water Act (CWA) and under North Dakota Century Code Ch. 61-28. NDDEQ uses a statewide construction general permit for stormwater discharges from construction activity to fulfill the regulatory requirements under the CWA and N.D.C.C. Ch. 61-28. The construction general permit identifies responsibilities that apply to NDDOT as the owner of construction projects and responsibilities of general contractors as operators of construction activities. The construction general permit does not apply within

Indian Country because the United States Environmental Protection Agency regulates stormwater dischargers within Indian Country.

The Agencies share a common interest in providing for the health, safety and welfare of the residents of the state of North Dakota. The Agencies recognize that it is in the best interest of the state that highway projects be designed, constructed and operated according to standards that will minimize erosion and sediment damage to the highway and adjacent properties as well as preventing pollution of surface and groundwater resources.

3. No Contractual Relationship

The Agencies acknowledge that no contractual relationship is created between them by this Memorandum. Nothing in this Memorandum alters or waives the Agencies' obligations under N.D.C.C. Ch. 61-28, N.D. Admin. Code art. 33.1-16, or NDR11-0000.

4. Guidelines and Actions

To promote interagency cooperation, efficient use of state funding, and protection of state resources, the Agencies agree to address stormwater control issues as they relate to state highway projects in the following manner:

- a. Pursuant to Title 40 of the Code of Federal Regulations (CFR), Parts 122.26(b)(14)(x) and (b)(15) respectively, and North Dakota Administrative Code (NDAC) 33.1-16-01-01.1(4), any project considered as construction activity in the construction general permit (clearing, grading, filling and excavation, etc.) that disturbs greater than or equal to one (1) acre is required to obtain coverage under the construction general permit. Projects that have multiple individual sites of activity will require coverage under the construction general permit if any one of the individual sites has an area of disturbance greater than or equal to one (1) acre, or if the sum of the combined individual sites totals an area of greater than or equal to one (1) acre.
- b. NDDOT is aware of and accepts the responsibilities and liabilities relating to the construction general permit for projects within its authority. For purposes of the construction general permit, NDDOT understands it is the project owner.
- c. NDDOT's contractors have day to day operational control of construction activities and is thus an operator of the project under the construction general permit.
- d. NDDOT shall, together with the relevant contractor or subcontractor, complete and sign a construction general permit Notice of Intent (NOI) for all projects requiring coverage. NDDOT contract documents will make the contractor aware of its responsibility to obtain coverage under the construction general permit from NDDEQ or EPA or both. For all projects that require construction general permit coverage, NDDOT shall require the contractor to create a Stormwater Pollution Prevention Plan (SWPPP) for the project in accordance with the construction general permit.
- e. If a project does not require coverage under the construction general permit, a SWPPP is not required. But, in such instances, NDDOT shall recommend that its contractors create a SWPPP. Projects that do not require construction general permit coverage

must be conducted in a manner that does not impact waters of the state.

- f. For project areas that are not included in the contract, but are obtained and solely controlled by the contractor exclusively for the project (e.g., concrete or asphalt batch plants, concrete washout areas, equipment staging yards, material storage areas, excavated material disposal areas, contractor furnished borrow areas, etc.), NDDOT requires the contractor to obtain separate permit coverage for the actions conducted on these areas. NDDEQ will issue permit coverage as appropriate (i.e., construction, industrial, mining and paving preparation) for these areas.
- g. Erosion and sediment control management and design will be implemented by NDDOT in project planning. The plans should take into account the complexity of the project, erosion potential and potential for offsite impacts. NDDOT has design criteria (specification/guidelines) relating to erosion control to meet the intent of the NDPDES stormwater program. The Agencies will interchange information on sediment and erosion control techniques or standards to assure designs continue to contain sound engineering principals and up-to-date methods.
- h. NDDOT shall take measures to ensure contractor compliance with construction general permit requirements, including:
 - i. Administering NDDOT's coverage under the NDPDES stormwater construction general permit and the Municipal Separate Storm Sewer System (MS4) general permit. Duties of administering these coverages shall include:
 1. Periodically review SWPPPs prepared by NDDOT,
 2. Review at least ten percent (10%) of the total number of SWPPPs prepared by NDDOT contractors,
 3. Oversee stormwater management requirements for NDDOT construction activities,
 4. Conduct on site reviews on a representative sample of projects on a yearly basis to ensure NDDOT and its contractors are complying with the CWA, N.D.C.C. ch. 61-28, relevant rules, and applicable construction general permit(s).
 - ii. Developing and maintain a webpage that specifically focuses on stormwater management.
 - iii. Conducting training for NDDOT construction oversight staff, outside engineering consultants, and contractors on proper erosion and sediment control, construction general permit requirements and other relative stormwater topics. Formal training will be conducted on an annual basis. Informal training will be conducted during on site reviews detailed in Section 4(h)(i)(4) of this Memorandum. This informal training will be focused towards educating on site NDDOT, consultant and contractor staff of the regulations as well as issues that are apparent on each particular site.

- iv. Continuing to develop further training avenues to better convey information to all parties.
 - v. Working with contractors to foster a better understanding of and ensure compliance with stormwater and other provisions of the CWA.
 - vi. Periodically reviewing NDDOT standard drawings to ensure they reflect the proper installation of Best Management Practices (BMPs) for erosion and sediment control as well as other stormwater requirements under the construction general permit.
 - vii. Partnering with NDDEQ on training related to the CWA and stormwater requirements.
- i. When the project meets the criteria for final stabilization, NDDOT will file a Notice of Termination (NOT) with NDDEQ indicating the project meets the criteria for final stabilization. For the purpose of statewide planning and coordination of projects, average annual rainfall will not be used as termination criteria for final stabilization of the construction general. If final stabilization is achieved using a method other than by establishing 70% of preexisting vegetative cover and an erosion control failure occurs within 3 years of final stabilization, then NDDOT will have 45 days from observing the failure to take corrective action. Erosion control failure is defined as any failure of the erosion controls on a site that would prohibit the establishment of 70% preexisting vegetative cover within 3 years. NDDEQ will have the discretion to reactivate the project's construction general permit coverage (in whole or in part) if corrective action is not taken within 45 days or based on the potential for contribution to a violation of a water quality standard.
 - j. NDDOT may release a contractor from a contract without terminating the construction general permit coverage. By releasing a contractor from the contract before the construction general permit coverage is terminated, NDDOT shall become the sole permittee until the project meets the criteria for final stabilization. If a subsequent contract is entered into with a new contractor for the project, NDDOT will direct the new operator to submit a written request for permit transfer/modification within 14 days as required by the construction permit.

5. Termination

This Memorandum shall remain in effect until terminated. Either Agency may terminate this Memorandum by notifying the other party in writing of its intention to withdraw from this Memorandum.

6. Effectiveness of Memorandum

This Memorandum is effective when fully executed by both Agencies.

For the North Dakota
Department of Transportation:

William T. Panos
Director

[Handwritten signature]

Signature

12-1-20

Date

CMO

APPROVED as to substance by:

Mark S Baydus

Division Engineer

[Handwritten signature]

Signature

11/25/20

Date

APPROVED as to execution this
27th day of *November* 20 *20*
ATTORNEY GENERAL
By *[Handwritten signature]*
SPECIAL ASST. ATTORNEY GENERAL

For the North Dakota
Department of Environmental Quality:

David Glatt,
Director

[Handwritten signature]

Signature

12-14-2020

Date