

**TIER 3 CATEGORICAL EXCLUSION
&
PROGRAMMATIC 4(F) EVALUATION**

**ARDOT JOB 040793
FAP NHPP-0065(62)
DITCH AT L.M. 18.699 STR. & APPRS. (S)
ROUTE 45, SECTION 1
SEBASTIAN COUNTY**

Submitted Pursuant to 42 U.S.C. 4332(2)

By the

U.S. Department of Transportation
Federal Highway Administration

And the

Arkansas Department of Transportation

July 2022

July 28, 2022

Date of Approval



Randal Looney
Environmental Coordinator
Federal Highway Administration

The Environmental Division reviewed the referenced project and has determined it falls within the definition of the Tier 3 Categorical Exclusion as defined by the ARDOT/FHWA Programmatic Agreement on the processing of Categorical Exclusions. The following information is included for your review and, if acceptable, approval as the environmental documentation for this project.

The purpose of this project is to replace weight restricted bridge over Cedar Creek on Highway 45 in Sebastian County, Arkansas. Total length of the project is 0.43 mile. A project location map is attached.

ARDOT Bridge Number 00879 is 26' x 43'. The existing roadway consists of two 10' wide paved travel lanes with 4' wide paved shoulders. Existing right of way width is 100'.

The bridge will be replaced with a triple-barrel concrete box culvert. Proposed roadway improvements include two 11' wide paved travel lanes with 6' wide paved shoulders. The proposed right of way width will average 150'. Approximately 3.3 acres of additional right of way will be required for this project. Of this acreage, 1.9 acres of prime farmland and 0.5 acre of Farmland of Statewide Importance will be impacted. A NRCS-CPA-106 Form addressing these farmland impacts is attached.

Design data for this project is as follows:

Design Year	Average Daily Traffic	Percent Trucks	Design Speed
2023	6,200	3	55 mph
2043	7,300		

There are no relocations, wetlands, or environmental justice issues associated with this project. Field inspections found no evidence of existing underground storage tanks or hazardous waste deposits.

ARDOT, in consultation with the State Historic Preservation Program staff, determined Bridge Number 00879 as eligible for inclusion in the National Register of Historic Places (NRHP) as part of the 2007 ARDOT Historic Bridge Inventory. After being determined NRHP eligible, the Historic Bridge Analysis Committee recommended marketing the bridge to federal, state, and local entities for reuse at its current location. No entity was found willing to take ownership of the bridge for preservation in place. An executed Memorandum of Agreement among the FHWA, ARDOT, and SHPO stipulates the mitigation for the bridge demolition. This mitigation includes architectural documentation to SHPO standards with

photographs and laser scanning. No other structures or archeological sites eligible for, or listed in, the NHRP will be impacted by the proposed project. The Programmatic Section 4(f) evaluation for the bridge is attached.

The official species lists obtained from the US Fish and Wildlife Service's (USFWS) Information for Planning and Consultation identified the following species as potentially occurring within the project area: Indiana bat (*Myotis sodalis*), northern long-eared bat (*Myotis septentrionalis*), Eastern Black Rail (*Laterallus jamaicensis ssp. jamaicensis*), Piping Plover (*Charadrius melodus*), Red Knot (*Calidris canutus rufa*), American burying beetle (*Nicrophorus americanus*) (ABB), and the monarch butterfly (*Danaus plexippus*). See the attached USFWS species lists.

Utilizing the Arkansas Determination Key, it has been determined that the project will have "no effect" on the Eastern Black Rail, Piping Plover, and Red Knot.

Utilizing the FHWA Programmatic Biological Opinion for Transportation Projects Within the Range of Indiana Bat and Northern Long-Eared Bat, it has been determined that the project "may affect and is likely to adversely affect" the Indiana bat. ARDOT proposes \$1,876 to be deducted from the USFWS-approved Indiana Bat Spring Migration Research Project as compensatory mitigation for the removal of 0.3 acre of suitable habitat. The USFWS concurred on 7/22/2022.

The NLEB Final 4(d) Rule applies to the project's activities that have the potential to affect northern long-eared bats. The NLEB Final 4(d) Rule exempts the incidental take of northern long-eared bats from take prohibitions in the Endangered Species Act. The exemptions apply as long as the activities do not occur within 0.25 mile of a known hibernaculum or within 150 feet of a known occupied maternity roost from June 1 to July 31. No known hibernacula or maternity roosts exist within the project limits; therefore, the project can proceed without restrictions.

The ABB Final 4(d) Rule applies to the project's activities that have the potential to affect American burying beetles. The Final 4(d) Rule exempts the incidental take of American burying beetles from take prohibitions in the Endangered Species Act. The exemptions apply as long as the activities do not occur on certain conservation lands in the Southern Plans Analysis Areas. Within Arkansas, these conservation lands are entirely within the existing boundaries of Fort Chaffee. This project occurs outside of the existing boundaries of Fort Chaffee; therefore, the project can proceed without restrictions.

The Monarch butterfly is a candidate species, and as such, is not federally protected under the Endangered Species Act. However, the USFWS recommends agencies implement conservation measures for candidate species in action areas, as these are species by definition, that may warrant future protection under the

Act. ArDOT will plant native wildflowers after construction as a conservation measure.

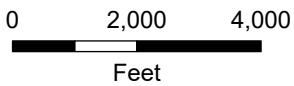
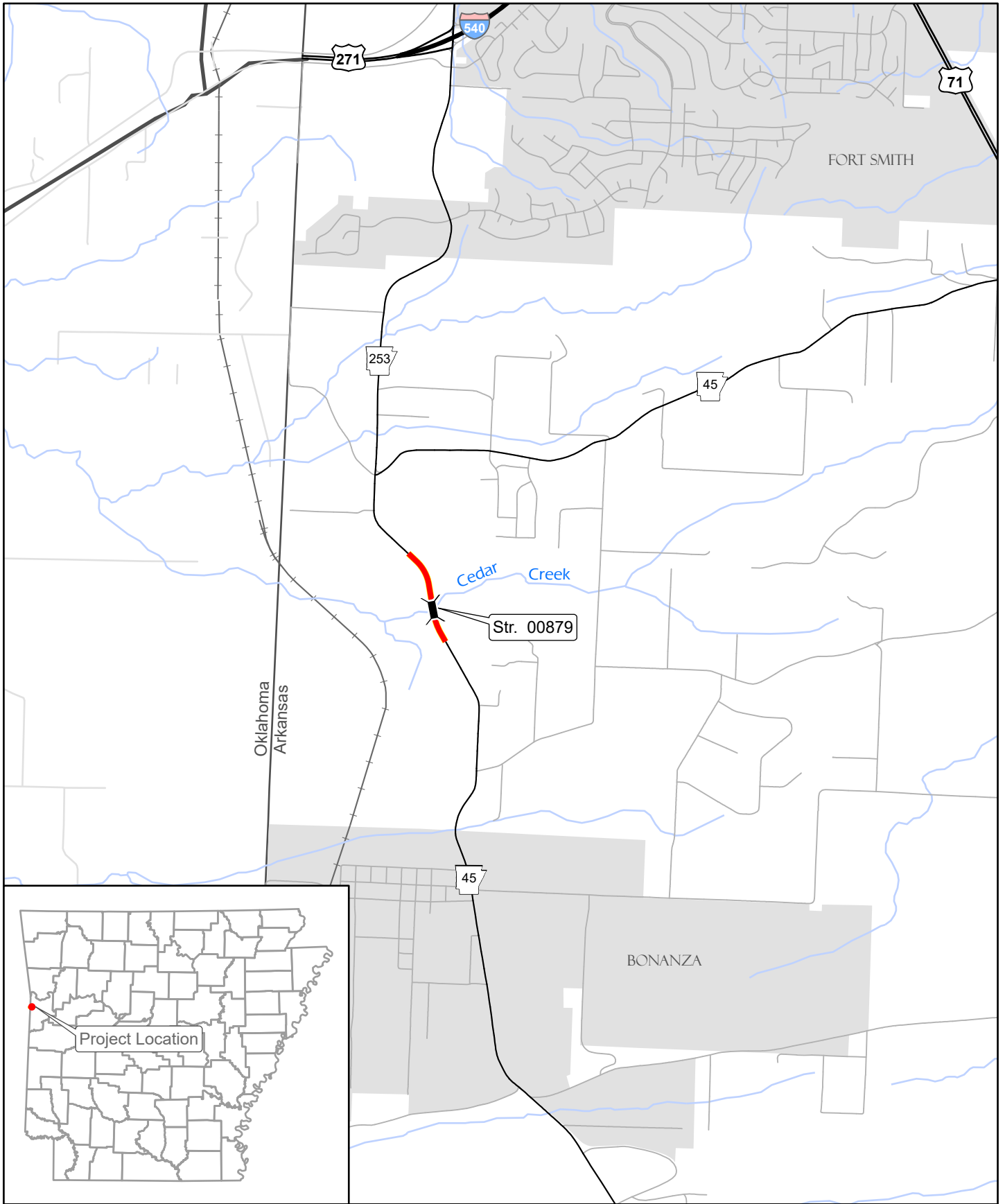
Permanent impacts to Cedar Creek total 86' due to box culvert construction. Construction of the proposed project should be allowed under the terms of a Nationwide 14 Section 404 Permit for Linear Transportation Projects as defined in the Federal Register 86(245):73522-73583.

This project has been determined to generate minimal air quality impacts for *Clean Air Act* criteria pollutants and has not been linked with any special mobile source air toxics (MSAT) concerns. As such, this project will not result in changes in traffic volumes, vehicle mix, basic project location, or any other factor that would cause a meaningful increase in MSAT impacts of the project from that of the no-build alternative.

Sebastian County participates in the National Flood Insurance Program. The project lies within the Zone A Special Flood Hazard Area. The final project design will be reviewed to confirm that the design is adequate and that the potential risk to life and property are minimized. Adjacent properties should not be impacted nor have a greater flood risk than existed before construction of the project. None of the encroachments will constitute a substantial floodplain encroachment or risk to property or life.

Based on the ARDOT noise policy, a noise analysis is not required for this project. The bridge replacements will not involve adding capacity, substantially changing the roadway alignment, or exposing noise sensitive land uses to traffic noise sources. In compliance with federal guidelines, local authorities will not require notification.

No other adverse environmental impacts were identified. The checklist used to verify consideration of potential environmental impacts is attached.



ARDOT - Environmental GIS - Dudley
February 11, 2022

Job 040793
Ditch at L.M. 18.699
Strs. & Apprs. (Hwy. 45)
Sebastian County





Asa Hutchinson
Governor
Stacy Hurst
Secretary

August 4, 2021

Mr. John Fleming
Division Head
Environmental Division
Arkansas Department of Transportation
P.O. Box 2261
Little Rock, AR 72203-2261

Re: Sebastian County – General
Section 106 Review – FHWA
Big Branch & Cedar Creek Strs. & Apprs. (S)
Route 45, Section 1
ARDOT Job Number 040793
AHPP Tracking Number 106218.03

Dear Mr. Fleming:

The staff of the Arkansas Historic Preservation Program (AHPP) reviewed the Project Identification Form for the above-referenced job in Sections 16 and 21, Township 6 North, Range 32 West (Bridge 02224) and Sections 28 and 29, Township 7 North, Range 32 West (Bridge 00879) in Sebastian County. As described, the undertaking entails the replacement of Bridges 02224 (AHPP Resource SB0453) and 00879 (AHPP Resource SB0982) near Hackett and Bonanza. The survey area totals 6.06 acres. A .34-acre segment will require survey after the acquisition of the right-of-way. There are no historic or unevaluated properties documented within either survey area.

In correspondence dated July 30, 2020, the AHPP confirmed that Bridge 02224 (AHPP Resource SB0453) is listed in the National Register and that Bridge 00879 (AHPP Resource SB0982) is eligible for listing. Both resources are eligible under Criteria A and C. The Arkansas Department of Transportation will draft a memorandum of agreement (MOA) governing the mitigation of adverse effects to Bridges 02224 and 00879.

Based on the provided information and fulfillment of the stipulations provided by the MOA, the AHPP anticipates no adverse effect to historic properties. We will provide our concurrence after receipt of the MOA.

Tribes that have expressed an interest in the area include the Caddo Nation, the Cherokee Nation, the Choctaw Nation of Oklahoma, the Muscogee (Creek) Nation, the Osage Nation, the Quapaw Nation, and the Shawnee Tribe. We recommend consultation in accordance with 36 CFR § 800.2(c)(2).

Thank you for the opportunity to review this undertaking and thorough report. If you have any questions, please contact Eric Mills of my staff at (501) 324-9784 or eric.mills@arkansas.gov.

Sincerely,

Eric R. Mills  Digitally signed by Eric R. Mills
Date: 2021.08.04 14:15:56 -05'00'

for

Scott Kaufman
Director, AHPP

cc: Mr. Randal Looney, Federal Highway Administration
Dr. Melissa Zabecki, Arkansas Archeological Survey

**FARMLAND CONVERSION IMPACT RATING
FOR CORRIDOR TYPE PROJECTS**

PART I (To be completed by Federal Agency) Job 040793	3. Date of Land Evaluation Request	4. Sheet 1 of _____
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1. Name of Project	5. Federal Agency Involved
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2. Type of Project	6. County and State
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PART II (To be completed by NRCS)	1. Date Request Received by NRCS	2. Person Completing Form
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3. Does the corridor contain prime, unique statewide or local important farmland? (If no, the FPPA does not apply - Do not complete additional parts of this form). YES <input type="checkbox"/> NO <input type="checkbox"/>	4. Acres Irrigated Average Farm Size
---	--

5. Major Crop(s)	6. Farmable Land in Government Jurisdiction Acres: _____ %	7. Amount of Farmland As Defined in FPPA Acres: _____ %
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8. Name Of Land Evaluation System Used	9. Name of Local Site Assessment System	10. Date Land Evaluation Returned by NRCS
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PART III (To be completed by Federal Agency)	Alternative Corridor For Segment			
	Corridor A	Corridor B	Corridor C	Corridor D

A. Total Acres To Be Converted Directly				
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B. Total Acres To Be Converted Indirectly, Or To Receive Services				
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C. Total Acres In Corridor				
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PART IV (To be completed by NRCS) Land Evaluation Information				
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A. Total Acres Prime And Unique Farmland				
--	--	--	--	--

B. Total Acres Statewide And Local Important Farmland				
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C. Percentage Of Farmland in County Or Local Govt. Unit To Be Converted				
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D. Percentage Of Farmland in Govt. Jurisdiction With Same Or Higher Relative Value				
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PART V (To be completed by NRCS) Land Evaluation Information Criterion Relative value of Farmland to Be Serviced or Converted (Scale of 0 - 100 Points)				
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PART VI (To be completed by Federal Agency) Corridor Assessment Criteria (These criteria are explained in 7 CFR 658.5(c))	Maximum Points			
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1. Area in Nonurban Use	15			
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2. Perimeter in Nonurban Use	10			
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3. Percent Of Corridor Being Farmed	20			
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4. Protection Provided By State And Local Government	20			
--	----	--	--	--

5. Size of Present Farm Unit Compared To Average	10			
--	----	--	--	--

6. Creation Of Nonfarmable Farmland	25			
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7. Availability Of Farm Support Services	5			
--	---	--	--	--

8. On-Farm Investments	20			
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9. Effects Of Conversion On Farm Support Services	25			
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10. Compatibility With Existing Agricultural Use	10			
--	----	--	--	--

TOTAL CORRIDOR ASSESSMENT POINTS	160			
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PART VII (To be completed by Federal Agency)				
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Relative Value Of Farmland (From Part V)	100			
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Total Corridor Assessment (From Part VI above or a local site assessment)	160			
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TOTAL POINTS (Total of above 2 lines)	260			
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1. Corridor Selected:	2. Total Acres of Farmlands to be Converted by Project:	3. Date Of Selection:	4. Was A Local Site Assessment Used? YES <input type="checkbox"/> NO <input type="checkbox"/>
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5. Reason For Selection:

Signature of Person Completing this Part:	DATE
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Joshua Graham

NOTE: Complete a form for each segment with more than one Alternate Corridor



PROGRAMMATIC SECTION 4(F) EVALUATION FOR
FEDERALLY-AIDED HIGHWAY PROJECTS THAT NECESSITATE
THE USE OF HISTORIC BRIDGES

ARDOT Job 040793

Ditch at L.M. 18.699 Strs. & Apprs. (S)

Sebastian County

June 2022

Submitted Pursuant to 49 USC Section 303 and 23 USC Section 138 by the U.S. Department of Transportation Federal Highway Administration and the Arkansas Department of Transportation.

Programmatic Section 4(f) Evaluation – Historic Bridges

1 Why is this report being prepared?

Section 4(f) of the Department of Transportation Act of 1966 declared a national policy to make a special effort to preserve the natural beauty of the countryside, public parks and recreation lands, wildlife and waterfowl refuges, and historic sites. The current Section 4(f) legislation permits the Secretary of Transportation to approve a project that requires the use of historic bridge structures scheduled to be replaced or rehabilitated with Federal funds. Approval depends on a determination that no feasible and prudent alternative to the use of the property existed, and all possible planning occurred to minimize harm to the property resulting from such use. These determinations, pursuant to 49 United States Code (USC) Section 303 and 23 USC Section 138, are described in this Programmatic Section 4(f) Evaluation.

2 What would the project accomplish?

The Arkansas Department of Transportation (ARDOT), in conjunction with the Federal Highway Administration (FHWA), proposes construction of a new bridge across a ditch formerly known as Cedar Creek along Highway 45 in Sebastian County, Arkansas. The project improves safety and transportation needs in western Arkansas. As part of the project, a historic bridge will be replaced.

ARDOT Bridge Number 00879 (Cedar Creek Bridge) is a steel multi-beam bridge consisting of steel W-beams. The total length of the bridge is 43 feet. It has two 10-foot wide travel lanes and two 1.5-foot sidewalks, with a total clear roadway width of approximately 26 feet. The Bridge Inspection Report dated August 25, 2021, lists the condition of the deck, the superstructure, and substructure all as fair (code 5).

The bridge replacement structure is planned as a triple-barrel reinforced concrete box culvert measuring approximately 86 feet long and 34 feet wide. To meet current standards, the new culvert roadway plans show two 11-foot wide paved travel lanes, each with a 6-foot shoulder.

3 What Section 4(f) properties are being impacted?

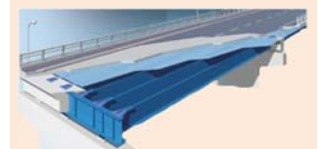
The State Highway Department engineers designed ARDOT Bridge Number 00879 (Cedar Creek Bridge) in 1941, and the Works Projects Administration (WPA), previously known as the Works Progress

What are Section 4(f) properties?

Section 4(f) properties include significant publicly owned parks, recreation areas, and wildlife or waterfowl refuges, or any publicly or privately owned historic site listed or eligible for listing in the National Register of Historic Places with national, state, or local significance. The ARDOT considers historic bridges as historic sites.

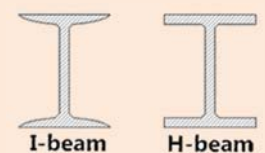
What is a steel stringer or multi-beam bridge?

The primary structure of the bridge consists of three or more parallel rolled beams also called stringers.



What is an H-beam or W-beam bridge?

H-beams developed as a variation of the I-beam in the early 1900s. While the I-beam has tapered flanges (top and bottom pieces), the H-beam does not. Its name comes from the blocky H shape. It is also known as a wide-flange beam or a W-beam.



Administration, built the bridge in 1942. It consists of one 39-foot long simple span with a reinforced concrete deck on steel W-beams (Figure 1). The beams rest on masonry abutments with concrete caps. The railings consist of concrete posts and rails, with a design typical of the 1940s. The railings have sustained impact damage over the years but have been repaired with like design and materials, visible by the lighter colored concrete. The bridge retains its historic integrity.

The Cedar Creek Bridge was determined eligible for inclusion in the National Register of Historic Places (NRHP) during the 2007 ARDOT Historic Bridge Inventory. It is eligible under Criterion A for its association with the WPA, a Depression Era program (Figure 2). The bridge spans the crossing of an unnamed ditch, historically known as Cedar Creek. The bridge is also eligible under Criterion C as a good example of a W-beam bridge on concrete and masonry abutments, a well-known WPA building material combination. The State Highway Department designed the bridge, including those abutments, indicating that the bridge construction by WPA workers was planned prior to design. The bridge plans also show an early documentation of the W-beam use in Arkansas.

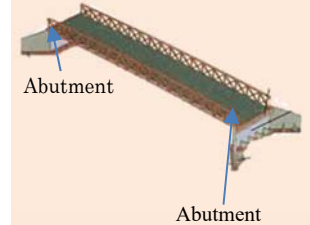
Cedar Creek Bridge



Figure 1

What is a bridge abutment?

An abutment generally retains the embankment and supports the bridge, connecting the bridge to the ground on either end. A masonry abutment consists of stone or brick.



What are the National Register Criteria for evaluation?

Properties that possess significance in American history, architecture, archeology, engineering, and culture that retain aspects of integrity, and:

- A) associated with an event, broad patterns, or trends of history;
- B) associated with an important person(s);
- C) embody typical features of a type, period, or construction method, that represent the work of a master, or possess high artistic values; or
- D) that have yielded, or will likely yield, significant information for history or prehistory.

(National Register Bulletin 15: <https://www.nps.gov/NR/PUBLICATIONS/bulletins/nrb15/>)

Cedar Creek Bridge, WPA Stamp on the Bridge End



Figure 2

What was the Works Progress Administration?

The Works Progress Administration (WPA), later renamed the Works Projects Administration in 1939, began as part of President Franklin Delano Roosevelt's New Deal. WPA operations in Arkansas dated from 1935 through June 1943. This program employed Arkansans and contributed buildings, roads, bridges, and culverts to the state during the Great Depression. WPA structures are generally known for craftsmanship in concrete and stone construction.

The Cedar Creek Bridge is not considered a National Historic Landmark.

4 Does this project qualify for the Section 4(f) programmatic for historic bridges?

The FHWA may apply the programmatic Section 4(f) evaluation to projects that meet the criteria shown in Table 1.

Table 1

Criteria To Use Programmatic Section 4(f) Evaluation For Federally-Aided Highway Projects That Necessitate The Use of Historic Bridges

The bridge is to be replaced or rehabilitated with Federal funds.	√
The project will require the use of a historic bridge structure that is eligible for inclusion or listed in the NHRP.	√
The bridge is not a National Historic Landmark.	√
The FHWA Division Administrator determines that the facts of the project match those set forth in the FHWA Section 4(f) Policy Paper issued March 1, 2005.	√
Agreement has been reached among the FHWA, State Historic Preservation Officer (SHPO), and the Advisory Council on Historic Preservation through procedures pursuant to Section 106 of the National Historic Preservation Act (NHPA).	√

What are the qualifications for a National Historic Landmark?

A National Historic Landmark is a property selected by the Secretary of the Interior for its national historic significance. The property should "possess exceptional value in honoring or showing the history of the United States," according to the National Park Service (<https://www.nps.gov/nhl/learn/intro.htm>).

Figure 1

5 Could the project avoid demolishing the historic bridge?

For a Programmatic Section 4(f) Evaluation and Approval for FHWA Projects That Necessitate the Use of Historic Bridges to be applied to a project, each of the three following alternatives must be supported by circumstances, studies, and consultations on the project:

- 1) No Action,
- 2) Rehabilitation of the Existing Structure, and
- 3) Build on New Location and Retain the Existing Structure.

ARDOT established a Historic Bridge Analysis Committee (HBAC) to evaluate viable alternatives for the preservation of historically significant bridges through retention, rehabilitation, or justification of their removal. The HBAC evaluated the required alternatives to determine if a feasible and prudent alternative exists to the proposed impacts on this historic bridge. The results of the discussion are listed below.

No Action

This alternative involves no improvements to the existing facility and continues providing only routine maintenance. The roadway across the bridge is narrow for current design standards. The bridge railing does not meet current crash test requirements or *AASSTO Manual for Assessing Safety Hardware* (MASH) criteria. And the bridge is posted with weight restrictions.

This alternative does nothing to improve the existing roadway width, carrying capacity, or railing deficiencies and would not alleviate safety issues. It is not prudent to leave the bridge in this condition, resulting in safety and operational concerns.

Rehabilitation of the Existing Structure

Two rehabilitation alternatives were considered for this project.

Rehabilitation Alternative One rehabilitates the existing historic bridge for two-way traffic operations. To meet current design standards, the alternative would require a minimum width of approximately 34 feet. With a clear roadway width of 26 feet, it does not meet minimum design standards. Widening adds reinforced concrete adjacent or attached to the current masonry piers, resulting in an incompatible addition, and compromising the bridge’s historic integrity. It is not feasible, or good engineering judgement, to widen the structure. The bridge and abutments are not designed to carry current weights. In evaluating rehabilitation for less than design standards, the bridge remains posted with weight restrictions, leaving a safety issue. *Rehabilitation Alternative One* is not

What is meant by feasible?

Per 23 CFR 774.17, Feasible and prudent avoidance alternative definitions:
 (2) An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.

What is meant by prudent?

Per 23 CFR 774.17, *Feasible and prudent avoidance alternative definitions*:
 (3) An alternative is not prudent if:
 (I) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;
 (ii) It results in unacceptable safety or operational problems;
 (iii) After reasonable mitigation, it still causes:
 (A) Severe social, economic, or environmental impacts
 (B) Severe disruption to established communities;
 (C) Severe disproportionate impacts to minority or low income populations; or
 (D) Severe impacts to environmental resources protected under other Federal statutes;
 (iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
 (v) It causes other unique problems or unusual factors; or
 (vi) It involves multiple factors in paragraphs (3)(I) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

prudent as it impacts the historic integrity of the structure and results in unacceptable safety and operational problems.

Rehabilitation Alternative Two rehabilitates the existing historic bridge for one-way traffic operations and constructs a new bridge for one-way traffic operations in the opposite direction. The width would meet the design criteria; however, a couplet bridge adds a safety issue introducing curves at both ends of the bridge to split and rejoin the roadway. An approach gutter would need to be added protecting the couplet bridge, and that addition would impact the bridge's historic integrity. The weight restriction remains with this alternative due to the original design. *Rehabilitation Alternative Two* is not prudent due to affects to the historic integrity of the bridge and unacceptable safety and operational problems.

New Location

The *New Location Alternative* constructs a new bridge, according to the approved ARDOT project design decisions, in a new location with the owner maintaining possession of the historic bridge and preserving it in place. ARDOT owns the Cedar Creek Bridge. The design of the proposed bridge on a new location is feasible; however, it is the policy of ARDOT to no longer retain bridges following their removal from the highway system.

A new bridge can be built to current, minimum design standards with another entity accepting ownership of the historic bridge for preservation in place. ARDOT marketed the bridge on April 7, 2021, to find an entity willing to accept the bridge (see Appendix A for marketing correspondence). No entity was found willing to accept ownership and maintenance responsibility of the bridge for preservation in place. The *New Location Alternative* is not prudent as it would either result in additional maintenance costs of extraordinary magnitude creating liability concerns for ARDOT.

6 How will the ARDOT mitigate for the harm being done to the historic property?

The FHWA and the SHPO reached an agreement through the Section 106 process (36 CFR 800) of NHPA (16 USC 470) on measures to minimize harm. These measures have been incorporated into this project. Through a Memorandum of Agreement (MOA), it was agreed that ARDOT Bridge Number 00879 be documented to the Arkansas Historic Preservation Program's (AHPP) architectural documentation standards and then demolished. A copy of the MOA, which includes all agreed-upon mitigation stipulations, can be found in Appendix B.

7 What are the findings of the alternatives analysis and this evaluation?

Table 2 contains a summary of the analysis and decision-making information included in this evaluation.

Table 2

Section 4(f) Analysis Summary

Alternative	Feasible	Prudent	Uses Section 4(f) Property	Harm to Section 4(f) Property
No Action	Yes	No	No	None
Rehabilitation One	No	No	Yes	Adverse Effect
Rehabilitation Two	Yes	No	Yes	Adverse Effect
New Location	Yes	No	Yes	Adverse Effect*

* No entity was found willing to take title for the bridge.

Based on the above considerations, no feasible and prudent alternative exists avoiding the use of the historic bridge. The proposed action includes all possible planning to minimize the harm to the historic bridge resulting from such use.

8 What are the recommendations on this project?

ARDOT recommends that the Cedar Creek Bridge is documented to AHPP architectural documentation standards and demolished as agreed under the stipulations in the MOA (Appendix B).

The above documentation illustrates that the proposed project complies with all requirements of the Programmatic Section 4(f) Evaluation for Federal-aid highway projects that require the use of a historic bridge.

Appendix A: Marketing Correspondence



ARKANSAS DEPARTMENT OF TRANSPORTATION

ArDOT.gov | IDriveArkansas.com | Lorie H. Tudor, P.E., Director

ENVIRONMENTAL DIVISION

10324 Interstate 30 | P.O. Box 2261 | Little Rock, AR 72203-2261 | Phone: 501.569.2281 | Fax: 501.569.2009

April 7, 2021

RE: Historic Bridge 00879
Job Number 040793
Big Branch & Cedar Creek
Strs. & Apprs. (S).
Sebastian County
Historic Bridge Marketing Request

To Whom It May Concern:

The Arkansas Department of Transportation (ARDOT) is planning to replace Bridge Number 00879 (Cedar Creek Bridge) on Highway 45 in Sebastian County. This bridge was determined eligible to the National Register of Historic Places (NRHP) as part of the ARDOT's 2007 Historic Bridge Inventory. A location map and further information about the bridge are enclosed.

The Fixing America's Surface Transportation (FAST) Act, 23 USC § 144 (g)(5) states: "Any State which proposes to demolish a historic bridge for a replacement project ... shall first make the bridge available for donation to a State, locality, or responsible private entity..." As part of the mitigation process, the ARDOT is offering to donate Bridge Number 00879 to any government or entity that demonstrates a willingness to accept the title, maintain in place, preserve the historic features, and assume the financial responsibility for the continued maintenance of the structure.

The ARDOT, through the Federal Highway Administration (FHWA), can reimburse costs associated with preservation up to the demolition estimate expense for bridges preserved in place. The demolition estimated reimbursement will be determined by the FHWA, not to exceed 100% of the bridge's demolition costs, based on the estimate by ARDOT. The costs associated with preservation could include rehabilitation of the bridge or minor modifications for recreational use.

If you are interested in acquiring this bridge, please respond with a letter of interest addressed to me within 45 days from this letter's date. Such letter submission does not commit an entity to accept the bridge. Following its receipt, the ARDOT Historic Bridge Analysis Committee will request a preservation plan, including the required information for consideration, before a preferred recipient is selected. For further information, contact Nikki Senn at (501) 569-2979 or at Nikki.Senn@ardot.gov.

Sincerely,

John Fleming
Division Head
Environmental Division

Enclosures
JF:NS:cb

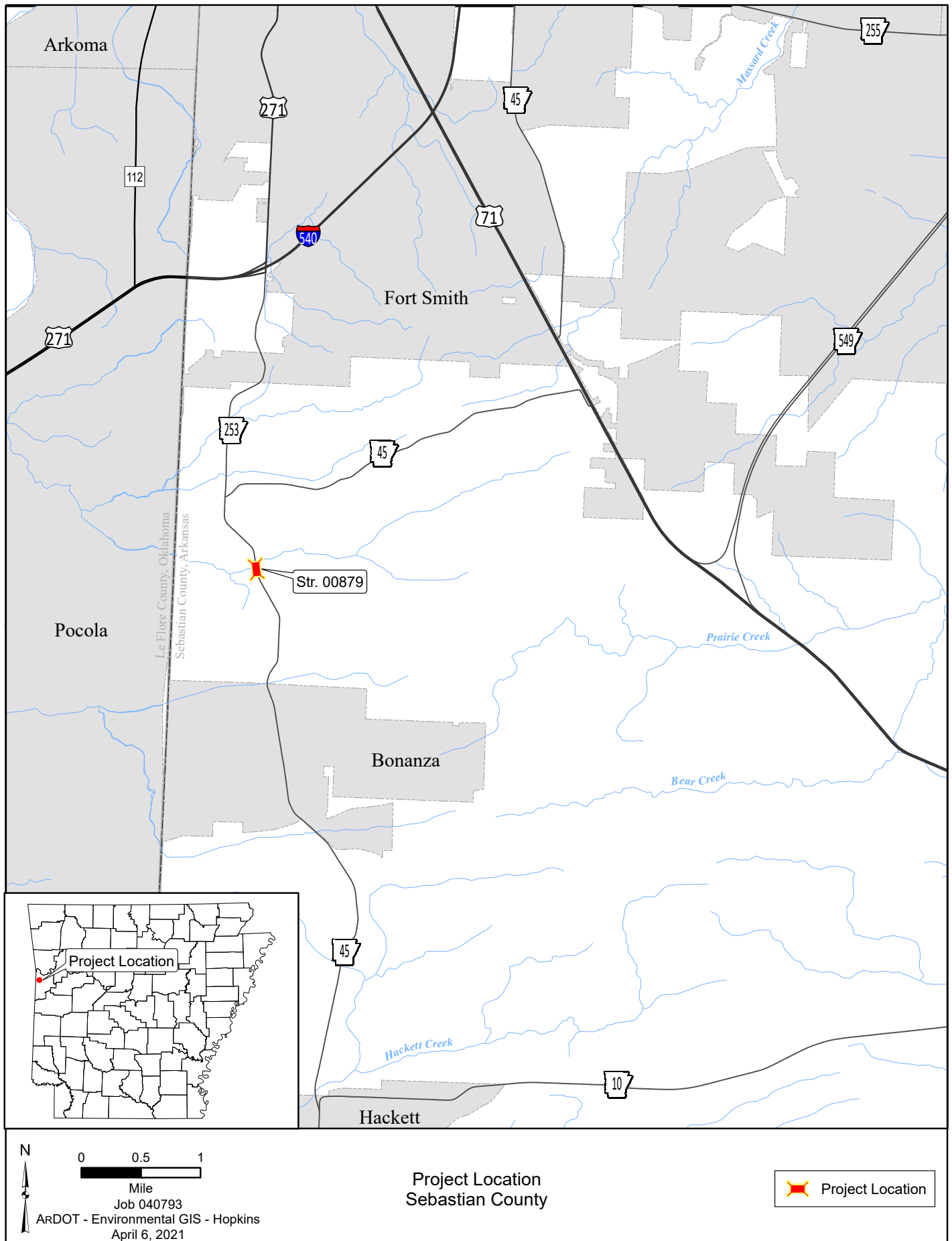
c: Assistant Chief Engineer - Planning
Bridge Division
District 4 Engineer

ARDOT Job Number 040793
Historic Bridge Marketing Description



ARDOT Bridge Number 00879 was determined eligible for inclusion in the National Register of Historic Places during the 2007 ARDOT Historic Bridge Inventory. The Arkansas State Highway Department engineers designed the bridge on Highway 45 over Cedar Creek. The Works Projects Administration constructed it under Job 004266 in 1942. ARDOT Bridge Number 00879 (Cedar Creek Bridge) is a steel stringer/multi-beam bridge measuring 43 feet long and approximately 26 feet wide.

The Works Progress Administration (WPA), later renamed the Works Projects Administration in 1939, came into existence as a program under President Franklin Delano Roosevelt's New Deal. WPA operations in Arkansas dated from 1935 through June 1943. This program employed Arkansans and contributed roads, bridges, and culverts to Arkansas. The New Deal relief programs impacted the economy and morale across the country. This bridge is significant for its association with the WPA. It is also significant for the craftsmanship of stone and concrete construction, a common materials combination among WPA projects.



**Job 040793 Marketing
Bridge 00879**

Marketing Groups	Greeting	Name	Title	Agency	Address 1	Address 2	City
Mayor	Mayor Harper	Trini Harper	Mayor	City of Hackett	P.O. Box 209		Hackett, AR 72937
Mayor	Mayor Gattis	Wally Gattis	Mayor	City of Barling	P.O. Box 23039		Barling, AR 72923
Mayor	Mayor Kinslow	Doug Kinslow	Mayor	City of Greenwood	P.O. Box 1450		Greenwood, AR 72936
Chamber of Commerce	President Ware	Meryl Ware	President	Greenwood Chamber of Commerce	16 Town Square Street		Greenwood, AR 72936
County Judge	Judge Hudson	David Hudson	County Judge	Sebastian County	35 South 6th Street		Fort Smith, AR 72902
County Historical Society				Fort Smith Historical Society	P.o. Box 3676		Fort Smith, AR 72913
County Historical Society				South Sebastian County Historical Society	P.O. Box 523		Greenwood, AR 72936
Arkansas Historical Association	Ms. Matkin-Rawn	Story Matkin-Rawn	President	Arkansas Historical Association	Department of History, University of Arkansas	416 Old Main	Fayetteville, AR 72701
Preserve Arkansas	Ms. Patton	Rachel Patton	Executive Director	Preserve Arkansas	P.O. Box 305		Little Rock, AR 72203-0305
Association of Arkansas Counties	Ms. Smith	Christy Smith	Communications Director	Association of Arkansas Counties	1415 W. Third St.		Little Rock, AR 7220
Arkansas Game and Fish Commission	Mr. Fitts	Pat Fitts	Director	Arkansas Game and Fish Commission	2 Natural Resources Drive		Little Rock, AR 72205
Arkansas Game and Fish Commission	Mr. Bowman	Darrell Bowman	Assistant Chief of Fisheries Management	Arkansas Game and Fish Commission	2 Natural Resources Drive		Little Rock, AR 72205
Arkansas Game and Fish Commission	Mr. Wentz	Tate Wentz	Stream Team Biologist	AGFC Stream Team Region III	915 East Sevier Street		Benton, AR 72015
Arkansas Game and Fish Commission	Mr. Burnley	Tim Burnley	Stream Habitat Programs' Coordinator	Arkansas Game and Fish Commission	201 E. 5th Street		Mountain Home, AR 72653
Arkansas Game and Fish Commission	Mr. Saunders	Sean Saunders	Region I Stream Team Coordinator	Arkansas Game and Fish Commission			
US Corps of Engineers	Colonel Miller	Colonel Eric M. Noe	Commander and District Engineer	U.S. Army Corps of Engineers	Little Rock District, P.O. Box 867	P.O. Box 867	Little Rock, AR 72203-0867

**Job 040793 Marketing
Bridge 00879**

Marketing Groups	Greeting	Name	Title	Agency	Address 1	Address 2	City
Metro Planning Org, if applicable	Ms. Grist	Sasha Grist	Executive Director	Western Arkansas Planning and Development District	1109 South 16th		Fort Smith, AR 7290
Metro Planning Org, if applicable	Ms. McKenna	Tracee McKenna	Community Development	Western Arkansas Planning and Development District	1109 South 16th		Fort Smith, AR 7290
Central Arkansas Water	Ms. Lawson	Raven Lawson	Watershed Protection Manager	Central Arkansas Water	221 East Capitol Avenue, P.O. Box 1789	P.O. Box 1789	Little Rock, AR 72203
Arkansas Trails Council	Mr. Sprague	Mike Sprague	Executive Secretary	Arkansas Trails Council, Dept. of Parks and Tourism	One Capitol Mall		Little Rock, AR 72201
Arkansas Trails Council	Mr. Von Rembow	Toby Van Rembow	Chair	Arkansas Trails Council, Dept. of Parks and Tourism	One Capitol Mall		Little Rock, AR 72201
City of Fayetteville	Mr. Jack	Ted Jack	Park Planning Superintendent	City of Fayetteville, Parks and Recreation Department	113 West Mountain Street		Fayetteville, AR 72701
City of Bentonville	Mr. Wright	David Wright	Director	City of Bentonville, Parks and Recreation Department	215 SW A Street		Bentonville, AR 72712
City of Springdale	Mr. Wolf	Chad Wolf	Director	City of Springdale, Parks and Recreation Department	P O Box 42		Springdale, AR 72764
City of Paragould	Ms. Austin	Pat Austin	Director	City of Paragould, Parks and Recreation Department	3404 Linwood Drive		Paragould, AR 72450
City of Marion	Mr. Rawls	Andy Rawls	Parks and Recreation Department Head	City of Marion	3821 Complex Drive		Marion, AR 72364
City of West Memphis	Mr. Parker	Lorenzo Parker	Director	City of West Memphis, Parks and Recreation Department	P.O. Box 1728		West Memphis, AR 72303

**Job 040793 Marketing
Bridge 00879**

Marketing Groups	Greeting	Name	Title	Agency	Address 1	Address 2	City
City of Jonesboro	Mr. Kapales	Danny Kapales	Director	City of Jonesboro, Parks and Recreation Department	3009 Dan Avenue		Jonesboro, Arkansas 72401
City of Hot Springs	Mr. Whittington	Anthony Whittington	Director	City of Hot Springs, Parks and Recreation Department	111 Opera		Hot Springs, AR 71902
Arkansas Department of Parks, Heritage and Tourism (ADPHT)/ Arkansas State Parks	Mr. Thomas	Jordan Thomas	Chief Planner & Landscape Architect	Division of Arkansas State Parks	One Capitol Mall, 4B.215		Little Rock, AR 72201
Arkansas Natural Resources Commission/ Arkansas Unpaved Roads Program	Mr. Stake	Steve Stake	Grants Coordinator	Arkansas Unpaved Roads	101 E Capitol, Suite 350		Little Rock, AR 72201
Concerned Citizen	Mr. Rutherford	Kris Rutherford		Sheridan non-profit			
Concerned Citizen	Mr. Smith	Martin Smith		Ecological Design Group	210 East Merriman		Wynne, Arkansas 72396
Concerned Citizen	Mr. Dickard	Lon Dickard					
CC on letter							
ACE-Planning		Jared Wiley					
Bridge Engineer		Rick Ellis					
District Engineer		Chad Adams					
FHWA	Ms. Hoang	Vivien Hoang	Arkansas Division Administrator	Federal Highway Administration	700 West Capitol Ave, Suite 3130		Little Rock, AR 72201
SHPO, and Parks and Tourism	Secretary Hurst	Stacy Hurst	Arkansas State Historic Preservation Officer	Department of Arkansas Parks, Heritage and Tourism	1100 North Street		Little Rock, AR 72201

Appendix B: Memorandum of Agreement

MEMORANDUM OF AGREEMENT
AMONG THE
FEDERAL HIGHWAY ADMINISTRATION,
THE ARKANSAS STATE HISTORIC PRESERVATION OFFICER,
AND THE ARKANSAS DEPARTMENT OF TRANSPORTATION
REGARDING
ARDOT JOB 040793
DITCH AT L.M. 18.699 STR. & APPRS. (S)
HIGHWAY 45, SEBASTIAN COUNTY, ARKANSAS
ARDOT BRIDGE NUMBER 00879

WHEREAS, the Federal Highway Administration (FHWA) and the Arkansas Department of Transportation (ARDOT) wish to construct a new bridge across Cedar Creek along Highway 45 in Sebastian County; and the old Cedar Creek Bridge (Bridge) will be demolished as part of completing ARDOT Job 040793; and

WHEREAS, the Bridge is a historic property that has been determined eligible for inclusion in the National Register of Historic Places (NRHP) in consultation with the State Historic Preservation Officer (SHPO); and

WHEREAS, the FHWA has marketed the Bridge to federal and state agencies, the Sebastian County Judge, the Cities of Hackett, Barling, and Greenwood, area chambers of commerce, the area metro planning organization, other interested parties, and state and local historical societies; and

WHEREAS, during the recent marketing, no entities were found willing to accept title for the Bridge for preservation and reuse in place; and

WHEREAS, through the Programmatic Section 4(f) Evaluation process, the FHWA has determined that no feasible and prudent alternative to the demolition of the historic bridge exists; and

WHEREAS, the FHWA and ARDOT have determined that this undertaking will have an adverse effect on a historic property and in accordance with the 36 Code of Federal Regulation (CFR) Part 800, regulations implementing Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended [54 United States Code (USC) 306108], must address this effect; and

WHEREAS, the definitions set forth in 36 CFR § 800.16 are applicable throughout this Memorandum of Agreement (MOA); and

WHEREAS, the FHWA has consulted with the Shawnee Tribe, the Muscogee (Creek) Nation, the Quapaw Nation, the Osage Nation, Choctaw Nation of Oklahoma, the United Keetoowah Band of Cherokee Indians in Oklahoma, the

ARDOT Job 040793
Memorandum of Agreement
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Cherokee Nation, and the Caddo Nation for which the Bridge or sites and properties in the immediate area might have religious and cultural significance; and

WHEREAS, in accordance with 36 CFR § 800.6(a)(1), the FHWA has notified the Advisory Council on Historic Preservation (ACHP) of its adverse effect determination, and the ACHP has chosen not to participate in the consultation pursuant to 36 CFR § 800.6(a)(1)(iii).

NOW THEREFORE, the FHWA, the SHPO, and ARDOT agree that the undertaking shall be implemented in accordance with the following stipulations in order to take into account the adverse effect of this undertaking on the Bridge.

STIPULATIONS

The FHWA, through ARDOT, shall ensure that the following stipulations are carried out.

I. MITIGATION OF ADVERSE EFFECT TO THE HISTORIC PROPERTY

- A. ARDOT will produce architectural documentation for the Bridge that meets the Secretary of the Interior's *Standards and Guidelines for Archeology and Historic Preservation* set forth in 48 FR 44716 and the Arkansas Historic Preservation Program's (AHPP) 2016 *Survey Procedures Manual: Guidelines for Historic and Architectural Surveys in Arkansas*. Documentation for the Bridge will include the AHPP Arkansas Architectural Resources Form and color digital photographs.
- B. The documentation will be provided for curation to the AHPP, the Arkansas State Library, the Arkansas Studies Institute, the Arkansas State Archives, and the Torreyson Library at the University of Central Arkansas.
- C. The Bridge will be laser scanned and the data housed in ARDOT's Environmental Division file server.
- D. No construction will be undertaken on the historic property until all fieldwork portions of the required mitigation have been completed.
- E. The FHWA shall ensure that adequate time and funding are provided in order to carry out all aspects of the required mitigation.

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II. HUMAN REMAINS

Human remains are not expected to be discovered on this undertaking; however, if they are encountered during implementation of the project, all activity in the vicinity of the discovery shall cease and procedures shall follow those as outlined in Stipulation XII of the *Programmatic Agreement Among the FHWA, the SHPO, the ACHP, the Osage Nation, and ARDOT Regarding Section 106 Implementation for Federal-Aid Transportation Projects*. The treatment of human remains shall follow the guidelines developed for the *Arkansas Burial Law* (Act 753 of 1991, as amended) and the ACHP's *Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects* published February 23, 2007. As such, a permit will be obtained from the AHPP prior to exaction of any remains.

III. DURATION

This MOA will expire if its terms are not carried out within ten (10) years from the date of its execution. Prior to such time, the FHWA may consult with the other signatories to reconsider the terms of the MOA and amend it in accordance with Stipulation VIII below.

IV. PROFESSIONAL QUALIFICATIONS STANDARDS

The FHWA shall ensure that all archeological investigations and other historic preservation activities pursuant to this MOA are carried out by, or under the direct supervision of, a person or persons meeting the appropriate qualifications set forth in the Secretary of the Interior's professional qualification standards (36 CFR Part 61).

V. POST-REVIEW DISCOVERY SITUATIONS

Pursuant to 36 CFR § 800.13, if cultural material is discovered during implementation of the project, then procedures shall follow those as outlined in Stipulation XI of the *Programmatic Agreement Among the FHWA, the SHPO, the ACHP, the Osage Nation, and ARDOT Regarding Section 106 Implementation for Federal-Aid Transportation Projects*.

VI. DISPUTE RESOLUTION

Should the SHPO or any consulting party to this MOA object within thirty (30) calendar days to any findings, proposed actions or determinations made pursuant to this MOA, the FHWA shall consult with the objecting party to resolve the objection. If the FHWA determines that

ARDOT Job 040793
Memorandum of Agreement
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the objection cannot be resolved, it shall request further comments from the ACHP pursuant to 36 CFR § 800.7. Any ACHP comment provided in response to such a request shall be taken into account by the FHWA in accordance with 36 CFR § 800.6(b)(2) with reference only to the subject of the dispute; the FHWA's responsibility to carry out all actions under this MOA that are not subject to dispute shall remain unchanged.

VII. MONITORING

The consulting parties or one or more parties in cooperation may monitor the undertaking and stipulations carried out pursuant to this MOA.

VIII. AMENDING THE MEMORANDUM OF AGREEMENT

Should any of the signatories to this MOA believe that the terms of this MOA are not being met or cannot be met, that party shall immediately notify the other signatories and request consultation to amend this MOA in accordance with 36 CFR § 800.6. The process to amend this MOA shall be conducted in a manner similar to that leading to the execution of this MOA.

IX. TERMINATING THE MEMORANDUM OF AGREEMENT

If any signatory to this MOA determines that its terms of this MOA will not or cannot be carried out, that party shall immediately consult with other signatories to attempt to develop an amendment per Stipulation VIII, above. If within thirty (30) days an amendment cannot be reached, any signatory may terminate the MOA upon written notification to the other signatories. In the event of termination, the FHWA shall comply with 36 CFR § 800.4 through 800.6 with regard to the undertaking covered by this MOA.

X. FAILURE TO CARRY OUT THE MEMORANDUM OF AGREEMENT

In the event that the FHWA does not carry out the terms of this MOA, the FHWA shall comply with 36 CFR § 800.4 through 800.6 with regard to the undertaking covered by this MOA.

XI. FULFILLMENT OF SECTION 106 RESPONSIBILITIES

Execution of this MOA and implementation of its terms evidences that the FHWA and ARDOT have taken into account the effect of the undertaking

ARDOT Job 040793
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on the historic property and have fulfilled its Section 106 responsibilities under the NHPA of 1966, as amended.

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Signatory

FEDERAL HIGHWAY ADMINISTRATION



Vivien N. Hoang, P.E.
Arkansas Division Administrator

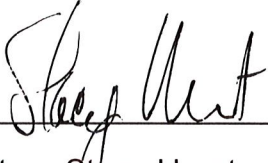
5/31/2022

Date


ARDOT Job 040793
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Signatory

ARKANSAS STATE HISTORIC PRESERVATION OFFICER



Secretary Stacy Hurst
Arkansas State Historic Preservation Officer

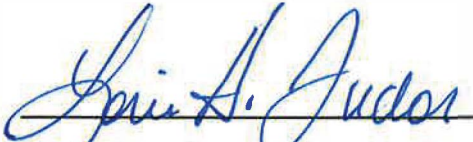


Date

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Signatory

ARKANSAS DEPARTMENT OF TRANSPORTATION


Lorie H. Tudor, P.E.
Director
JDW RV

2/9/22
Date



IN REPLY REFER TO:

United States Department of the Interior

FISH AND WILDLIFE SERVICE

Arkansas Ecological Service Field Office
110 South Amity Road, Suite 300
Conway, Arkansas 72032



July 21, 2022

Mr. John Fleming
c/o Matthew Schrum
Arkansas Department of Transportation
10324 Interstate 30
Little Rock, Arkansas 72209

Project code: 2022-0062322

RE: ARDOT Job 040793 Big Branch & Cedar Creek Strs. & Apprs. (S) (re-initiation)

Dear Mr. Fleming:

The U.S. Fish and Wildlife Service (Service) is responding to your re-initiation, project plans, mitigation calculations, and request to verify that the proposed Arkansas Department of Transportation (ARDOT) Job 040793 Big Branch & Cedar Creek Strs. & Apprs. (S), Sebastian County, Arkansas (the Project) may rely on the February 5, 2018, Programmatic Biological Opinion (BO) for federally funded or approved transportation projects that may affect the federally listed endangered Indiana Bat (IBAT) (*Myotis sodalis*) and/or federally listed threatened Northern Long-eared Bat (NLEB) (*Myotis septentrionalis*). We received your request and the associated LAA Consistency Letter on July 15, 2022.

This letter provides the Service's response as to whether the Project may rely on the BO to comply with Section 7(a)(2) of the Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.) for its effects to the IBAT and/or NLEB. This letter also responds to your request for Service concurrence that the Project may affect, but is not likely to adversely affect (NLAA) ESA listed species and/or designated critical habitats other than the IBAT and NLEB.

The ARDOT has determined that the Project is likely to adversely affect (LAA) the IBAT and NLEB. The Service concurs with these determinations, because of the proximity of known species sites and foraging range to the project location and the occurrence of suitable foraging habitat for these species that exists on and adjacent to the site. A determination of LAA for IBAT and NLEB is appropriate based on the distance from the existing roadway and amount of suitable habitat being lost. The conservation measures being proposed, active season clearing restriction provision based on the site assessment and bridge survey results, and the proposed implementation of all required avoidance and mitigation measures will help to mitigate the effects in accordance with the BO.

As stated in the Consistency Letter, the Service concurs with the "no effect" and "NLAA" determination(s) for the listed species identified. No further consultation for this project is required for these species. The verification letter confirms you may rely on effect determinations provided in the Arkansas Determination Key for project review and guidance for federally listed

species to satisfy agency consultation requirements under Section 7(a)(2) of the Endangered Species Act of 1973 (87 Stat. 884, as amended 16 U.S.C. 1531 et seq.; ESA)." This concurrence concludes your ESA Section 7 responsibilities relative to these species for this Project, subject to the Re-initiation Notice below.

Conclusion

The Service has reviewed the effects of the proposed Project, which includes the ARDOT's commitment to implement any applicable mitigation measures, as indicated on the Project Submittal Form. We confirm that the proposed Project's effects are consistent with those analyzed in the BO. The Service has determined that projects consistent with the conservation measures and scope of the program analyzed in the BO are not likely to jeopardize the continued existence of the IBAT and/or the NLEB. In coordination with your agency and the other sponsoring Federal Transportation Agencies, the Service will re-evaluate this conclusion annually in-light-of any new pertinent information under the adaptive management provisions of the BO.

Incidental Take: Indiana Bat

The Service anticipates that tree removal associated with the proposed Project will cause incidental take of IBATs. As described in the Incidental Take Statement (ITS) of the BO, such taking will be difficult to detect. The Service determined that it is appropriate to measure the amount or extent of incidental taking resulting from BO projects using the proposed acreage of tree removal from IBAT suitable habitat as a surrogate for the numbers of individuals taken.

The proposed Project will remove 0.2 acre of trees from habitat that is suitable for the IBAT. All tree removal will occur in winter and comply with all other conservation measures in the BO. Based on the BO, 1.37 acre are anticipated to not result in adverse effects, and 0.2 acre are anticipated to result in adverse effects.

The ARDOT uses the mitigation ratio of 1.5 from Table 3 of the BO¹ to calculate the compensatory mitigation required to offset these adverse impacts for a total of 0.3² acre of trees that is suitable for the IBAT. Mitigation will be provided in the form of a \$1,876 contribution to TCF, the Program Sponsor, within 1 year of this letter or prior to the start of construction, whichever is earliest, for adverse impacts to the IBAT and NLEB associated with this project.

In order to comply with the mitigation requirements of the BO, the ARDOT will provide mitigation in the amount of \$1,876. These calculations are based on the mitigation identified above² and the 2021 Land Use Values in Table 2 of Exhibit E in TCF's ILF Instrument³. If payment is made later than 1 year from the date of this letter, the mitigation cost may change as a result of updated land use values in Table 2 of Exhibit E. The Federal Transportation Agency or designated non-federal representative must notify TCF at least five days prior to payment so that

1 https://www.fws.gov/midwest/endangered/section7/fhwa/pdf/IBAT_ILF_ratios_transportation_agencies.pdf

2 XX acres * XX ratio

3 <https://www.fws.gov/media/exhibit-e-fee-schedule-range-wide-indiana-bat-lieu-fee-program>

TCF can verify that the appropriate land value has been used. At the time of payment, the Federal Transportation Agency or designated non-federal representative shall notify the Service of compliance with the compensatory mitigation requirements as described above.

The purchase of species conservation credits and/or in-lieu fee contributions shall occur prior to construction of a transportation project covered under this programmatic consultation. Exceptions to this program stipulation include emergency projects that do not require a letting prior to construction. In these cases, purchase of credits and/or in-lieu fee contributions shall occur within three months of completion of the project. This timeframe allows for measuring the acres of habitat affected by the emergency project and for financial processing.

In addition, the Project may take up to 5 IBATs that were not detected during bridge bat assessments conducted prior to implementing the proposed work on the Big Branch and Cedar Creek Bridges. In these instances, potential incidental take of IBATs may be exempted provided that the take is reported to the Service (refer to User Guide Appendix E - Post Assessment Discovery of Bats at Bridge/Structure Form). Although such take is reasonably certain to occur at up to 10 bridge projects per year, as included in the scope of the BO, it is a remote possibility for any individual project that is implemented consistent with the conservation measures of the BO.

The Service will add the acreage of Project-related tree removal to the annual total acreage attributed to the BO as a surrogate measure of IBAT take and exempted from the prohibitions against incidental taking. Such exemption is effective as long as your agency implements the reasonable and prudent measure (RPM) and accompanying terms and conditions of the BO's ITS.

The sole RPM of the BO's ITS requires the Federal Transportation Agencies to ensure that state/local transportation agencies, who choose to include eligible projects under the programmatic action, incorporate all applicable conservation measures in the project proposals submitted to the Service for ESA section 7 compliance using the BO. The implementing terms and conditions for this RPM require the Federal Transportation Agencies to offer training to appropriate personnel about using the BO, and about promptly reporting sick, injured, or dead bats (regardless of species) (or any other federally listed species) located in project action areas.

Northern Long-eared Bat

The Service anticipates that tree removal associated with the proposed Project will cause incidental take of NLEBs. However, the Project is consistent with the BO, and such projects will not cause take of NLEB that is prohibited under the ESA section 4(d) rule for this species (50 CFR §17.40(o)). Therefore, the take of NLEBs resulting from this project does not require exemption from the Service.

Reporting Dead or Injured Bats

The ARDOT, its state/local cooperators, and any contractors must take care when handling dead or injured IBATs and/or NLEBs, or any other federally listed species that are found at the Project site to preserve biological material in the best possible condition and to protect the handler from exposure to diseases, such as rabies. Project personnel are responsible for ensuring that any evidence about determining the cause of death or injury is not unnecessarily disturbed.

Reporting the discovery of dead or injured listed species is required in all cases to enable the Service to determine whether the level of incidental take exempted by this BO is exceeded, and to ensure that the terms and conditions are appropriate and effective. Parties finding a dead, injured, or sick specimen of any endangered or threatened species must promptly notify this Service Office.

Reinitiation Notice

This letter concludes consultation for the proposed Project, which qualifies for inclusion in the BO issued to the Federal Transportation Agencies. To maintain this inclusion, a reinitiation of this Project-level consultation is required where the ARDOT's discretionary involvement or control over the Project has been retained (or is authorized by law) and if:

1. the amount or extent of incidental take of IBAT is exceeded;
2. new information reveals that the Project may affect listed species or critical habitat in a manner or to an extent not considered in the BO;
3. the Project is subsequently modified in a manner that causes an effect to listed species or designated critical habitat not considered in the BO; or
4. a new species is listed or critical habitat designated that the Project may affect.

Per condition #1 above, the anticipated incidental take is exceeded when:

- the Project removes trees from more than 0.2 acre of habitat suitable for the IBAT.
- the Project takes more than 5 IBATs resulting from work on the Big Branch and Cedar Creek Bridges.

In instances where the amount or extent of incidental take is exceeded, the Federal Highway Administration/Arkansas Department of Transportation is required to immediately request a reinitiation of formal consultation. Please note that the Service cannot exempt from the applicable ESA prohibitions any Action-caused take that exceeds the amount or extent specified in the ITS of this BO that may occur before the reinitiated consultation is concluded.

Mr. John Fleming

5

We appreciate your continued efforts to ensure that this Project is fully consistent with all applicable provisions of the BO. If you have any questions regarding our response or if you need additional information, please contact Lindsey Lewis at lindsey_lewis@fws.gov or (501) 513-4489.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Melvin L. Tobin', with a stylized flourish at the end.

Melvin L. Tobin
Field Supervisor

cc: Project File
Read File

Filename: C:\Users\lilewis\Documents\PROJECTS\FY2022\ARDOT\ARDOT Job 040793 Big Branch & Cedar Creek Strs. & Apprs\20220715_Ltr_ARDOT Job 040793_Concurrence_Ltr_LCL.docx



United States Department of the Interior



FISH AND WILDLIFE SERVICE
Arkansas Ecological Services Field Office
110 South Amity Suite 300
Conway, AR 72032-8975
Phone: (501) 513-4470 Fax: (501) 513-4480

In Reply Refer To:

July 11, 2022

Project Code: 2022-0062094

Project Name: 040793 - Ditch at L.M. 18.699 Str. & Apprs. (S)

Subject: List of threatened and endangered species that may occur in your proposed project location or may be affected by your proposed project

To Whom It May Concern:

The enclosed species list identifies threatened, endangered, proposed and candidate species, as well as proposed and final designated critical habitat, that may occur within the boundary of your proposed project and/or may be affected by your proposed project. The species list fulfills the requirements of the U.S. Fish and Wildlife Service (Service) under section 7(c) of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*).

New information based on updated surveys, changes in the abundance and distribution of species, changed habitat conditions, or other factors could change this list. Please feel free to contact us if you need more current information or assistance regarding the potential impacts to federally proposed, listed, and candidate species and federally designated and proposed critical habitat. Please note that under 50 CFR 402.12(e) of the regulations implementing section 7 of the Act, the accuracy of this species list should be verified after 90 days. This verification can be completed formally or informally as desired. The Service recommends that verification be completed by visiting the ECOS-IPaC website at regular intervals during project planning and implementation for updates to species lists and information. An updated list may be requested through the ECOS-IPaC system by completing the same process used to receive the enclosed list.

The purpose of the Act is to provide a means whereby threatened and endangered species and the ecosystems upon which they depend may be conserved. Under sections 7(a)(1) and 7(a)(2) of the Act and its implementing regulations (50 CFR 402 *et seq.*), Federal agencies are required to utilize their authorities to carry out programs for the conservation of threatened and endangered species and to determine whether projects may affect threatened and endangered species and/or designated critical habitat.

A Biological Assessment is required for construction projects (or other undertakings having similar physical impacts) that are major Federal actions significantly affecting the quality of the human environment as defined in the National Environmental Policy Act (42 U.S.C. 4332(2) (c)). For projects other than major construction activities, the Service suggests that a biological

evaluation similar to a Biological Assessment be prepared to determine whether the project may affect listed or proposed species and/or designated or proposed critical habitat. Recommended contents of a Biological Assessment are described at 50 CFR 402.12.

If a Federal agency determines, based on the Biological Assessment or biological evaluation, that listed species and/or designated critical habitat may be affected by the proposed project, the agency is required to consult with the Service pursuant to 50 CFR 402. In addition, the Service recommends that candidate species, proposed species and proposed critical habitat be addressed within the consultation. More information on the regulations and procedures for section 7 consultation, including the role of permit or license applicants, can be found in the "Endangered Species Consultation Handbook" at:

<http://www.fws.gov/endangered/esa-library/pdf/TOC-GLOS.PDF>

Migratory Birds: In addition to responsibilities to protect threatened and endangered species under the Endangered Species Act (ESA), there are additional responsibilities under the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA) to protect native birds from project-related impacts. Any activity, intentional or unintentional, resulting in take of migratory birds, including eagles, is prohibited unless otherwise permitted by the U.S. Fish and Wildlife Service (50 C.F.R. Sec. 10.12 and 16 U.S.C. Sec. 668(a)). For more information regarding these Acts see <https://www.fws.gov/birds/policies-and-regulations.php>.

The MBTA has no provision for allowing take of migratory birds that may be unintentionally killed or injured by otherwise lawful activities. It is the responsibility of the project proponent to comply with these Acts by identifying potential impacts to migratory birds and eagles within applicable NEPA documents (when there is a federal nexus) or a Bird/Eagle Conservation Plan (when there is no federal nexus). Proponents should implement conservation measures to avoid or minimize the production of project-related stressors or minimize the exposure of birds and their resources to the project-related stressors. For more information on avian stressors and recommended conservation measures see <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php>.

In addition to MBTA and BGEPA, Executive Order 13186: *Responsibilities of Federal Agencies to Protect Migratory Birds*, obligates all Federal agencies that engage in or authorize activities that might affect migratory birds, to minimize those effects and encourage conservation measures that will improve bird populations. Executive Order 13186 provides for the protection of both migratory birds and migratory bird habitat. For information regarding the implementation of Executive Order 13186, please visit <https://www.fws.gov/birds/policies-and-regulations/executive-orders/e0-13186.php>.

We appreciate your concern for threatened and endangered species. The Service encourages Federal agencies to include conservation of threatened and endangered species into their project planning to further the purposes of the Act. Please include the Consultation Code in the header of this letter with any request for consultation or correspondence about your project that you submit to our office.

Attachment(s):

- Official Species List

Endangered Species Act Species

There is a total of 7 threatened, endangered, or candidate species on this species list.

Species on this list should be considered in an effects analysis for your project and could include species that exist in another geographic area. For example, certain fish may appear on the species list because a project could affect downstream species.

IPaC does not display listed species or critical habitats under the sole jurisdiction of NOAA Fisheries¹, as USFWS does not have the authority to speak on behalf of NOAA and the Department of Commerce.

See the "Critical habitats" section below for those critical habitats that lie wholly or partially within your project area under this office's jurisdiction. Please contact the designated FWS office if you have questions.

1. [NOAA Fisheries](#), also known as the National Marine Fisheries Service (NMFS), is an office of the National Oceanic and Atmospheric Administration within the Department of Commerce.

Mammals

NAME	STATUS
Indiana Bat <i>Myotis sodalis</i> There is final critical habitat for this species. The location of the critical habitat is not available. Species profile: https://ecos.fws.gov/ecp/species/5949	Endangered
Northern Long-eared Bat <i>Myotis septentrionalis</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/9045	Threatened

Birds

NAME	STATUS
Eastern Black Rail <i>Laterallus jamaicensis ssp. jamaicensis</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/10477	Threatened
Piping Plover <i>Charadrius melodus</i> Population: [Atlantic Coast and Northern Great Plains populations] - Wherever found, except those areas where listed as endangered. There is final critical habitat for this species. The location of the critical habitat is not available. Species profile: https://ecos.fws.gov/ecp/species/6039	Threatened
Red Knot <i>Calidris canutus rufa</i> There is proposed critical habitat for this species. The location of the critical habitat is not available. Species profile: https://ecos.fws.gov/ecp/species/1864	Threatened

Insects

NAME	STATUS
<p>American Burying Beetle <i>Nicrophorus americanus</i> Population: Wherever found, except where listed as an experimental population No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/66</p>	Threatened
<p>Monarch Butterfly <i>Danaus plexippus</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/9743</p>	Candidate

Critical habitats

THERE ARE NO CRITICAL HABITATS WITHIN YOUR PROJECT AREA UNDER THIS OFFICE'S JURISDICTION.

IPaC User Contact Information

Agency: Arkansas Department of Transportation
Name: Matthew Schrum
Address: 10324 I30
City: Little Rock
State: AR
Zip: 72209
Email: matthew.schrum@ardot.gov
Phone: 5015692083

Lead Agency Contact Information

Lead Agency: Federal Highway Administration

**ARDOT ENVIRONMENTAL VERIFICATION CHECKLIST
FOR CONSIDERATION OF POTENTIAL IMPACTS**


ARDOT Job 040793 FAP NHPP-0065(62)

Job Title Ditch at L.M. 18.699 Strs. & Apprs. (S)

Environmental Resource	None	Minimal	Major	Comments-required for each item
Air Quality	X			No impacts anticipated
Cultural Resources		X		SHPO attached
Economic	X			No impacts anticipated
Endangered Species		X		NLAA, see USFWS consultation
Environmental Justice/Title VI	X			No impacts anticipated
Fish and Wildlife		X		Temporary during construction
Floodplains		X		Zone A Special Flood Hazard Area
Forest Service Property	X			None in project area
Hazardous Materials/Landfills	X			No impacts anticipated
Land Use		X		3.3 acres new ROW
Migratory Birds		X		Migratory Bird SP included
Navigation/Coast Guard	X			None in project area
Noise Levels	X			No impacts anticipated
Prime Farmland		X		NRCS-CPA-106 attached
Protected Waters	X			None in project area
Public Recreation Lands	X			No impacts anticipated
Public Water Supply/WHPA	X			None in project area
Relocates	X			No impacts anticipated
Section 4(f)/6(f)		X		Programmatic Section 4(f) attached
Social	X			No impacts anticipated
Underground Storage Tanks	X			No impacts anticipated
Visual	X			No impacts anticipated
Streams		X		86' impacts to Cedar Creek; NW14
Water Quality		X		Temporary during construction
Wetlands	X			None in project area
Wildlife Refuges	X			None in project area

Section 401 Water Quality Certification Required? No
 Short-term Activity Authorization Required? Yes
 Section 404 Permit Required? Yes Type NW 14

Remarks: _____

Signature of Evaluator  Date July 22, 2022

Date Sent: July 30, 2021
Date Revised: April 20, 2022

ROADWAY DESIGN REQUEST

Job Number 040793 FAP No. NHPP-0065(56) County Sebastian

Job Name Ditch at L.M. 18.699 Str. & Apprs. (S)

Design Engineer Nick Dail Environmental Staff TT/SL/MS

Detailed Project Description This project consists of replacing existing bridge over Ditch at L.M. 18.699 with a box culvert on the new location. This project consists of earthwork, ACHM binder and surface courses, aggregate base course, drainage structures, and erosion control.

A. Existing Conditions:

Roadway Width: 28' Shoulder Type/Width: 4' Paved

Number of Lanes and Width: 2 @ 10' Existing Right-of-Way: 100'

Sidewalks? No Location: N/A Width: N/A

Bike Lanes? No Location: N/A Width: N/A

B. Proposed Conditions:

Roadway Width: 34' Shoulder Type/Width: 6' Paved

Number of Lanes and Width: 2 @ 11' Proposed Right-of-Way: 150'

Sidewalks? No Location: N/A Width: N/A

Bike Lanes? No Location: N/A Width: N/A

C. Construction Information:

If detour: Where: N/A Length: N/A

D. Design Traffic Data:

2023 ADT: 6200 2043 ADT: 7300 % Trucks: 3

Design Speed: 55 m.p.h.

E. Approximate total length of project: 0.43 mile(s)

F. Justification for proposed improvements: Bridge replacement required.

G. Total Relocatees: 0 Residences: 0 Businesses: 0

H. Have you coordinated with any outside agencies (e.g., FHWA, City, County, etc.)? No

Agency/Official	Person Contacted	Date

Nationwide Permit No. 14

Linear Transportation Projects. Activities required for crossings of waters of the United States associated with the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads, highways, railways, trails, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than 1/2-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than 1/3-acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to construct the linear transportation project. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

This NWP cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The loss of waters of the United States exceeds 1/10-acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 32.) (Sections 10 and 404)

Note 1: For linear transportation projects crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Linear transportation projects must comply with 33 CFR 330.6(d).

Note 2: Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

Note 3: For NWP 14 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and

distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization.

Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. **Navigation.** (a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. **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. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

3. Spawning Areas. Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. Migratory Bird Breeding Areas. Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. Shellfish Beds. No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. Suitable Material. No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

7. Water Supply Intakes. No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. Adverse Effects From Impoundments. If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. 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, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. 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. 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).

10. Fills Within 100-Year Floodplains. The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. Equipment. Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

13. Removal of Temporary Fills. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. Proper Maintenance. Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

15. Single and Complete Project. The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

16. Wild and Scenic Rivers. (a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. The permittee shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: <http://www.rivers.gov/>.

17. Tribal Rights. No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

18. Endangered Species. (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless ESA section 7 consultation addressing the effects of the proposed activity has been completed. Direct effects are the immediate effects on listed species and critical habitat caused by the NWP activity. Indirect effects are those effects on listed species and critical habitat that are caused by the NWP activity and are later in time, but still are reasonably certain to occur.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed activity or that utilize the designated critical habitat that might be affected by the proposed activity. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction

notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification that the proposed activity will have "no effect" on listed species or critical habitat, or until ESA section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps. (d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWPs.

(e) Authorization of an activity by an NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word "harm" in the definition of "take" means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

(g) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide web pages at <http://www.fws.gov/> or <http://www.fws.gov/ipac> and <http://www.nmfs.noaa.gov/pr/species/esa/> respectively.

19. Migratory Birds and Bald and Golden Eagles. The permittee is responsible for ensuring their action complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting appropriate local office of the U.S. Fish and Wildlife Service to determine applicable measures to reduce impacts to migratory birds or eagles, including whether “incidental take” permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. Historic Properties. (a) In cases where the district engineer determines that the activity may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act. If pre-construction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP

activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: no historic properties affected, no adverse effect, or adverse effect. Where the non-Federal applicant has identified historic properties on which the activity might have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed.

(d) For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps. (e) Prospective permittees should be aware that section 110k of the NHPA (54

U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. Discovery of Previously Unknown Remains and Artifacts. If you discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by this permit, you must immediately notify the district engineer of what you have found, and to the maximum extent practicable, avoid construction activities that

may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal, and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

22. Designated Critical Resource Waters. Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWP 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

23. Mitigation. The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory

mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation to ensure that the activity results in no more than minimal adverse environmental effects.

Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. Restored riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f)).

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan only needs to address the baseline conditions at the impact site and the number of credits to be provided.

(6) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a

forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

24. Safety of Impoundment Structures. To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. Water Quality. Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. Coastal Zone Management. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

29. Transfer of Nationwide Permit Verifications. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to

the letter, and the letter must contain the following statement and signature:

“When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.”

(Transferee)

(Date)

30. Compliance Certification. Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

- (a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;
- (b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and
- (c) The signature of the permittee certifying the completion of the activity and mitigation.

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation, whichever occurs later.

31. Activities Affecting Structures or Works Built by the United States. If an NWP activity also requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army

Corps of Engineers (USACE) federally authorized Civil Works project (a “USACE project”), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission is not authorized by NWP until the appropriate Corps office issues the section 408 permission to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

32. Pre-Construction Notification. (a) Timing. Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

- (1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or
- (2) 45 calendar days have passed from the district engineer’s receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is “no effect” on listed species or “no potential to cause effects” on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee’s right to proceed under the NWP

may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) Contents of Pre-Construction Notification: The PCN must be in writing and include the following information:

- (1) Name, address and telephone numbers of the prospective permittee;
- (2) Location of the proposed activity;
- (3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;
- (4) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. For single and complete linear projects, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);
- (5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial, intermittent, and ephemeral streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetlands, other special aquatic sites, and other waters. Furthermore, the 45-day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;
- (6) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal

and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

- (7) For non-Federal permittees, if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed activity or utilize the designated critical habitat that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;
 - (8) For non-Federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;
 - (9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the "study river" (see general condition 16); and
 - (10) For an activity that requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request for section 408 permission from the Corps office having jurisdiction over that USACE project.
- (c) Form of Pre-Construction Notification: The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is an NWP PCN and must include all of the applicable information required in paragraphs (b)(1) through (10) of this general condition. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.
- (d) Agency Coordination: (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWP(s) and the need for mitigation to reduce the activity's adverse environmental effects so that they are no more than minimal.
- (2) Agency coordination is required for: (i) all NWP activities that require pre-construction notification and result in the loss

of greater than 1/2-acre of waters of the United States; (ii) NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed; (iii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iv) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

(3) When agency coordination is required, the district engineer will immediately provide (e.g., via e-mail, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or e-mail that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the individual crossings of waters of the United States to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP. If an applicant requests a waiver of the 300 linear foot limit on impacts to streams or of an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51, 52, or 54, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal individual and cumulative adverse environmental effects. For those NWPs that have a waivable 300 linear foot limit for losses of intermittent and ephemeral stream bed and a 1/2-acre limit (i.e., NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52), the loss of intermittent and ephemeral stream bed, plus any other losses of jurisdictional waters and wetlands, cannot exceed 1/2-acre.

1. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by NWP and whether those cumulative adverse environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

District Engineer's Decision

2. If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters (e.g., streams). The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

3. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) that the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or (c) that the activity is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse environmental effects, the activity will be authorized within the 45-day PCN period (unless

additional time is required to comply with general conditions 18, 20, and/or 31, or to evaluate PCNs for activities authorized by NWPs 21, 49, and 50), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.
2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.
3. NWPs do not grant any property rights or exclusive privileges.
4. NWPs do not authorize any injury to the property or rights of others.
5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31)