

# **National Environmental Policy Act / Clean Water Act Section 404 (NEPA/404) Merger Process And Agreement For Transportation Projects In Colorado**

## **Background**

In a May 12, 2003, letter from Mr. James L. Connaughton, Executive Office of the President, Council on Environmental Quality, to Mr. Norman Y. Mineta, Secretary of Transportation, Mr. Connaughton advises, "In situations involving two or more agencies that have a decision to make for the same proposed action and responsibility to comply with National Environmental Policy Act (NEPA) or a similar statute, it is prudent to jointly develop a Purpose and Need statement that can be utilized by both agencies". The Federal Highway Administration (FHWA) has a requirement to ensure compliance with the National Environmental Policy Act (NEPA) for major federally funded transportation projects. The FHWA is the NEPA lead Federal agency for federally funded transportation projects proposed by the Colorado Department of Transportation (CDOT). Those projects that also require a Clean Water Act (CWA) Section 404 permit make the US Army Corps of Engineers (USACE) responsible for NEPA compliance for issuance of a federal permit. The USACE must also ensure compliance with the CWA. This merger agreement has been developed to ensure that USACE NEPA and CWA requirements are satisfied during development of the FHWA NEPA document.

## **Parties to this Agreement:**

### Signatory agencies

Colorado Department of Transportation

US Army Corps of Engineers

US Department of Transportation, Federal Highway Administration

### Participating non-signatory agencies

US Environmental Protection Agency

US Fish and Wildlife Service

## **Purpose**

This agreement has been developed through a collaborative process to identify and develop methodologies for alternative analysis in the NEPA process. The purpose of this agreement is to establish a procedure and provide guidance to CDOT, FHWA, and USACE staff to ensure that documentation and coordination conducted to comply with NEPA will meet the standards of all signatories and that any preferred alternative selected under this joint NEPA / CWA Section 404 decision-making process also complies with CWA Section 404(b)(1) Guidelines. These procedures do not supersede lead agency NEPA decision-making requirements.

## **Introduction**

NEPA requires federal agencies to consider the environmental effects of, and any alternatives to, their proposed actions. The FHWA is the NEPA lead Federal agency for federally funded transportation projects proposed by CDOT. A CDOT action that involves the placement of fill material into a water of the US also requires a CWA Section 404 permit (CWA Permit) from the USACE. If the CWA Permit required is a Standard Individual Permit (IP), the USACE must ensure compliance with the CWA and with NEPA in order to issue the CWA Permit.

The actions required by the USACE under the CWA provide them the opportunity to be a cooperating agency in the development of the transportation project. If the USACE serves as a cooperating agency they have the ability to adopt the FHWA/CDOT NEPA document for their NEPA compliance and have a more formal role and input into project development, which will assist them in determining whether the proposed project is in compliance with the CWA. In such cases, the USACE will be given an opportunity to provide input into the project Purpose and Need statement that is defined by the FHWA and CDOT for the project.

In a typical CWA Permit review process, the USACE uses information supplied by the applicant (CDOT) to help define the basic and overall project purpose. The basic project purpose is the fundamental or irreducible reason for the project that is used by the USACE to determine if the proposed action is water dependent. The overall project purpose is a more detailed, comprehensive and project specific version of the basic project purpose. It is similar to the NEPA Purpose and Need and is used by the USACE when they consider alternatives so their input into Purpose and Need development is very important.

The NEPA process includes an alternative development and analysis process that leads to the identification and selection of a preferred alternative. Under this merger agreement, alternative screening and evaluation processes should be developed in a manner that: 1) complies with NEPA, and 2) provides evidence that the applicant (CDOT) has not inappropriately eliminated the “Least Environmentally Damaging Practicable Alternative” (LEDPA) from further consideration. This should not result in major changes to a traditional NEPA screening process. However, it is the responsibility of the Permit applicant to prove to the USACE that the LEDPA has not been screened out during the decision making process, so factors such as aquatic resource impacts should be explicit in screening.

The NEPA preferred alternative will be evaluated by the USACE to determine if it is considered the LEDPA in order to proceed with authorization under the CWA. The LEDPA, as defined in 40 CFR Part 230.10(a), is the alternative with the least impacts to the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. “Environmental” in this context is defined by the USACE as non-aquatic natural resources. The alternatives screening process should therefore be designed to provide information regarding impacts to the aquatic ecosystem, Purpose and Need, and impacts to the natural environment. Additionally, criteria to determine the

practicability of the alternative should be included. The term “practicable” is explained further below and defined in 40 CFR 230.3(q) as “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”

### **Thresholds for initiating the NEPA/404 Merger process**

The NEPA/404 merger process is required for Environmental Impact Statement (EIS) level projects that also require an IP. An Environmental Assessment (EA) with an IP will enter the merger process only if the FHWA, USACE and CDOT determine it is in the overall best interest of the public. This decision will be made considering potential impacts to waters of the US, the range of potential alternatives, and the potential for controversy on environmental grounds.

### **Tier 1 NEPA documents**

Tier 1 NEPA documents are not intended to obtain the level of detail of a typical or “Tier 2” NEPA document. In many cases, alignment information will be at the corridor level and no jurisdictional determination will be obtained for waters of the US. Detailed information regarding impacts and mitigation may not be available. The decision regarding whether a Tier 1 NEPA document enters the merger process will be made at the discretion of the CDOT and FHWA project team. The merger team will consider the level of detail and whether it will be adequate for determining CWA compliance when deciding whether to enter the merger process for Tier 1 documents.

If the decision is made to use the merger process, concurrence that the Preferred Alternative is the LEDPA or does not exclude the LEDPA will be a written statement from USACE that the Preferred Alternative complies with the LEDPA requirements of the CWA 404(b)(1) Guidelines. Final agency decisions and concurrence issued during the Tier 1 process will not be revisited unless new information is obtained or it is determined to be otherwise required. If a subsequent Tier 2 document meets the threshold for entering the merger process, that process will be initiated using the Tier 1 Preferred Alternative only. If the Tier 1 document includes enough information, the team can agree to forgo the merger process for the subsequent Tier 2 documents. This agreement must be in writing, and will be reviewed at the beginning of each subsequent Tier 2 document.

If the merger process is not used in development of a Tier 1 document, all Tier 1 alternatives will be subject to review by USACE during the preparation of Tier 2 documents.

### **Initiating the Merger Process**

The merger process is initiated when the lead Federal agency submits, and the USACE responds affirmatively to, a formal written request for the USACE to be a cooperating agency and to use the merger agreement. The decision to request cooperating agency status and initiate the merger process shall be made after early consultation with the USACE on the subject.

### **Roles and Responsibilities**

**USACE:** USACE will serve as a cooperating agency under this agreement. The USACE will participate in meetings and review draft chapters of the Draft EIS, Final EIS, and EA, as appropriate. They agree to provide input to ensure that the information being presented may also be used for CWA compliance. This may include providing substantive comments on the project Purpose and Need, assisting with the development of practicability criteria for evaluation of alternatives, providing comments relative to whether the Preferred Alternative is the apparent LEDPA, and providing input on proposed compensatory mitigation. The USACE will confirm compliance with the CWA by providing written concurrence that the Purpose and Need statement may be used to define basic and overall project purpose, the Alternatives Selected for Detailed Evaluation comply with the Guidelines, the Preferred Alternative is the LEDPA, and the proposed Compensatory Mitigation adequately offsets impacts to aquatic resources.

**FHWA:** FHWA is the lead Federal agency under NEPA and is required to furnish guidance, participate in the preparation, independently evaluate, approve and adopt NEPA documents prepared for federally funded highway improvement projects. The Federal Transit Administration (FTA) has a similar role to that of FHWA for projects that use federal transit funds. In the event a project has both highway and transit components, FHWA and FTA may be co-lead agencies under NEPA. Under this agreement, FHWA will actively encourage adherence to NEPA and CWA requirements, assist in the determination to enter the merger process, encourage joint development of Purpose and Need, review and approve Purpose and Need, evaluation criteria, alternatives, and the preferred alternative.

**CDOT:** The highway improvement program in Colorado is programmed, developed and implemented by CDOT. CDOT is also the direct recipient of highway funds administered by FHWA and functions as a co-lead agency on NEPA project development for EIS projects. CDOT is the permit applicant for CWA Permits. CDOT, in conjunction with FHWA (and FTA, as appropriate), will have the primary role for implementing this merger agreement.

### **Role of Other Reviewing Agencies**

The US Environmental Protection Agency (USEPA) and the US Department of Interior Fish and Wildlife Service (USFWS) will be provided the opportunity to participate as commenting agencies in the NEPA/404 merger process. These agencies may accomplish these duties as either cooperating agencies or as Federal participating agencies.

Commenting agency status under this agreement requires that these agencies be invited to concurrence meetings and that all information provided to USACE also be provided to the USEPA and USFWS for their review. Official concurrence will not be sought from these agencies. Rather, they will review and provide comments on material provided. Full consideration shall be given to commenting agency input. Any disputes shall be referred to the lead Federal agency.

Typically, administrative draft NEPA documents are only distributed to cooperating agencies. The documents are considered deliberative and not for public dissemination. Therefore, USEPA and USFWS should be invited and accepted as cooperating agencies prior to being supplied the draft Purpose and Need or other deliberative material. In the absence of cooperating agency status, some form of agreement must be exercised with the commenting agency to ensure that deliberative material will not be distributed to the public freely or through the Freedom of Information Act. This can be accomplished through a separate MOU or by transmitting deliberative materials under a cover letter that specifically describes that material provided pursuant to this merger agreement is subject to deliberative process privilege and not releasable under the Freedom of Information Act. The letter should indicate that by acceptance of the material that the commenting agency understands and agrees to this privilege.

The USEPA has responsibility under Section 404 of the CWA including, but not limited to:

- developing and interpreting environmental criteria used in evaluating permit applications
- determining scope of geographic jurisdiction
- approving and overseeing State assumption
- identifying activities that are exempt
- reviewing/commenting on individual permit applications
- authority to veto USACE permit decisions (Section 404[c])
- authority to elevate specific cases (Section 404[q])
- enforcing Section 404 provisions<sup>1</sup>

The USFWS has responsibility under the Fish and Wildlife Coordination Act (FWCA), the Endangered Species Act (ESA) and other similar wildlife legislation. The FWCA provides the basic authority for USFWS involvement in evaluating impacts to fish and wildlife from proposed water resource development projects. It requires that fish and wildlife resources receive equal consideration to other project features. It also requires that Federal agencies that construct, license or permit water resource development projects must first consult with the USFWS (and the National Marine Fisheries Service in some instances) and State fish and wildlife agency regarding the impacts on fish and wildlife resources and measures to mitigate these impacts. The ESA requires Federal agencies enter formal consultation with the USFWS if a proposed federal action may

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<sup>1</sup> There is an understanding that adherence to this agreement will provide a smoother process for FHWA, CDOT and the USACE, and will provide CDOT and FHWA assurance that the USACE is in agreement with the Section 404(b)(1) Guidelines process and alternatives evaluation. Note that because USEPA is not a signatory to this agreement, nor does it have concurrence authority under this agreement at the three concurrence points, USEPA may not be in agreement with the USACE, particularly on issues where there is national disagreement between the USACE and USEPA. USEPA's authorities under Section 404 of the CWA include recommending that the USACE deny a permit, authority to veto USACE permit decisions, and authority to elevate permit decisions on specific cases. Nevertheless, USEPA will endeavor to make comments on all projects early in the process, so that all parties are on notice of any potential disagreements.

affect a federally listed species. The USACE typically circulates IP applications to the USFWS for their review pursuant to the above statutes. The USFWS also has authority to elevate certain Section 404 decisions (Section 404[q]).

### **Merger Framework and Timing**

The merger process integrates the requirements of two Federal agencies and must be initiated early in project development to avoid schedule delays. The timing may coincide with determining the results of project scoping and the decision on a class of NEPA document (EIS vs. EA). The merger process is a sequential process that requires concurrence at three key milestones: 1) Purpose and Need and Alternative Screening Criteria, 2) Alternatives Selected for Detailed Evaluation, and 3) the Preferred Alternative.

If the NEPA process will use information or decisions made during a pre-NEPA planning stage then that information and a description of how it will be used must be provided to external agencies and the public during the pre-NEPA planning stage and/or NEPA scoping. It will be very important to clarify to the USACE any intention to use this information to help define the Purpose and Need, narrow the range of alternatives, or influence alternative screening so they have the opportunity to provide comments. This is not a concurrence point. Rather, it will help identify deficiencies in level of detail or limitations on how planning level information may be used on a particular project.

The three concurrence points described above should be scheduled early in the project development considering the critical work items and ultimate delivery date for the environmental document. Concurrence points must be included in the project coordination plan and schedule.

Concurrence will be obtained by providing a written request with supporting material to the USACE. Materials may only be supplied to the USACE after internal FHWA and CDOT review. It is recommended that a meeting be scheduled with the USACE to review the concurrence request and supporting information. In this case, CDOT would submit information to USACE a minimum of ten business days prior to a scheduled concurrence meeting to provide sufficient review time. Following the meeting, and if all necessary information has been provided, the USACE will issue a written concurrence, or provide detailed comments outlining deficiencies that prevent their concurrence. Their response is required within 30 business days following the request or the concurrence meeting, whichever occurs later. The USACE will direct all written correspondence to the FHWA and any co-lead Federal agencies. The applicant shall be sent a duplicate copy.

A written concurrence will allow the project to proceed to the next concurrence point without revisiting the decision unless new information is obtained or it is determined to be required by legal counsel. In the event that concurrence needs to be revisited, FHWA and CDOT will clarify any data needs and arrange a second concurrence meeting, if necessary. The USACE will have 30 days to issue concurrence or provide comments after the second concurrence attempt. Failure to obtain concurrence at this point will

trigger the dispute resolution process as described in Appendix D. If after going through the dispute resolution process, FHWA, CDOT, and USACE cannot come to resolution, the project team can decide to exit the merger as a last resort. This decision must be in writing.

Comments received from commenting agencies must be fully considered and incorporated into the project, as appropriate. FHWA will provide a meaningful written response to the commenting agency, if necessary. The commenting agency will be provided copies of all formal correspondence between signatories.

**Concurrence Point #1 - Purpose and Need and Alternative Screening Criteria**

The purpose of this concurrence point is to ensure that the NEPA Purpose and Need can be utilized by the Corps for their definition of overall project purpose (described above), includes sufficient detail for alternative screening and to present evaluation criteria that will be used to objectively screen alternatives. The USACE will review this information to determine if the Purpose and Need statement complies with regulatory requirements for defining the overall project purpose and to ensure that sufficient detail will result from screening to determine if a potential LEDPA has been eliminated. A draft Purpose and Need chapter and alternative evaluation criteria and screening process will be required for this submittal. USACE scoping comments and FHWA and CDOT guidance on preparing Purpose and Need should be followed and an interim consultation meeting may be required to ensure that the draft chapter and evaluation criteria are proceeding consistent with any requirements.

**Purpose and Need**

The NEPA Purpose and Need should be focused on the transportation problem to be solved. It will provide a detailed description of the needs for the proposed action. In accordance with CDOT Purpose and Need Guidance, project needs shall be measurable and quantified where feasible, recognizing that in some cases the needs may require evaluation in a more qualitative manner. Traffic data and projections, population and growth projections, level of service, safety data, roadway deficiencies, etc. are typical needs included in the chapter, as appropriate. The FHWA and any other co-lead agencies will participate in their development and be provided the opportunity to review and ensure that the project Purpose and Need complies with their NEPA requirements prior to submission to the USACE for concurrence.

The project needs will result in primary goals or objectives that must be met to justify the action and expenditure of funds. These primary goals or objectives form the basis and should clearly relate to the evaluation criteria used to screen alternatives. Examples of primary goals and objectives may be to reduce congestion, increase capacity, eliminate a safety hazard, or provide mode choice. These are all examples of bona fide “needs”, where meeting such needs would justify expenditure of public funds to construct the project.

There is often a desire to also include secondary goals or objectives that add value to the project and support the overall purpose. An example of a typical secondary goal would

be to minimize environmental effects. Secondary objectives may be considered during alternative evaluation. However, they are not considered part of the Purpose and Need. These secondary goals and objectives might be important considerations in alternative development and evaluation but will not be used for screening against meeting the Purpose and Need unless they have been specifically identified as a need for the project (meeting the need justifies expenditure of public funds for the project).

FHWA guidance makes clear that a Purpose and Need may change during the development of a project. Such changes may range from obtaining new or updated data to eliminating a need or identifying an entirely new transportation need not considered initially. If after concurrence, changes to the Purpose and Need occur that are expected to influence the project purpose and screening process, then FHWA and USACE will review changes to determine if concurrence should be revisited. If concurrence needs to be revisited a second opportunity for review shall be granted using the time frames identified above.

#### Alternative Screening Criteria

This merger agreement requires that the alternative screening process and evaluation criteria be identified when the Purpose and Need is presented for concurrence. The purpose is to ensure that all applicable FHWA and Council of Environmental Quality (CEQ) requirements are being met, and to provide the USACE the opportunity to review this information to determine if the screening process will meet their NEPA and CWA requirements.

Screening criteria fall into the following categories. These questions are intended to help define whether an alternative is practicable or environmentally damaging:

- 1) Does a particular alternative meet the Purpose and Need? If not, this alternative may be eliminated and could not be the LEDPA. To answer this question, practitioners need to identify the evaluation criteria that relate directly to Purpose and Need and have some means to determine if that criteria has been satisfied.
- 2) Would the alternative present insurmountable technological or logistical challenges, result in non-compliance with other laws or regulations, or result in extraordinary cost? If so, this alternative would not be practicable and could not be the LEDPA. To answer these questions, practitioners are advised to develop definitions for each cost, technology, logistics, and legal criterion and determine if an alternative meets any of the respective definitions.
- 3) What are the impacts to aquatic resources? This information will identify the alternatives that might be less damaging to the aquatic ecosystem.
- 4) Does the alternative result in significant adverse impacts to other natural resources that cannot be mitigated? If so, this alternative could be eliminated as not being the least environmentally damaging. To answer this, practitioners must be prepared to provide information regarding natural resource impacts other than those to aquatic resources.

### *Consideration of Impacts to Natural and Physical Resources in Alternative Screening*

The Council on Environmental Quality regulations for the implementation of NEPA uses the term “human environment,” which is defined to include both the natural and physical environment.

The CWA is a law that protects aquatic resources from impacts resulting from the construction of physical resources and defines “Environment” to mean the “natural environment.” The CWA does not include consideration of the cultural and social environment in the phrase “Least Environmentally Damaging”.

Under NEPA, practitioners regularly balance impacts to natural and physical resources and use each as factors in alternative screening. For example, an alternative that hits a comparatively large number of residences or businesses may be eliminated in the NEPA process in favor of another alternative that similarly meets the Purpose and Need and has fewer residential and business impacts. In this example, social impacts are considered part of the human environment and thus commonly considered “environmental” impacts.

Under the CWA, no problem exists if the eliminated alternative has greater aquatic resource impacts than the retained alternative. However, if the eliminated alternative has fewer aquatic resource impacts, then it is the responsibility of the practitioner to make sure sufficient evidence or interpretation has been provided to make clear that elimination of that alternative is in compliance with both NEPA and the CWA. This additional information or interpretation need not be integrated into the NEPA document and can be provided to the USACE in a separate CWA Section 404(b)(1) evaluation document.

The NEPA requirement will normally be met through documentation of the impacts and the reason for elimination. Once the NEPA requirements have been met, an interpretation may need to be provided to the USACE and commenting agencies that make clear that the alternative that has been eliminated in the NEPA process is not the LEDPA. Questions 1-4 above have been developed to help guide the determination on whether or not an alternative is practicable (technology, logistics, legal compliance and cost in light of overall project purpose), has more or less impacts to aquatic resources, and would result in other significant adverse impacts to the natural environment. This information must be presented as explicitly as possible when presenting information to the USACE and commenting agencies.

### *Comparison of Impacts to Natural Resources*

The CWA 404(b)(1) analysis process is sequential and first considers avoidance, minimization and then compensatory mitigation as a last resort. The USACE review during this early stage in project development focuses on avoidance and minimization. Compensatory mitigation for impacts to aquatic resources is not yet considered. Otherwise, the net impact to aquatic resources would theoretically be zero and there would be no differences between alternatives because all would be mitigated to a net effect of zero.

Non-aquatic natural resources are looked at differently by the USACE. Most natural resource laws require that mitigation be provided for adverse effects so impacts to non-aquatic natural resources are considered to have been mitigated when they are compared to impacts to aquatic resources. For example, Section 7 of the Endangered Species Act requires that an adverse effect to a federally listed species be minimized through the issuance of reasonable and prudent measures intended to minimize take. These measures are required and, by definition, decrease the level of take and would be considered mitigation in the NEPA context.

Practitioners are advised to include natural resource impacts in alternative screening. If this information is not included up front, then it will need to be obtained for concurrence for alternatives to be evaluated in detail. Coordination with the signatories to this agreement is highly recommended to verify the level of detail and limitations of the information to be used for alternative screening. It is recognized that mitigation will not be detailed during these early stages; however, some level of mitigation of impacts to non-aquatic natural resources will be assumed by the USACE during any comparison to aquatic resources.

#### *Functional Assessment*

The USACE has the flexibility to consider aquatic resource functions in their 404(b)(1) analysis. A one acre impact to an aquatic resource with high functions may be considered more damaging to the environment than a two acre impact to such a resource with low functions. A discussion of functions should be provided in cases where an alternative with similar or greater impacts to aquatic resources compared to other alternatives is moved forward in screening.

#### *Submittal for Concurrence*

Below is a list of items to be included in this concurrence point request:

- Purpose statement and a list of needs for the project (the needs should include supporting arguments)
- Screening criteria based on the purpose and need
- Draft Purpose and Need chapter (if available)
- The limits of the study area on a project location map
- The project's consistency with local transportation plans
- Past studies supporting the project that support the Purpose and Need or the 404 permitting process
- Public and agency comments from scoping that are pertinent to 404 permitting

#### **Concurrence Point #2 - Alternatives to be Evaluated in Detail**

Concurrence on Purpose and Need and screening criteria is required before they may be used as factors in alternative screening.

After the project has developed a Purpose and Need and evaluation criteria, then the next concurrence point would be for the identification of alternatives selected for detailed

analysis (reasonable range of alternatives under NEPA and practicable under CWA). This concurrence must be sought as early as possible and prior to detailed analysis in the DEIS (or EA). This concurrence should be obtained prior to presenting the results of alternative screening to the public.

The purpose of this concurrence point is to ensure that alternatives carried forward have met the agreed upon screening criteria and can be evaluated to determine the LEDPA. Materials needed for this stage include the results of screening. This would normally include a table and summary information.

Alternatives that clearly don't meet the Purpose and Need or are clearly not practicable will not be forwarded to the Corps as part of the concurrence on the alternatives to be evaluated in detail. However, alternatives that will be discussed in the "Considered but Eliminated" section of the Alternatives Chapter of a document would be presented to the Corps with the rationale behind why they do not meet the Purpose and Need.

Note: The public review process and interagency consultation may always identify new alternatives subject to consideration under this NEPA and CWA merger agreement.

#### *Submittal for Concurrence*

Below is a list of items to be included in this concurrence point request:

- The limits of the study area on an Environmental Features Map. The map should include as much information as possible for natural resources in the study area
- Alignment descriptions and general design elements
- Discussion of operational or geometric safety attributes (positive and negative) of each alternative
- Alternatives screening table comparing how well each alternative meets the Purpose and Need, practicability and natural resource impacts
- Attach screening report or draft Alternatives Considered Chapter from EA or DEIS, if appropriate

#### **Concurrence Point #3 - Preferred Alternative and LEDPA**

It is the desire of FHWA and CDOT to select a preferred alternative that may also be permitted under the CWA. This stage in the process requires the USACE review the preferred alternative for their concurrence that it appears to be the LEDPA.

Although a preferred alternative may be identified in the DEIS, formal selection of the preferred alternative for compliance with the CWA will take place prior to the FEIS. Four scenarios are possible leading up to the FEIS: 1) The DEIS does not identify a preferred alternative, 2) The DEIS identifies the preferred alternative and it remains the same in the FEIS, and 3) The DEIS identifies a preferred alternative and that alternative is either modified after the DEIS or another alternative is identified as the preferred in the FEIS or 4) A Supplemental EIS is prepared in combination with one of the above.

In all cases, prior to issuance of the DEIS the project team will submit a review copy of the DEIS to the USACE for their review with a request for comments within 30 business days from them that would include their opinion regarding which alternative appears to be LEDPA or that the project has not eliminated the LEDPA.

After the information in the DEIS has been considered along with agency and public comments, CDOT will confirm their preferred alternative and prepare a FEIS. CDOT should seek concurrence from the USACE at this time (Pre-FEIS) and prior to additional public disclosure regarding the preferred alternative. The request for concurrence should identify the agency preferred alternative supported by the rationale for decision making and provide data supporting the preferred alternative as the LEDPA. Practitioners are advised that definitions of what is practicable, how well an alternative meets the Purpose and Need, or the level of natural resource impacts may change as more detail is obtained throughout screening and detailed analysis. The analysis of the alternatives against the screening criteria should therefore be expanded, as necessary, as new information is developed and analyzed. The argument regarding practicability, meeting the Purpose and Need, and other criteria for decision making should be comprehensive and persuasive, including all factors supporting the agency preferred alternative as the LEDPA.

The request for concurrence will be a letter request to the USACE accompanied by a CWA Permit application. A meeting should be scheduled with the USACE and commenting agencies to present the results of the DEIS and public and agency coordination. CDOT public involvement procedures require a formal public hearing after issuance of the FEIS. If at the completion of the FEIS the design has sufficient details for them to make a decision on the permit application, the USACE will time their public review period required for their CWA Permit to coincide with the distribution of the FEIS and subsequent public review period. A joint meeting or hearing is an option should the signatories deem it advantageous to the public and project development. Once all public involvement requirements have been met, the USACE will provide final concurrence that the preferred alternative is the LEDPA through issuance of a permit. If the preferred alternative is not the LEDPA, the permit application may be denied.

If design details are not sufficient at the time of the NEPA document, the CWA Permit application will still be submitted, but the USACE's decision on the permit will be postponed until sufficient design details are available. The letter accompanying the CWA Permit application must clearly indicate that the design of the preferred alternative does not yet have the detail necessary for a complete permit application. Once all public involvement requirements have been met, the USACE will provide a letter indicating whether or not the preferred alternative appears to be the LEDPA. The USACE's final determination that the preferred alternative is the LEDPA would occur through issuance of the CWA Permit.

In the case of a Tiered document, following the Tier 1 FEIS the USACE will provide a letter indicating whether the preferred alternative is in compliance with the 404(b)(1) Guidelines. No permit application will be required and no permit will be issued.

For EA projects using the merger process, the concurrence request would be submitted prior to issuing the FONSI.

*Submittal for Concurrence*

Below is a list of items to be included in this concurrence point request:

- Letter requesting the USACE determine whether or not the preferred alternative is or appears to be the LEDPA or is in compliance with the 404(b)(1) Guidelines
- Description of the Preferred Alternative
- Updated Environmental Features Map
- Updated Alternatives screening table comparing how well each alternative meets the Purpose and Need, practicability and natural resource impacts
- Direct, indirect and cumulative effects of the Preferred Alternative
- Conclusion that the Preferred Alternative is the LEDPA with a summary of the supporting data
- CWA Permit application (except for Tier 1 projects)

Next Steps: **Permit Application and Compensatory Mitigation**

The CWA Permit application must identify compensatory mitigation for unavoidable impacts to wetlands and other aquatic resources. Therefore, compensatory mitigation options should be presented to the USACE for their review and comment prior to submittal of the permit application. The USACE will provide comments on whether or not the compensatory mitigation would provide functional replacement for impacts. The compensatory mitigation plan may be “conceptual” at the time that the CWA Permit application is submitted for review. Conceptual is defined as providing sufficient information so that the USACE can determine the proposed mitigation adequately replaces aquatic resource functions lost or adversely affected by the project (the USACE must be able to determine that the mitigation proposal complies with the Guidelines, the 1990 USACE/USEPA Mitigation MOA, and the Mitigation Rule [33 CFR Part 332]).

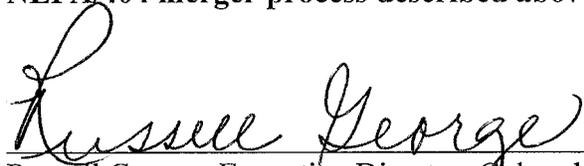
The conceptual mitigation proposal shall include baseline information, goals and objectives, site selection criteria, mitigation work plan, recommended performance standards, site protection plans and contingency plans (See 33 CFR Part 332). In accordance with 33 CFR Part 332.4(c)(1), a final mitigation plan must be approved by the USACE before they can issue a permit.

In most cases, a jurisdictional wetland determination should be obtained prior to completion of the DEIS. Note that often large corridor projects have been permitted to obtain a jurisdictional determination prior to identification of the preferred alternative to avoid unnecessary field work that would be required to make a determination for all alternatives that are being evaluated.

**Maintenance of Agreement**

This agreement will be revisited by signatory agencies every three calendar years to assess its effectiveness and recommend and implement changes, as necessary, to maintain it as a useful working agreement.

**By signing this agreement, I agree to work cooperatively to implement the NEPA/404 merger process described above.**

  
Date 8/18/08  
Russell George, Executive Director, Colorado Department of Transportation

  
Date 8/21/08  
Lieutenant Colonel Kim Colloton, Commander, US Army Corps of Engineers,  
Albuquerque District

  
Date Aug. 12, 2008  
Karla S. Petty, P.E., Division Administrator, Colorado Division, Federal Highway  
Administration

## Appendix A - NEPA/404 Merger Process Outline

### Initiating the process:

- Lead Agency request for cooperating agency status and participation in the merger process. Lead agency informs commenting agencies that the merger process will be initiated.

### Purpose and Need:

- CDOT Project Team (PT) will present the Draft Purpose and Need, Goals and Objectives, and Evaluation Criteria to the USACE for concurrence.
- CDOT PT will identify any alternatives screened out during preliminary screening based on practicability or significant impacts to the natural environment.

### Alternatives to be Evaluated in Detail:

- CDOT PT will present results of alternatives screening (provide documentation that supports screening of alternatives based quantitative objectives where data is available) to USACE for concurrence.
- CDOT PT will identify primary pros/cons of remaining alternatives with respect to aquatic ecosystems and other potentially significant effects

### Preferred Alternative:

Prior to the issuance of the FEIS (or DEIS if a preferred alternative has been identified), CDOT PT will provide to USACE, for concurrence, the following:

- Results of detailed analysis and recommendation for the preferred alternative/LEDPA

### Compensatory Mitigation:

Prior to the issuance of the FEIS (or DEIS if a preferred alternative has been identified), CDOT PT will provide to USACE, for concurrence, the following:

- Estimated unavoidable impacts of preferred alternative to wetlands and other waters of the US
- Conceptual compensatory mitigation plan\*

\*Prior to issuance of a permit, the USACE must approve a final mitigation plan.

## Appendix B – Acronyms

CDOT	Colorado Department of Transportation
CEQ	Council on Environmental Quality
CWA	Clean Water Act
DEIS	Draft Environmental Impact Statement
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FHWA	Federal Highway Administration
FTA	Federal Transit Administration
FWCA	Fish and Wildlife Coordination Act
IP	Standard Individual Permit
LEDPA	Least Environmentally Damaging Practicable Alternative
NEPA	National Environmental Policy Act
PT	Project Team
USACE	US Army Corps of Engineers
USEPA	US Environmental Protection Agency
USFWS	US Department of Interior Fish and Wildlife Service

## Appendix C – References

### Federal NEPA Laws and Regulations

- NEPA of 1969
- CEQ Regulations 40 CFR 1500 - 1508

### FHWA Laws and Regulations

- 23 USC 109 (h)
- 23 CFR 771 - Subchapter H Environmental Impact and Related Procedures
- 23 CFR 771 - Preamble to the Regulation

### NEPA Guidance

- SAFETEA-LU Environmental Review Process Final Guidance
- Project Development and Documentation Overview
- Purpose and Need Paper
- The Development of Logical Project Termini
- FHWA Technical Advisory
- CEQ Guidance

### Clean Water Act Guidance

- Text of 404(b)(1) Guidelines (40 CFR 230)
- Memo of Agreement, EPA and Corps: Mitigation Under 404(b)(1) Guidelines

## Appendix D – Dispute Resolution

All agencies agree to work cooperatively to avoid and resolve conflicts. The agencies agree to explore issues thoroughly before seeking to use this dispute resolution mechanism by ensuring that adequate communication has occurred, that all agencies fully understand the issues, and the reasons why an agency is committed to a position.

If disagreements emerge which cannot be resolved, the impasse shall be escalated as follows:

<b>USACE</b>	<b>CDOT</b>	<b>FHWA</b>
Project Manager	Project Coordinator	Operations Engineer
Field Office Supervisor	Regional Transportation Director	Program Delivery Engineer
Regulatory Branch Chief	Chief Engineer	Assistant Division Administrator
District Engineer	Executive Director	Division Administrator

When the parties at the lowest organizational level of the agencies have agreed to escalate, a meeting date will be established within 14 days. At that time, the agencies from both levels will meet to discuss the issues and come up with a resolution. If an agreement cannot be reached, then the issue will be escalated to the next level and a meeting date established within 30 days. At that time, the agencies from all three levels will meet to discuss the issues and come to a resolution. If an agreement cannot be reached, the issue will be escalated to the highest level and a meeting date established within 30 days.

Mediation and facilitation may be used at any level to help expedite resolution. Documentation of all disagreements and resolutions shall be furnished to all involved agencies and included in the project file.

If after going through the dispute resolution process, FHWA, CDOT, and USACE cannot come to resolution, the project team can decide to exit the merger as a last resort. This decision must be in writing. In cases where the LEDPA and the Preferred Alternative are in conflict, the USACE must make a decision on the permit application and either issue or deny the permit. If the USACE intends to deny the permit and the recommended denial is contrary to the written position of the Governor of Colorado, the District Engineer will refer the permit application to the Division Engineer [see 33 CFR Part 325.8(b) and (c)].