

**EMERGENCY RELIEF PROGRAMMATIC AGREEMENT
BETWEEN
THE UNITED STATES ARMY CORPS OF ENGINEERS,
THE UNITED STATES FISH AND WILDLIFE SERVICE,
THE FEDERAL HIGHWAY ADMINISTRATION, NORTH DAKOTA DIVISION,
AND THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

WHEREAS, the United States Army Corps of Engineers (USACE) is the federal agency with statutory responsibilities for issuing permits for the discharge of dredged or fill material into the navigable waters under 33 U.S.C. 403,

WHEREAS, the USACE Nationwide Permit (NWP) 3 authorizes the repair, rehabilitation, or replacement of structures or fills destroyed or damaged by storms, floods, fire or other discrete events,

WHEREAS, the United States Fish & Wildlife Service (USFWS) is the federal agency with statutory responsibilities for trust fish and wildlife resources including migratory birds, bald and golden eagles, threatened and endangered species, certain marine mammals, international resources within the continental United States, interjurisdictional fish, and all fish and wildlife on lands under Service control, and the Ecological Services Division consults with and advises other federal, state, and local agencies on their responsibilities to protect and conserve these trust resources,

WHEREAS, 50 CFR 402.05 allows informal consultation on possible effects to threatened and endangered species through alternate procedures where emergency circumstances mandate the need to consult in an expedited manner with formal consultation initiated, as needed, as soon as practical after the emergency is under control,

WHEREAS, the Federal Highway Administration (FHWA), North Dakota Division, is the federal agency with statutory responsibilities for administering the Emergency Relief (ER) program under Title 23 U.S.C. - Highways,

WHEREAS, 23 CFR 668.105(c) requires the expenditure of ER funds for emergency repairs to be promptly constructed in a manner so as to reduce, to the greatest extent feasible, the cost of permanent restoration work,

WHEREAS, the FHWA ER Manual permits permanent repairs to be performed concurrently with emergency repairs in situations where immediate completion of the permanent work is determined to be more economical or practical,

WHEREAS, the signatories to this agreement desire to reduce additional work and expedite the project delivery of permanent repairs so as to perform such work concurrently with emergency repairs,

NOW, THEREFORE, the USACE, the USFWS, the FHWA North Dakota Division, and the North Dakota Department of Transportation (NDDOT), pursuant to 23 CFR 668, agree that the ER program for federal-aid highways, these being public highways other than those functionally classified as local roads or rural minor collectors, shall be implemented in accordance with the following stipulations.

STIPULATIONS

The FHWA shall ensure that the following stipulations are carried out:

I. **Emergency Repairs**

a. **Eligibility**

The eligibility of all work is contingent upon approval by the FHWA Division Administrator of an application for ER and inclusion of the work in an approved program of projects (23 CFR 668.109(a)). A detailed explanation of emergency repairs is found in Section D(1) of Chapter II of the FHWA ER Manual. The Detailed Damage Inspection Report (DDIR) is the document the FHWA uses to determine eligibility. DDIRs for emergency repair projects are normally prepared after the work is completed. DDIRs for emergency repair projects must be promptly completed and submitted to the FHWA, not to exceed six weeks after the work is completed.

b. **Contracting Method**

Emergency repair work may be accomplished by contract, negotiated contract, or NDDOT or local public agency (LPA) force account methods as determined by the NDDOT or LPA as best suited to protect the public health and safety (23 CFR 668.105(i)). Emergency repairs must include the most current version of the all required federal provisions/documents in the proposal or governing specifications including Davis Bacon wage rates, FHWA-1273, Equal Employment Opportunity (EEO) Affirmative Action Requirements, ER Race-Neutral Disadvantaged Business Enterprise (DBE) Special Provision, Prompt Payment, Buy America, and Convict Labor. Davis Bacon requirements do not apply to state or local government agency employees who perform emergency repairs or construction work on a force account basis, or emergency contract work that is only for the removal of debris and related clean up.

c. **Federal Share**

The federal share payable for emergency repairs to minimize damage, protect facilities, or restore essential traffic accomplished within 180 days after the initial day of the actual occurrence of the natural disaster or catastrophic failure may amount to 100 percent of the costs thereof (23 CFR 668.107(a)). The initial day of the actual occurrence of the natural disaster or catastrophic failure serves as the beginning date of ER eligibility unless a different date is approved by FHWA. The NDDOT's letter of intent serves as the beginning date of ER eligibility for a basin flooding disaster unless a different date is approved by FHWA.

For costs of all repairs incurred after the first 180 days, the federal share is based on the type of federal-aid highway that is being repaired. For Indian Reservations Roads, the federal share is 100 percent. For Interstate highways, the federal share is 90 percent. For all other federal-aid highways, the maximum federal share using the sliding scale is 80.93 percent.

d. **Prior FHWA Approval**

Prior FHWA DDIR approval and Fiscal Management Information System (FMIS) authorization is not required for emergency repairs and preliminary engineering (23 CFR 668.109(a)(1)).

II. Repairs Performed Concurrently with Emergency Repairs

a. Eligibility

The eligibility of all work is contingent upon approval by the FHWA Division Administrator of an application for ER and inclusion of the work in an approved program of projects (23 CFR 668.109(a)). A detailed explanation of permanent repairs can be found in Section D(2) of Chapter II of the FHWA ER Manual. The DDIR is the document the FHWA uses to determine eligibility. DDIRs with permanent repairs performed concurrently with emergency repairs are normally prepared after the work is completed. The DDIR must clearly note which permanent repairs were performed concurrently with emergency repairs. DDIRs must be promptly completed and submitted to the FHWA, not to exceed six weeks after the work is completed.

The FHWA permits all permanent repairs to be performed concurrently with emergency repairs within 180 days after the actual occurrence of the natural disaster or catastrophic failure. The initial day of the actual occurrence of the natural disaster or catastrophic failure serves as the beginning date of ER eligibility unless a different date is approved by FHWA. The NDDOT's letter of intent serves as the beginning date of ER eligibility for a basin flooding disaster unless a different date is approved by FHWA. All permanent work performed after the first 180 days shall be considered as permanent repairs **not** performed concurrently with emergency repairs.

b. Contracting Method

The FHWA permits permanent repairs performed concurrently with emergency repairs to be administered according to emergency contracting procedures as contained in the NDDOT ER Manual. All permanent repairs must include the most current version of all required federal provisions/documents in the proposal or governing specifications including Davis Bacon wage rates, FHWA-1273, EEO Affirmative Action Requirements, ER Race-Neutral DBE Special Provision, Prompt Payment, Buy America, and Convict Labor. Davis Bacon requirements do not apply to state or local government agency employees who perform emergency repairs or construction work on a force account basis, or emergency contract work that is only for the removal of debris and related clean up.

Permanent repairs performed concurrently with emergency repairs may be completed by solicited contract, negotiated contract, or force account at a cost of less than \$150,000*. By this Programmatic Agreement, either method best suited to protect the public health or safety is deemed cost effective. If completed by solicited contract, a minimum of three quotes may be obtained for permanent repairs performed concurrently with emergency repairs at a cost of less than \$150,000 (full value of permanent work). Permanent repairs valued at \$150,000 and greater are accomplished by competitive bidding. Any expenditure exceeding the \$150,000 limit will be the responsibility of the contracting agency. Exceptions to the contract awarded by competitive bidding for permanent repairs performed concurrently with emergency repairs over \$150,000 shall be approved in advance by the FHWA Division Administrator on a project-by-project basis.

c. Federal Share

The permanent repair work continues to be reimbursed at the normal pro rata share for that facility even if the permanent repair is performed concurrently with emergency repair work. The federal share is based on the type of federal-aid highway that is being repaired. For Indian

Reservations Roads, the federal share is 100 percent. For projects on the Interstate System, the federal share is 90 percent. For all other federal-aid highways, the maximum federal share using the sliding scale is 80.93 percent.

d. **Prior FHWA Approval**

Prior FHWA DDIR approval and FMIS authorization is not required for permanent repairs performed concurrently with emergency repairs (23 CFR 668.109(a)(2)).

III. **Permanent Repairs**

a. **Eligibility**

The eligibility of all work is contingent upon approval by the FHWA Division Administrator of an application for ER and inclusion of the work in an approved program of projects (23 CFR 668.109(a)). A detailed explanation of permanent repairs can be found in Section D(2) of Chapter II of the FHWA ER Manual. The DDIR is the document the FHWA uses to determine eligibility. DDIRs for permanent repair projects must be approved by FHWA before the projects have been authorized. FHWA authorization is required prior to project advertisement. DDIRs must be promptly completed and submitted to the FHWA.

b. **Contracting Method**

Permanent repairs shall be performed only by competitive bidding unless the NDDOT (or LPA with NDDOT concurrence) adequately demonstrates that some other method is more cost effective (23 CFR 668.105(i)). Exceptions to competitive bidding for permanent repairs shall be approved by the FHWA Division Administrator on a project-by-project basis. All permanent repairs must include the most current version of the all required federal provisions/documents in the proposal or governing specifications including Davis Bacon wage rates, FHWA-1273, EEO Affirmative Action Requirements, Standard Race Conscious/Race Neutral DBE Special Provision, Prompt Payment, Buy America, and Convict Labor.

c. **Federal Share**

The federal share is based on the type of federal-aid highway that is being repaired. For Indian Reservations Roads, the federal share is 100 percent. For projects on the Interstate System, the federal share is 90 percent. For all other federal-aid highways, the maximum federal share using the sliding scale is 80.93 percent.

d. **Prior FHWA Approval**

Prior FHWA DDIR approval and FMIS authorization is required for permanent repairs **not** performed concurrently with emergency repairs (23 CFR 668.109(a)(2)).

IV. **Criteria for Environmental Classification of Emergency Work**

Emergency work procedures are described in 23 CFR 668 Emergency Relief Program and eligibility is defined in part 668.109. Additional guidance is also included in FHWA's Emergency Relief Manual (<http://www.fhwa.dot.gov/reports/erm/erm.pdf>). FHWA's environmental classification as described below does not relieve the NDDOT from obtaining other permits or agency approvals. The environmental classification for the emergency work is categorized and processed as follows with one exception: all material (borrow, aggregate, riprap, etc.) incorporated into the emergency repair

requires a material source clearance. All environmental classifications for emergency work require a Governor's proclamation and/or request for Presidential declaration or an actual Presidential declaration.

a. Category One

Category One is a Categorical Exclusion (CATEX) in accordance to 23 CFR 771.117(c)(9). Emergency Repairs that are expected to have little or no environmental impacts and, due to the emergency corrective type of work, do not require any additional submittal of data to FHWA to obtain the Class of Action of a Categorical Exclusion other than an approved DDIR.

The emergency repair work is limited to the work necessary to immediately restore the roadway to pre-existing conditions and work completed in accordance to the regulatory and environmental guidelines as detailed in the Emergency Repair Guidelines, as amended.

Examples:

- i. *Temporary traffic control operations, including detours*
- ii. *Roadway and structural embankments and fill*
 1. *Reestablish the original footprint (cross section and profile).*
 2. *Repair or replace the roadway surface, roadbed, inslopes, scour holes, and/or riprap.*
- iii. *Pipes and culverts*
 1. *Reinstall or replace at pre-existing size(s) and invert(s).*
 2. *Modestly increase the pipe size to accommodate the use of readily available pipe in a supply yard. This is not intended to delay repairs to perform hydraulic analysis. The pipe invert should be maintained at pre-existing elevations.*
 3. *Repair or replace previously existing riprap.*
 4. *The Pipe Material Selection Guidelines do not apply.*
- iv. *Temporary structures or bypasses*
 1. *Construct temporary crossings, bridge supports, cofferdams, earthen berms, or other structures that are necessary to conduct the repairs as necessary in accordance with NWP 3.*
 2. *Work outside department right-of-way may require temporary easements or a right to enter agreement prior to the initiated activity.*
 3. *Remove temporary measures immediately after construction.*
 4. *Raise Minimal Emergency grades to restore essential traffic.*
- v. *Debris or slide removal*

As these projects repair or restore to pre-existing conditions and have little or minor effects, no additional review is required. These projects are processed as a CATEX by "definition" using an approved DDIR.

b. Category Two

Category Two is a CATEX that requires no further NEPA review but may require permits. These projects include permanent repairs or restorations where impacts are expected to be minor in nature. The projects are considered in accordance to 23 CFR 771.117(c)(9). These are permanent repairs or restoration that occur by FHWA program approval and include minor alterations or betterments that require coordination and/or permits and approval from state or federal agencies. Examples are projects that include, but are not limited to: additional riprap (more than

pre-existing); projects that impact wetlands beyond pre-existing conditions; projects that require Endangered Species Act clearance or Section 106 review of location or material sources (non pre-approved); projects that include other than minor upgrades in pipe, which as a result of a hydraulic analysis, require a modest increase in pipe size (e.g., 2 standard diameter increases or 30" to 42" diameter) or length (approximately 10 percent increase) to bring the typical section up to current standard.

These projects may have impacts and/or mitigation that require public and/or state and federal agency coordination, this coordination should be documented by a spreadsheet listing the projects and coordination or activities completed, e.g., 404 Permit, Floodplain, Section 106, Hydraulic Review, etc.

These projects are processed as CATEXs using an approved DDIR. NDDOT shall certify to FHWA in the authorization request that all required permits have been obtained. Local project owners certify to NDDOT that all required permits have been obtained.

c. Category Three

Category Three is a CATEX that requires a documented NEPA evaluation. These projects include permanent repairs or restorations that occur by FHWA program approval and include major alterations or betterments that require coordination and/or permits and approval from state or federal agencies. Examples include box culvert and bridge replacements, projects that impact 4(f) properties, permanent grade raises, major typical section changes, major footprint changes, etc. that have the potential for adverse effects. These projects may require public involvement and/or have engineering analysis or environmental impacts that require state and/or federal agency coordination, permits, etc.

The class of action and level of documentation required in the NEPA process should be coordinated with FHWA on a project-by-project basis. FHWA NEPA approval must be obtained prior to FMIS authorization.

d. Documentation

The Local Government Division develops and maintains the master Emergency Relief spreadsheet. The spreadsheet is located to provide accessibility to local government, Environmental and Transportation Services, Maintenance Division, and programming divisions. The respective divisions populate the spreadsheet as necessary.

The Local Government Division processes the local government (urban and county) projects. Environmental and Transportation Services processes the state projects.

Category classification is identified with the DDIR for approval by the FHWA.

The DDIR is placed into FileNet after the Project Control Number (PCN) and Project Number have been assigned.

The Programming Division uses the DDIR and includes the category classification when requesting project authorization from FHWA.

V. Regulatory Compliance and Environmental Guidelines

Work shall be completed in accordance with the NWP 3 for maintenance activities. Paragraph (a) of the permit provides for the repair, rehabilitation, or replacement of structures or fills; preconstruction notification is not required. Paragraph (c) of the permit also authorizes temporary structures, fills, and work necessary to conduct the maintenance activity. The NWP 3 applies provided impacts are minimal.

*The NWP 3 Factsheet, General Conditions, Regional Conditions and 401 Water Quality Certifications are at <http://www.nwo.usace.army.mil/html/od-rnd/factsheet.htm> and click on *Maintenance, NDDH 401 Cert* and *EPA 401 Cert* for each respective document.*

The Department or other agency must comply with the following general conditions, as appropriate, in addition to any regional or case-specific conditions imposed by the USACE Division Engineer or District Engineer, to be authorized to conduct the work:

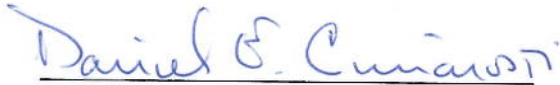
- a. Work in spawning areas during the spawning season must be avoided to the maximum extent practicable. Turbidity control measures must be placed to minimize effects. (Spawning restrictions may be waived by the USACE or other resource agencies as may be applicable; contact the Environmental and Transportation Services Division – Environmental Services to obtain requirements.)
- b. Fills within 100-year floodplain do not require authorization since the original footprint would be reestablished.
- c. Erosion and sediment control measures must be used and maintained in effective operating conditions during construction, and all exposed soil and other fills must be permanently stabilized to prevent erosion and sedimentation.
- d. Temporary structures must be removed in their entirety and the affected areas returned to preconstruction elevations, and revegetated as necessary.
- e. Material Sources (fill, gravel, riprap, etc.) must be from a pre-approved or previously established source. New material sources must be cleared pursuant to the Material Source Clearance process (Section 107.04 of the current edition of the *NDDOT Standard Specifications for Road and Bridge Construction*) prior to initiating activity.
 - i. Compliance with the Endangered Species Act is addressed by limiting the work to pre-existing conditions and by coordination with the USFWS during the Material Source Clearance process.
 - ii. Compliance with the National Historical Preservation Act is addressed by limiting the work to pre-existing conditions and by coordination with the State Historical Preservation Office (SHPO) and through the Material Source Clearance process.

EXECUTION of this Programmatic Agreement shall constitute conclusive evidence that the USACE, USFWS, FHWA, and NDDOT agree to be bound by the foregoing conditions and to perform the obligations herein set forth.

Any agency to this Programmatic Agreement may terminate their participation by providing thirty (30) days written notice to the other agencies, provided that the agencies will consult during the period before termination to seek agreement on amendments or other action that would avoid termination.

Signed by:

UNITED STATES ARMY CORPS OF ENGINEERS



Daniel E. Cimarosti
State Program Manager, Bismarck Regulatory Office

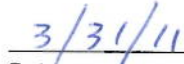


Date

UNITED STATES FISH AND WILDLIFE SERVICE



Jeffrey K. Towner
Field Supervisor, North Dakota Field Office



Date

FEDERAL HIGHWAY ADMINISTRATION

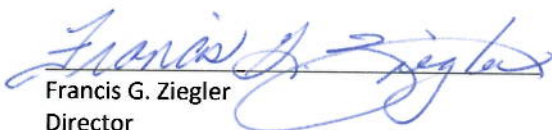


Wendall L. Meyer
North Dakota Division Administrator

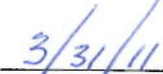


Date

NORTH DAKOTA DEPARTMENT OF TRANSPORTATION



Francis G. Ziegler
Director



Date