February 2023

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

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

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

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

WHEREAS, there may be projects where NDOT is not the primary recipient of federal-aid for a transportation project within Nebraska and therefore FHWA may elect to apply this programmatic agreement to these projects, with FHWA fulfilling both the role of NDOT and FHWA as outlined in this agreement; and,

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

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

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

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

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

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

WHEREAS, Title 23 USC Section 326 (23 USC 326 allow the U.S. Department of Transportation (USDOT) Secretary, acting through FHWA, to assign certain responsibilities for environmental review and compliance with the National Environmental Policy Act of 1969 (NEPA), the Endangered Species Act, and other Federal environmental laws to a State Department of Transportation through a Memorandum of Understanding (MOU), and where FHWA and NDOT have entered into such an MOU in Nebraska; and,

WHEREAS: Throughout this document, the term "lead federal agency" may apply to either FHWA or NDOT, depending upon whether the specific project is or is not assigned to NDOT through an active 326 MOU. Generally speaking, under the 326 MOU NDOT is the lead federal agency for project-specific categorical exclusion (CE) categories listed in 23 CFR 771.117, and FHWA is the lead federal agency for CEs not listed in 23 CFR 771.117, Recreational Trails projects regardless of CE classification, CEs of direct recipients that are not NDOT, all Emergency Relief projects, and all EAs and EISs; and,

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

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

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

STIPULATIONS

I. Applicability

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

i. A "no effect" determination is categorically given for these activities due to no presence of suitable or critical habitat or no potential to effect listed species, provided NDOT reviews the action to ensure a rare or unusual circumstance does not exist that would warrant further review:

1) grants for training;
2) federal-aid system revisions which establish classes of highways on the Federal Highway system;
3) acquisition of scenic easements with no ground disturbance;
4) improvements to existing truck, weigh stations and rest areas with no ground-disturbing activities;
5) ridesharing activities;
6) bus and railcar rehabilitation;
7) alterations to buildings or vehicles to make them accessible for elderly or handicapped persons;
8) purchase of vehicles;
9) acquisition of land for hardship or protective purposes; and
10) at-grade railroad crossing safety improvements with no ground disturbance outside the hinge point of the rail line or roadway.

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

1) pavement marking that does not include milling of previous markings
2) installation or improvements to auto gates, cameras, and Dynamic Message Signs (DMS), provided all work and trenching occur within the roadway hinge point.
3) survey and staking

iii. Based on the experience of the signatory agencies since the implementation of the original 2012 Agreement, projects limited in scope to only the following

activities also have no potential to affect listed species when they occur within entirely developed, urbanized areas with maintained/manicured vegetation (provided NDOT reviews the action to ensure a rare or unusual circumstances does not exist that would warrant further review):

1) Driving surface restoration/resurfacing activities occurring within the existing confines of the roadway and shoulders. This includes, but is not limited to: Armor coat, crack seal, fog seal, joint seal, milling and inlay, concrete repair, joint repair, and paving existing shoulders. For roadway restoration/resurfacing activities that include bridge structures within the project limits, only bridge deck pavement restoration/resurfacing and rail removal/replacement is allowed with this programmatic "no effect" determination.
2) Curb work, sidewalk installation or repair, bike lane installation or repair, and multi-use pathway installation or repairs.
3) Landscaping.
4) Installation, repair or replacement of traffic signals, railroad crossing signals and lighting (including trenching or boring for utility connection).

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

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

II. The Program Biological Evaluation Process:

A. For this Agreement, the Process refers to the standardized analysis, tools, and concurrence procedures developed in this Agreement. Tools developed as part of this Agreement include: the Sources of Impact Definitions, Checklist of NDOT Activities / Sources of Impacts, Project Action Area, USFWS and NGPC Species Ranges, Species Evaluation Parameter Form (SEP), State and Federal Species Matrices (Matrix), Federal and State Listed Species Conservation Conditions (CC), the Overview of Effects and Required Conservation Conditions form (OERCC), and the Individual Project Level Evaluation (IPLE, when needed), and the Individual Biological Assessment (IBA, when needed). A glossary of terms and acronym list is also included. For each individual project, the

collective use of the pertinent tools and resulting documentation will be referred to as the Biological Assessment (BA). In the future, appendices to the Process will be developed to address other biological considerations. See Section II. D, below.

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

i. The species identified by the SEP form as having suitable habitat within the project action area shall be carried forward to the Matrix. See Section II. C., below.

1) For Northern Long-eared Bat, reviews will not follow the Nebraska Biological Evaluation Process. Instead, reviews for NLEB will use the Programmatic Biological Opinion for Transportation Projects in the Range of Indiana Bat and Northern Long-eared Bat. Reviews will utilize USFWS's Information for Planning and Consultation (IPaC) Tool and the User Guide for the Range-Wide Programmatic Consultation for Indiana Bat and Northern Long-eared Bat (see appendix). See Nebraska Implementation Guidance Document for Northern Long-eared Bat (see appendix).
2) For American burying beetle, reviews will not follow the Nebraska Biological Evaluation Process, and instead utilize a species-specific programmatic agreement for American burying beetle that is in development. The interim review process will evaluate American burying beetle by utilizing Individual Project Level Evaluations (IPLE) or the formal consultation process with NGPC and USFWS. See Nebraska Implementation Guidance Document for American Burying Beetle (see appendix).

ii. For each species identified by the SEP form as having no suitable habitat present within the project action area, a "no effect" determination is made for those species.

iii. If through the use of the SEP form it is determined that no suitable habitat exists for any species, then, a "no effect" determination is made for all listed species and for the project as a whole. The SEP form is kept as part of the administrative record to document ESA and NESCA compliance, and the OERCC form is completed.

C. For those species carried forward from the SEP form to the Matrix, the Matrix identifies the effect determination for the species based upon each activity identified as being part of the scope for the project. The Matrix classifies a

project as either a “no effect”, a “may affect, not likely to adversely affect” with conservation conditions or a “may affect”.

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

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

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

D. The Process also includes procedures for compliance with other applicable fish, wildlife and plant laws and regulations, which have been or will be outlined in appendices to this agreement. Such appendices include, but are not limited to, Programmatic Biological Opinion for Transportation Projects in the Range of Indiana Bat and Northern Long-eared Bat, planned American burying beetle Programmatic Agreement, compliance procedures for the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, the Fish and Wildlife Coordination Act, and Platte River Depletions. Appendices may also be created for noxious weed compliance, habitat connectivity, and others, if deemed appropriate. Appendices shall be developed in coordination with the appropriate resource agencies and approved by all Signatories.

E. NDOT shall review individual projects to determine if habitat fragmentation concerns or opportunities to improve connectivity may exist, based on the listed species with suitable habitat within the project area, the scope of the project, habitat types within the project area, and the life history of the species in question. If NDOT determines there may be a habitat connectivity concern for a project under review, a consultation with the lead federal agency and the signatory agencies will occur.

F. NDOT is the responsible party for the completion of project-specific BA’s. NDOT Environmental Section qualified biologists will either directly complete the BA, or will provide guidance, oversight, and quality review of the BA completed by a local government or consultant. In all instances, a full-time equivalent governmental employee will make the final effect determination and approval of the biological assessment.

III. Project Level Assessment and Consultation:

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

B. Projects listed under Section I.C. shall follow the parameters below to determine if consultation with the USFWS and/or NGPC is required (Except for Emergency Relief (ER) projects as stipulated in III.C. of this agreement):

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

ii. No additional consultation is required with either FHWA or the resource agencies if the SEP form and Matrix process together determine that all activities associated with the project will either have:

1) “No effect” to all listed species or designated critical habitat, or
2) “May affect, is not likely to adversely affect” listed species and no adverse modifications to designated critical habitat, and the required conservation conditions will be met

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

C. The provisions of Section III.C. relate only to the procedures for review, analysis, and consultation required for threatened and endangered species during or following an emergency event. In the context of ESA and this agreement, an emergency is a situation involving an act of God, disasters, casualties, national defense, security emergencies, etc., and includes response activities that must be taken to prevent imminent loss of human life or property. Where emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures (50 CFR 402.05(a)).

Projects concerning an emergency shall follow the parameters below for assessments and to determine when consultation with the USFWS and/or NGPC is required:

i. For emergency actions that must be taken to prevent imminent loss of human life or property, and permanent repair actions incidental to those types of emergency actions, the repair itself can be made before completion of the ESA and NESCA review process.

1) These emergency actions are situations where minutes and hours can make a difference, and any delays may result in additional fatalities, serious injuries, and substantial property damage, including impacts to environmental resources (ex, Hazardous material spills into waterways). Emergency actions in these situations address an imminent threat to public health and safety during or immediately after an emergency event (Section 7(p) of ESA). Permanent repair activities incidental to emergency repairs refers to a specific type of Emergency Relief (ER) program activity funded by FHWA, as described within 23 U.S.C. 125 and FHWA's Emergency Relief Manual. Permanent repair activities incidental to emergency actions need FHWA approval prior to the repair occurring.
2) In these circumstances, NDOT will review the action for ESA and NESCA compliance after the repair is complete, based on the habitat conditions and likelihood of affect at the time the repair was made.
3) The assessment shall not be based on activity type, but on the likelihood of effect to species or designated critical habitat from the repair at the time of the event. Documentation of the assessment, including documentation of the repair scope, location, habitat conditions, assessment of effect, effect determination, and any required mitigation to offset adverse effects to species or designated critical habitat from the action shall be documented using the Emergency Repair Biological Assessment (BA) Form.
4) Until such time that the Emergency Relief program is assigned to NDOT, the Emergency Repair BA form for FHWA Emergency Relief funded activities shall be provided to FHWA for approval concurrent with or prior to the submittal of the NEPA document to FHWA.
5) The lead federal agency will consult with NGPC and the USFWS for any "may affect" determinations. NGPC and USFWS understand the urgent nature of these types of projects and will strive to reply to consultation within 10 working days. Consultations for emergency repairs may require after-the-fact mitigation or restoration activities.

ii. Within the FHWA Emergency Relief program, all other "emergency repairs" and permanent repairs incidental to the emergency repair that are not activities that must be taken to prevent imminent loss of human life or property during or immediately after an emergency event, ESA and NESCA review will occur prior to the repair.

1) Emergency repairs are those that meet the classification of an emergency repair per 23 CFR 668.103 and FHWA Emergency Relief Manual. Permanent repair activities incidental to emergency repairs refers to a specific type of Emergency Relief (ER) program activity funded by FHWA, as described within 23 U.S.C. 125 and FHWA's Emergency Relief Manual. Permanent repair activities incidental to emergency actions need FHWA approval prior to the repair occurring
2) In these circumstances, the ESA and NESCA compliance will occur prior to the repair occurring, based on the habitat conditions and likelihood of effects at the time the repair will be made.
3) The assessment shall not be based on activity type, but on the likelihood of effect to species or designated critical habitat at the time of the emergency repairs. Documentation of the assessment, including documentation of the repair scope, location, habitat conditions, assessment of effect, effect determination, and any required mitigation to offset adverse effects to species or designated critical habitat from the action shall be documented using the Emergency Repair Biological Assessment (BA) Form.
4) Until such time that the Emergency Relief program is assigned to NDOT, the Emergency Repair BA form for FHWA Emergency Relief funded activities shall be provided to FHWA for approval concurrent with or prior to the submittal of the NEPA document to FHWA.
5) The lead federal agency will consult with NGPC and the USFWS for any "may affect" determinations. The NGPC and USFWS will strive to reply to consultation, or request an extension, within 10 working days.

iii. Within the FHWA Emergency Relief program, stand-alone permanent repairs. will follow the regular federal-aid program (when federally funded) and the Process, as outlined in Sections II, III.A., and III.B. of this Agreement.

iv. Any deviation from the emergency response process described by the provision of Section III.C. shall be coordinated with the signatory agencies prior to the deviation occurring. In the event of such deviation from Section III.C., alternative procedures shall be agreed upon first by the lead federal agency, and then by all signatory agencies and documented specific to the emergency event.

D. For projects that require a consultation with the USFWS and NGPC, the lead federal agency shall be responsible for initiating consultation and obtaining concurrence.

i. For projects requiring consultation where FHWA is the lead federal agency, NDOT staff will inform FHWA as early as practical to analyze the effect determination (i.e., "may affect, not likely to adversely affect", "may affect, likely to adversely affect", or adversely modify Critical Habitat) for the

project, and to discuss the level of FHWA involvement in early agency coordination.

ii. NDOT may initiate early agency coordination for anticipated may affect, not likely to adversely affect determinations, and shall initiate early agency coordination for may affect, likely to adversely affect determinations. The early agency coordination will include the USFWS for federally listed species the NGPC for state-listed species, and FHWA as applicable, to discuss the impacts of the action to listed species and/or critical habitat, and appropriate measures prior to an official submittal to the USFWS and NGPC.

iii. The request for concurrence shall include a cover letter or email, the BA, and any necessary supporting survey reports, photos, or other documentation. The cover letter or email will include a brief description of the scope of work, the project location, a statement of whether species-specific surveys were completed and a summary of results, and the effect determination.

iv. When the early coordination and concurrence as described in Section III.D.ii. or informal consultation package as described in III.D.iii are complete, NDOT shall submit the material to FHWA, if FHWA is the lead federal agency. After review and approval of the material, FHWA will submit the information to NGPC and USFWS to initiate the official consultation or the request for concurrence.

v. FHWA and NDOT will be responsive to USFWS and NGPC requests for additional information and coordination. The lead federal agency will provide a response to reasonable requests for additional information to the USFWS and/or NGPC within 14 days of the request receipt unless a different project-specific timeframe is agreed to by all applicable parties. If the additional information is not provided within the specified timeframe, the typical 30-day informal consultation time period will be extended accordingly.

1) Regardless of the lead federal agency, if project-specific discussions lead to discussions of program-level implementation practices or program-level adjustments, parties to the conversation will ensure all four signatories to this agreement are engaged in the conversation to ensure common agreement on the program-level interpretation or adjustment prior to a final decision being rendered.
2) FHWA may occasionally elect to attend project meetings between the state and other signatories to this agreement for projects assumed by NDOT under an active Section 326 Assignment MOU and will follow the stipulations outlined within that MOU.

E. For projects requiring a concurrence or consultation from the USFWS and NGPC, the USFWS and NGPC will prioritize workloads to provide a timely response.

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

ii. For projects requiring a formal consultation:

1) Concurrent with submittal of a formal consultation package, the lead federal agency will schedule a meeting with the signatories to this agreement within 60 days of the submittal. USFWS and NGPC will respond within 30 days to request any additional or clarifying information needed prior to the meeting. The meeting will be held within 60 days of receiving the consultation package and will be held to discuss the project, the species and/or critical habitat that may be affected, and additional information needs. If additional project discussions or additional information are not needed and the consultation package is considered complete, the USFWS and/or the NGPC will inform the lead federal agency of such in writing. Additional information requests shall be reasonable and pertinent to the action under consideration.
2) If additional information was requested from FHWA (for unassigned projects) or NDOT, the USFWS and/or NGPC will inform the lead federal agency within a week of receipt of requested information, if the additional information provided has satisfied the request or if additional clarification is needed.
3) Unless the consultation period was extended as described in III.E.ii.1, the USFWS and NGPC will provide a draft of the Biological Opinion (BO) to the lead federal agency for review and comment within 135 days of receipt of the complete initiation package.

IV. Reporting and Monitoring

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

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

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

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

B. NDOT shall provide the report described in Section IV.A., above, to FHWA, USFWS and NGPC within the month of July each year, containing approvals made between July 1- June 30th of the previous state fiscal year.

C. Annual Meeting: An Annual Meeting will be conducted by NDOT, FHWA, USFWS, and the NGPC in response to the annual report to discuss any emerging issues, trends, new information or regulatory changes.

i. NDOT will schedule the annual meeting to be held within 60 days of the distribution of the annual report.

ii. Any recommendations that arise from the annual meeting shall be documented, and an action plan shall be developed (if necessary), with deliverables and timelines, to address any recommended program changes.

D. Monitoring

i. Biennially, initiated during even calendar years, a random sample of projects will be reviewed for assurance that the program is properly functioning. The review period will consist of all projects processed under this agreement that did not require USFWS or NGPC consultation from the end of the previous review period through June 30th of the odd year.

1) During the annual meeting in even calendar years, the annual meeting will also serve as the kickoff meeting for the random-sample program review. At the meeting, the signatories will decide the sample size, review period, general schedule, approach, and objective of the review.
2) Any findings or recommendations that arise from the review shall be documented, and an action plan shall be developed (if necessary), with deliverables and timelines, to address any issues.

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

V. Additional Provisions

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

B. If NDOT identifies federal-aid projects that do not fit within this Agreement and associated Process, NDOT will coordinate with the Signatories to obtain guidance for documentation and effect determinations, if needed. The documentation may include the use of an IPLE, IBA, a modified IBA, or an assessment in a memo format.

C. For projects requiring a NEPA Reevaluation or a supplemental EIS:

i. If there is any potential for new species effects or Critical Habitat impacts, either from a new listing, change in scope, or change in existing conditions, then NDOT will follow the Process and associated consultation requirements as outlined in this Agreement.

ii. If NDOT determines that there is no potential for new species effects or Critical Habitat impacts, then NDOT will document the determination within the project record and through the use of the Professionally Qualified staff (PQS) memo.

iii. In the event a change of scope or a modification of conservation conditions is needed during or just prior to the construction of the project, said changes will not occur until NDOT evaluates the effect to listed species and/or critical habitat and obtains any necessary agency concurrences as outlined by this agreement. This review and any necessary consultations shall be documented by NDOT.

D. In the early phase of NEPA or the planning process, including Planning and Environmental Linkages studies, NDOT will either request a meeting or send a scoping/technical assistance letter to the Signatories to notify the agencies that the environmental studies for the following types of projects are beginning and to invite their general input: projects requiring an EA/EIS, and projects that may affect habitat connectivity (both listed and non-listed species).

i. The scoping letter or meeting will include a description of the scope of work, the location, the reason for the coordination, and the anticipated season and year construction may start (if known).

ii. Within 30 calendar days of receipt of the letter (when a letter is sent), the USFWS and/or NGPC will notify NDOT and FHWA in writing if additional early coordination is requested. If a response is not received within 30 calendar days, NDOT will call or email the agency contact to ensure they received the letter.

iii. This coordination does not supersede the agencies' ability to participate under NEPA. These early coordination letters will be attached to the BA documentation, once it's written. This early coordination does not satisfy the concurrence/consultation requirements as outlined in this PA.

E. For projects that occur on tribal and/or federal agency lands:

i. NDOT will coordinate early with the tribe and/or federal agency to determine whether there are unique species of concern, or any specific natural resource concerns of the tribe and/or federal agency. The outreach and its result will be documented in the BA by NDOT.

ii. If a tribe indicates an interest in government-to-government consultation on a federal-aid project, FHWA shall be immediately notified.

iii. Once the BA has been drafted, the lead federal agency will submit the BA to the tribe and/or federal agency for review and will provide a cover letter or email introduction (if the tribe accepts an email in lieu of letter) for the BA, providing at a minimum a summary of the project, its effects, and a requested response date. The signatories will be copied on the submittal letter or email.

iv. Unless the tribe and/or federal agency agrees to a shorter duration, they will be provided 30 days for the BA review, with the lead federal agency following up within the 30 days to check the status of review. The lead federal agency will accommodate a tribal request for additional consultation time, where warranted and when the extension timeframe is reasonable.

F. In the event a new species is listed, proposed for listing, or is a candidate for listing as threatened or endangered, or Critical Habitat is listed, or a protected species' designation changes:

i. USFWS and/or NGPC will notify FHWA and NDOT as soon as feasible regarding proposed changes in species' status as disclosed in the Federal Register.

ii. The Signatories will coordinate within 30 days of the proposed change of status as disclosed in the Federal Register notice. During the meeting, the signatories will develop a plan of action for adjusting the tools of this agreement in response to the proposed status change. The plan of action will at a minimum include a schedule for completing the adjustment and an agreement on assessment and documentation approaches for NDOT to follow until the final program adjustments are made. The plan of action and interim approach shall be documented.

iii. Between the effective date of the status adjustment and the finalization of an interim approach, NDOT will address potential project-specific impacts to the newly listed species or designated Critical Habitat through the use of an IPLE for the species (or within the IBA, if one is being used for the project) and will request FHWA concurrence with the effect determination for unassigned projects

VI. Administrative Stipulations

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

B. Dispute Resolution:

i. The below escalation process shall be followed:

Time Period	FHWA	NDOT	USFWS	NGPC
Resolve within 1 week or escalate	Env. Specialist	Env. Specialist-Biologist	USFWS Biologist	Env. Analyst
Resolve within 1 week or escalate	Env. Specialist	Technical Resources Unit Mgr./Env. Sect. Mgr.	USFWS Biologist	Fish and Wildlife Specialist
Resolve within 1 week or escalate	Prog. Delivery Team Lead	Env. Sect Mgr./PD Mgr.	USFWS Biologist	Planning and Programming Administrator
Resolve within 2 weeks	ADA/DA	Deputy Director/Director	NE Field Supervisor	Deputy Director/Director

ii. For all program escalations, including project-specific disagreements on standard conservation conditions or effect determinations that influence their treatment at a program level, use of tools at a project level that would set a program-level precedent, or other program level issues, FHWA will be invited to, and will participate in, the program-level escalation proceedings. FHWA will also be invited to, and will participate in, project-specific escalations where FHWA is the lead federal agency.

iii. Issues will be resolved at the lowest levels first. Agencies will not escalate to higher levels without offering lower levels the opportunity to resolve within their designated timeframe. If a disagreement occurs where the escalation process may need to be used, the party planning to use the escalation process will notify the applicable parties at their level of their intent to escalate in writing (email is sufficient), and the pertinent timeframe starts. If a person is not available during an escalation (ex, on vacation) then their designee or the next person within the escalation chain may step in. If affected parties agree, the item may sit idle waiting for the person to return, and if affected parties all agree, an issue can be escalated in a shorter period of time.

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

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

E. Option to Renew: The parties will convene to determine interest in renewing this Agreement 12 months prior to expiration. The Agreement may be extended for additional terms upon written agreement of the parties.

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

February 2023

SIGNATORIES

Federal Highway Administration:

James R Gemmel Date: 3/9/2023

Nebraska Division Administrator
Acting

US Fish and Wildlife Service:

MARK PORATH Digitally signed by MARK PORATH Date: 2023.03.14 14:50:46 -05'00' Date: _____

Nebraska Field Supervisor

Nebraska Game and Parks Commission:

Deputy
Date: 3-20-23

Director
For: Tim McCoy

Nebraska Department of Transportation:

Date: 21 FEB 23

Director