

Memorandum of Agreement Between the Federal Highway Administration Colorado Division and the Colorado Department of Transportation Regarding the Programmatic Approval of Certain Wetland Findings

Whereas, Executive Order 11990 (EO 11990), “Protection of Wetlands”, requires each federal agency, to the extent permitted by law, to avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use

Whereas, for all federal-aid transportation projects occurring in Colorado, the Administrator, Colorado Division, Federal Highway Administration (FHWA) is the agency official responsible for compliance with EO 11990; and

Whereas, many federal-aid transportation projects occurring in Colorado are planned and constructed by the Colorado Department of Transportation (CDOT) or consultants acting under the supervision of CDOT; and

Whereas, many federal-aid projects that are located in wetlands have minor impacts that can be mitigated with standard control measures; and

Whereas, both the FHWA and the CDOT are interested in reducing the time and expense required to prepare and process Wetland Findings while ensuring the intent of EO 11990 is upheld; and

Whereas, the Guidelines referred to below are attached to and made part of this Memorandum of Agreement;

Now, therefore, it is hereby agreed that:

1. Wetland Findings for federal-aid transportation undertakings that are located in wetlands and that satisfy the procedures and conditions of the guidelines for Programmatic Approval of Wetland Findings shall be approved by the Environmental Policy and Biological Resources Section Manager or by a designated representative in the CDOT Division of Transportation Development (CDOT DTD).
2. Wetland Findings for all other federal-aid transportation undertakings will be forwarded to the FHWA Colorado Division Administrator or designated representative for approval. Approval of Wetland Findings associated with Environmental Assessments (EA) and Environmental

Impact Statements (EIS) will be approved through the signature of the NEPA document, assuming appropriate coordination through NEPA reviews occurs between CDOT DTD and the CDOT regional offices. For Categorical Exclusion projects, the Wetland Finding must be approved separately.

3. Representatives of the FHWA Colorado Division and CDOT DTD will meet, when necessary to review the effectiveness of this agreement and to make necessary changes. Upon request, CDOT can prepare a report tallying the number of Programmatic and Non-Programmatic Wetland Findings processed annually.
4. If either signatory to this Agreement determines that the terms of the Agreement cannot be met or believes a change is necessary, that signatory can request an amendment or addendum that will be executed in the same manner as this Agreement.
5. Changes to the guidelines must be approved by the FHWA Division Administrator and the CDOT Executive Director or their designated representatives provided the terms and conditions of this Agreement are upheld.

In Witness Whereof, the parties hereto have executed this Agreement on this, the _____ day of _____, 2024.

Colorado Department of Transportation

By: _____ Date: _____
Shoshana Lew, Executive Director

Federal Highway Administration, Colorado Division

By: _____ Date: _____
John M. Cater, P.E., Division Administrator

Guidelines for Programmatic Approval of Wetland Findings Developed and Agreed Upon by the Federal Highway Administration Colorado Division and the Colorado Department of Transportation

April 2024

I. Introduction

On May 4, 1977, President Carter signed Executive Order 11990 (EO 11990), “Protection of Wetlands”. Section 2(a) of the Order requires that Federal agencies “to the extent permitted by law, shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands that may result from such use. In making this finding the head of the agency may take into account economic, environmental, and other pertinent factors.”

Since 1977, the Colorado Department of Transportation (CDOT) has prepared Wetland Findings on all federal-aid transportation projects with impacts to wetlands. For many transportation projects wetland impacts are minor and actions taken to avoid, minimize, and compensate impacts can be fairly consistent from one project to another. For these types of projects, Wetland Findings generally include standardized impact avoidance and minimization and mitigation measures as the conditions that support the finding that:

There is no practicable alternative to the proposed new construction in wetlands and that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.

These Guidelines outline the circumstances under which the Federal Highway Administration (FHWA) Colorado Division Administrator has delegated authority and responsibility to the CDOT Division of Transportation Development (DTD) Wetland Program Manager to approve Programmatic Wetland Findings. Certain parameters must first be met, and these are described in Part III (Applicability of the Programmatic Wetland Finding) and Part IV (General Conditions). Use of the Programmatic Wetland Finding allows CDOT to proceed with a federal-aid project that impacts wetlands without FHWA’s review and approval of the Wetland Finding prepared for that project.

Projects that qualify for programmatic approval are ones that have minor impacts to wetlands and are easier to mitigate. The purpose of having a programmatic approval is to expedite the wetland process and eliminate unnecessary coordination and paper work.

II. Definitions

Wetlands

E.O. 11990 defines "wetlands" as those areas that are inundated by surface or ground water with a frequency sufficient to support, and under normal circumstances does or would support, a prevalence of vegetative or aquatic life that requires saturated or seasonally-saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds. This definition is consistent with the definition provided in Title 23 CFR Part 777.2, "Mitigation of Impacts To Wetlands and Natural Habitat".

Natural Habitat

Title 23 CFR 777.2 defines "natural habitat" as a complex of natural, primarily native or indigenous vegetation, not currently subject to cultivation or artificial landscaping, a primary purpose of which is to provide habitat for wildlife, either terrestrial or aquatic. Wetlands or other aquatic resource that are created solely as a result of excavation, impoundment, or other activities occurring in upland areas, including features constructed to maintain and preserve the highway within the highway rights-of-way, do not constitute natural habitat.

III. Applicability of the Programmatic Wetland Finding

The Programmatic Wetland Finding shall be applied for all federal-aid transportation projects that meet all seven criteria below:

1. The project is being prepared as a categorically-excluded minor project as defined in 23 C.F.R. 771.117.
2. Project activities will involve at least 500 ft² of permanent wetland impacts or 1,000 ft² of combined temporary and permanent wetland impacts. Projects with wetland impacts less than above do not require a Wetland Finding.
3. Less than one acre of wetland will be impacted either temporarily, permanently, or in a combination of the two.
4. All practicable alternatives to avoid and minimize impacts have been addressed and documented in the Wetland Finding, as specified by EO 11990 and the FHWA Technical Advisory T6640.8A.
5. The wetland compensatory mitigation ratio is no less than 1:1, regardless of jurisdictional status, unless the mitigation plan will replace functions with a lower mitigation ratio.

6. The project will not impact a Gold Medal Trout Stream, a designated National Wild and Scenic River, or other areas of special ecological concern (e.g. fen, fish spawning ground, etc.).
7. The project does not require a Clean Water Act section 404 permit, or the project is authorized under a section 404 nationwide permit.

When any of the above criteria cannot be met, the project does not fall into the category of a Programmatic Wetland Finding. In this case CDOT will prepare a Non-Programmatic Wetland Finding and send it to the FHWA for review and approval by the Division Administrator or other representative. Approval of Non-Programmatic Wetland Findings associated with Environmental Assessments (EA) and Environmental Impact Statements (EIS) will be approved through the signature of the NEPA document, assuming appropriate coordination through NEPA reviews occurs between CDOT DTD and the CDOT regional offices. For Categorical Exclusion projects, the Wetland Finding must be approved separately through the process described in Part V.

IV. General Conditions

Projects with wetland impacts satisfying the criteria listed under Part III of these Guidelines must incorporate all applicable conditions listed below. These conditions are CDOT control measures (best management practices) developed to minimize impacts to wetlands as a result of construction activities. These conditions apply equally to projects that fall into the programmatic or non-programmatic categories. The practices discussed below are intended to be in conformance with Guidelines specified in the following CDOT documents: Erosion Control and Stormwater Quality Guide and Standard Specifications for Road and Bridge Construction.

1. During the planning and construction of a project, all measures will be taken to avoid disturbance to existing wetlands and adjacent riparian vegetation. Sensitive areas will be fenced to protect aquatic resources (i.e. wetlands, riparian habitats, stream channel, etc.).
2. Erosion control will be addressed on all projects to the extent warranted by the type of work and character of the project. Temporary and permanent erosion and sediment control measures will be installed at the earliest practicable time, consistent with good construction practices, and will be maintained throughout the operation of the project. All temporary erosion control will be removed following construction or when appropriate.
3. When possible, work will be performed during low flows/dry periods, and the use of heavy equipment in wetland areas will be minimized. Where practical, equipment will be operated outside wetlands.
4. Temporary fill in wetlands will require the use of geotextile fabric or construction mats prior to placement of fill material. Approved control measures will be used

when designated by a CDOT biologist or landscape architect to protect wetlands from permanent impacts.

5. When clearing scrub-shrub wetlands, prior to temporary fill placement, vegetation should be trimmed to the existing ground line, and the root masses left in place.
6. Construction staging areas will be located at least 50 horizontal feet from the ordinary high water mark and wetlands.
7. If flowing water occurs within an impacted wetland area, the water should be diverted around or piped through the active construction site to minimize water quality degradation.
8. Temporary fills, such as coffer dams and temporary road crossings using imported material, will utilize clean, chemical-free fill to avoid a substantial increase in suspended solids or pollution.
9. Point source discharge (dewatering) of effluent into wetlands is prohibited. Discharge of water directly into live water will be in accordance with applicable Clean Water Act sections 401, 402, and 404 permits and conditions.
10. All reasonable measures will be taken to avoid excess application and introduction of chemicals into aquatic ecosystems, including wetlands. Use of chemicals during construction, such as soil stabilizers, dust palliatives, growth inhibitors, and fertilizers, will be limited to those areas approved by a CDOT landscape architect or comparable staff.
11. Appropriate measures will be taken to prevent spilled fuels, lubricants, or other toxic materials from entering aquatic ecosystems.
12. Concrete will be disposed of in a labeled concrete washout area located at least 50 feet from wetlands and other aquatic ecosystems.
13. Wetland and riparian trees and shrubs removed during construction will be replaced as required by Senate Bill 40.
14. Immediately upon completion of a project, all disturbed areas, including wetland and adjacent non-wetlands, will be revegetated with appropriate native plant species to provide stabilization, erosion control, and habitat restoration.
15. All temporary fill will be removed from wetlands to an upland site upon completion of the project.
16. Where possible, stormwater run-off should be diverted away from existing wetlands unless those wetlands were created for water quality purposes.

V. Processing the Programmatic Wetland Finding

Wetland findings for federal-aid projects prepared by CDOT staff or contractors will be forwarded to the CDOT DTD for review by the Wetland Program Manager. The Wetland Finding will then be given to the CDOT DTD Environmental Policy and Biological Resources Section Manager or a designated representative for approval. Findings prepared for projects that meet the applicability of Part III and that incorporate the control measures of Part IV of these guidelines may be approved programmatically by the CDOT DTD Environmental Policy and Biological Resources Section Manager or a designated representative without the review and approval of FHWA. The Manager will sign a cover letter attached to the Wetland Finding, and the letter will be sent to the appropriate CDOT regional office.

The template for the Programmatic Wetland Finding is included in this MOA as Attachment 1. All Programmatic Wetland Findings prepared for CDOT, whether by CDOT staff or its contractors, must use the template. Non-Programmatic Wetland Findings shall be written commensurate with the level of project impacts and compensatory mitigation.

VI. Effective Date

These Guidelines and the use of the Programmatic Wetland Finding become effective on the date of execution of the Memorandum of Agreement (MOA) Regarding the Programmatic Approval of Certain Wetland Findings and will remain in effect until canceled by either or both parties to the agreement. A written notification at least 60 days beforehand is required to communicate a party's intention to terminate the agreement. Changes to the Guidelines may be approved by the signatories above or their designated representatives provided the terms and conditions of the MOA are upheld.