National Environmental Policy Act / Clean Water Act Section 404 (NEPA/404) merger process for transportation projects in Colorado

March 2025

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 NEPA for federally funded transportation projects. The FHWA funds and/or otherwise approves certain transportation projects in Colorado and therefore is the NEPA lead agency for those projects. In the event that a project has modal components involving other bureaus of the Department of Transportation (e.g. Federal Transit Administration, Federal Railroad Administration, and/or Federal Aviation Administration), FHWA may be a co-lead agency. Those projects may also require a Clean Water Act (CWA) section 404 permit. The US Army Corps of Engineers (USACE) is responsible for NEPA compliance for issuance of permits in accordance with section 404 of the CWA. In January 2019, USACE, FHWA, and CDOT signed a merger agreement to ensure that both NEPA and CWA requirements were satisfied during development of the FHWA documentation. This 2025 merger agreement will update and supersede the January 2019 merger agreement.

Parties to this Agreement

Signatory agencies:

- US Army Corps of Engineers
- US Department of Transportation, Federal Highway Administration
- Colorado Department of Transportation

Participating non-signatory agencies:

- US Environmental Protection Agency
- US Fish and Wildlife Service

Purpose

This agreement was developed through a collaborative process to identify and develop methodologies for integrating the NEPA and CWA 404(b)(1) Guidelines. The purpose of this agreement is to establish a procedure and provide guidance to USACE, FHWA, and CDOT 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 (Guidelines). These procedures do not supersede lead agency NEPA decision-making requirements, nor do they supersede the requirements of the CWA and its implementing regulations.

Introduction

NEPA requires federal agencies to consider the environmental effects of, and a reasonable range of alternatives to, their proposed actions. The FHWA is the NEPA lead federal agency for federally funded transportation projects proposed by CDOT and other entities with projects funded and/or approved by FHWA (other entities). An action that involves the discharge of dredged or fill material into a waters of the United States generally requires a Department of the Army (DA) permit in accordance with section 404 of the Clean Water Act from the USACE. If the DA permit required is an individual permit (IP), the USACE must ensure compliance with the CWA and with NEPA in order to issue the CWA permit.

If the USACE serves as a cooperating agency for a project, they have the ability to adopt the FHWA NEPA document for their own NEPA compliance and have a more formal role and input into project development, which will assist them in determining whether the NEPA document satisfies USACE needs and the proposed project is in compliance with section 404 of the CWA. In such cases, the USACE will be given an opportunity to provide input into and concur with project Purpose and Need statement that is defined by the FHWA, the development and analysis of alternatives, and to concur with the range of alternatives.

For a DA permit, the USACE uses information supplied by the applicant (FHWA, CDOT, or other entity) to help define the basic and overall project purpose. The basic project purpose is the fundamental, essential, or irreducible reason for the project that is used by the USACE to determine if the proposed action is water dependent for projects that will result in adverse loss of special aquatic sites. The overall project purpose serves as the basis for the Guidelines alternatives analysis and is determined by further defining the basic project purpose in a manner that more specifically describes the applicant's goals for the project and which allows a reasonable range of alternatives to be analyzed. The overall project purpose is similar to the NEPA Purpose and Need and is used by the USACE for consideration of alternatives.

The NEPA process includes an alternatives development and analysis process that leads to the identification and selection of a preferred alternative. Under this merger agreement, alternatives screening and evaluation processes should be developed in a manner that: 1) complies with NEPA; and 2) provides evidence that the applicant (FHWA, CDOT, or

other entity) has not inappropriately eliminated the "Least Environmentally Damaging Practicable Alternative" (LEDPA) from further consideration. This is not expected to result in major changes to a traditional NEPA screening process. However, it is the responsibility of the permit applicant to demonstrate to the USACE that the LEDPA has not been eliminated during the decision making process.

The NEPA preferred alternative identified by the applicant 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 § 230.10(a), is the practicable alternative with the least impacts to the aquatic ecosystem, providing the alternative does not have other significant adverse environmental consequences. Practicable is defined as meaning the alternative is available and capable of being done after taking into consideration cost, existing technology, and/or logistics in light of overall project purposes (40 CFR 230.3(l)). The alternatives screening process should be designed to provide information regarding impacts to the waters of the United States, overall aquatic ecosystem, impacts to the non-aquatic natural environment, and how alternatives address Purpose and Need.

Use of Pre-NEPA Products to Inform NEPA

CDOT and FHWA sometimes prepare Planning and Environmental Linkages (PEL) products prior to beginning the NEPA process. PEL is an approach used to identify transportation issues, priorities, and environmental concerns during the transportation planning process. PEL studies are able to link planning to environmental processes to develop information that can be carried forward and used to inform the NEPA process.

Early coordination with agencies such as the USACE is an important part of PEL that allows resource concerns to be incorporated into the PEL study which directly ties into and helps to focus future projects going through NEPA. This coordination during PEL focuses the NEPA effort substantially by providing context to issues and areas of concern, avoiding duplication of effort, and identifying mitigation measures during the planning process. Agency coordination on critical PEL milestones such as Purpose and Need and alternative analysis will help ensure a more seamless transition into a project's NEPA process.

The PEL Partnering Agreement, signed by the Transportation Environmental Resource Council (TERC) in 2009, acknowledges the commitment between FHWA, USACE, CDOT, and other state/federal resource agencies to actively participate during the PEL process. Participation for the USACE is defined as communicating USACE-specific needs to FHWA and CDOT, providing resources to assure that the planning process is able to move forward, and reviewing documents.

Thresholds for initiating the NEPA/404 Merger

Under this agreement the NEPA/404 merger process is required for Environmental Impact Statement (EIS) level projects that also require an IP and are subject to the caveats discussed below. An Environmental Assessment (EA) requiring an IP will enter the merger process only if the USACE, FHWA, or CDOT or other FHWA-funded

applicant determine it is in the overall best interest of the public. This decision will be made by considering potential impacts to waters of the United States, the range of potential alternatives, and the potential for controversy on environmental grounds.

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 consultation with the USACE on the project during initiation of the NEPA process.

Exiting the Merger Process

If a signatory agency wishes to exit the merger process once it has been initiated, that agency must submit a written request that explains its reasons for doing so. If the project reduces proposed impacts to waters of the United States is to qualify for a general permit, the lead Federal agency, in coordination with other involved agencies in the project, will decide whether to advance further under the merger process. If they decide they should exit the process and future design has no risk of increasing impacts to waters of the United States, FHWA or CDOT will send a letter to the USACE explaining the circumstances and intent. If the project is moving forward under a general permit, the letter will document the alternatives analysis and contrast impacts associated with previously considered alternatives with that of the currently proposed project. Diagrams should be provided that depict the project changes, including differences in the proposed infrastructure footprint, construction access and methods, and other avoidance and minimization measures. If the USACE concurs, the merger process for the project is terminated. If the USACE does not concur, FHWA will set up a meeting to discuss the process.

If all signatory agencies cannot come to an agreement regarding exiting the merger process, the agencies will initiate the dispute resolution process as identified in Appendix D. The final decision regarding the requirement of an IP rests with the USACE.

Roles and Responsibilities

USACE

The USACE is responsible for issuance of DA permits. When the USACE serves as a cooperating agency under this agreement they will participate in meetings and review draft chapters of the Draft EIS (DEIS), Final EIS (FEIS), or EA, as appropriate. The USACE agrees to provide input to ensure that the information being presented complies with section 404 of the CWA. This may include, but is not limited to, 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 at concurrence points, including 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, and the preferred alternative is potentially the LEDPA.

FHWA

The FHWA can be 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 transportation improvement projects, as well as projects that affect the Interstate even if not federally funded. Under this agreement, FHWA will follow NEPA and CWA requirements, assist in the determination to enter the merger process, encourage consideration of all concerns during the development of Purpose and Need, and review and approve Purpose and Need, evaluation criteria, alternatives, and the preferred alternative. FHWA will also participate in any concurrence meetings (if needed). In the event that a project has modal components involving other bureaus of the Department of Transportation (e.g. Federal Railroad Administration Federal Transit Administration and/or Federal Aviation Administration), FHWA may be a co-lead agency.

CDOT

The transportation improvement program in Colorado is programmed, developed, and implemented by CDOT. CDOT is a direct recipient of transportation funds administered by FHWA and functions as a co-lead agency on NEPA project development. CDOT is also the recipient of other federal transportation funds and may be the co-lead with other federal transportation agencies on NEPA project development. CDOT, in conjunction with FHWA, may have the primary role for implementing this merger agreement. CDOT will provide project information to the federal agencies, as well as plan and host concurrence meetings, as necessary. If a local agency project with CDOT oversight enters into the merger process, CDOT will be involved to the extent that is appropriate.

Other entities

Other entities, such as local governments, can be the recipient of federal transportation funds and/or require other federal transportation approvals for their projects. Those agencies may be the permit applicant for DA permits. In those cases, FHWA will have the primary role for implementing this merger agreement. The other entity's role is to provide project information and documentation as needed, and participate in meetings.

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 can 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 are not intended 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, the commenting agency must provide assurance in writing that it will not distribute the information outside of the agency unless required by law or court order. This can be accomplished through a separate MOU or by transmitting deliberative materials under a cover letter stating that material provided pursuant to this merger agreement is privileged, is subject to control of the originating agency, is exempt from disclosure under exemption 5 of the Freedom of Information Act (FOIA), and acceptance of such constituents understanding of an agreement to these conditions.

The USEPA has responsibility under section 404 of the CWA, including, but not limited to[1]:

- developing and interpreting policy, guidance, and environmental criteria used in evaluating permit applications
- determining scope of geographic jurisdiction
- 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

In addition, USEPA has general statutory authority under section 102(2)(C) of NEPA and specific authority and responsibility under section 309 of the Clean Air Act (CAA) to independently review other federal agencies' EIS and comment on the adequacy and the acceptability of the environmental impacts of the proposed action. USEPA is not a signatory to this agreement and may have regulatory authority and associated alternative viewpoints from the signatory agencies.

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

[1] An understanding lies herein 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 Guidelines process and alternatives evaluation. USEPA is not a signatory to this agreement and does not have concurrence authority under this agreement at the three concurrence points. Concurrence by USACE does not indicate concurrence by USEPA.

projects must first consult with the USFWS and Colorado Parks and Wildlife regarding the impacts on fish and wildlife resources and measures to mitigate these impacts. The ESA requires that federal agencies enter consultation with the USFWS if a proposed federal action may affect a federally listed species. The USFWS has authority to elevate certain section 404 decisions (section 404[q]). Full consideration shall be given to USFWS recommendations. USFWS is not a signatory to this agreement and may have authority and associated alternative viewpoints from the signatory agencies.

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.

The three concurrence points noted 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/Non-Concurrence

Definition of Concurrence: Concurrence is a written determination that:

1. The information is adequate for this stage, and
2. The project can proceed to the next stage without modification, and
3. The agency's concurrence is consistent with its statutes and regulations (given available information).

Definition of Non-concurrence: Non-concurrence is a written determination that:

1. The information to date is not adequate for this stage, or
2. Concurrence would violate the Guidelines or other agency regulations or policy.

The agencies will attempt to resolve issues causing non-concurrence on an informal basis within 15 days before entering into a formal dispute resolution outlined in Appendix D.

Concurrence will be obtained by providing a written request with supporting material to the USACE. Materials may only be supplied to the USACE after review by the lead federal agency. A concurrence point meeting with the USACE is recommended to review the concurrence request and supporting information. In this case FHWA or 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 preventing their concurrence.

A written concurrence/non-concurrence from the USACE is required within 30 calendar days following receipt of a complete concurrence package. If the lead federal agency has not received a response at the end of 30 days, the lead federal agency or CDOT will contact the USACE to determine the status of the concurrence. If concurrence is not forthcoming, the dispute resolution process described in Appendix D would be triggered. The USACE will direct all written correspondence to the lead federal agency and CDOT (as appropriate).

A written concurrence will allow the project to proceed to the next concurrence point without revisiting the decision. An exception to this would be if new information is obtained, or a review is determined to be required by legal counsel. In the event that concurrence needs to be revisited, the lead federal agency and/or 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, the lead federal agency and USACE cannot come to a resolution, the project team can decide to exit the merger with the understanding that the project may not be in compliance with CWA section 404. This decision must be in writing.

Comments received from commenting agencies must be fully considered and incorporated into the project, as appropriate. The lead federal agency 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 USACE 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. The USACE scoping comments and other federal and CDOT guidance on preparing Purpose and Need (as appropriate) 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 focus on the transportation problem(s) to be solved. It will provide a detailed description of the needs for the proposed action. The 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, transportation deficiencies, etc. are typical needs included in the chapter, as appropriate.

The lead federal agencies will participate in the development of the project's Purpose and Need statement, and have the opportunity to review and ensure that it complies with their NEPA requirements prior to submittal 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 for 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.

Often secondary goals or objectives that add value to the project and support the overall purpose may arise. An example of a typical secondary goal would be to minimize environmental effects. Secondary objectives may be considered during alternative evaluation but do not supersede the requirement under CWA section 404 to select the LEDPA. Additionally, 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).

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, the lead federal agency and the 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.

Alternatives Screening Criteria

This merger agreement requires that the alternatives screening process and evaluation criteria be identified when the Purpose and Need is presented for concurrence. The purpose is to ensure that all applicable federal agency 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:

1) **Purpose and Need**
   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 the criteria have been satisfied.

2) **Practicability**
   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) **Impacts to Waters of the United States**
   What are the impacts to aquatic resources, including waters of the United States? This information will identify the alternatives that might be less damaging to the aquatic ecosystem.

4) **Other Natural Resource Impacts**
   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.

5) **Other Resource Impacts**
   Does the alternative result in significant adverse impacts to other (e.g., cultural or community) resources that cannot be mitigated.

Consideration of Impacts to Natural and Physical Resources in Alternative Screening (Criteria 3, 4, & 5)
The Guidelines, in conjunction with the Public Interest Review factors described at 33 CFR 320.4, provide the substantive criteria for evaluation of impacts to proposed dredge/ fill discharge sites. These criteria are evaluated in a stepwise process that focus on the natural/physical environment but leave room for consideration of built/cultural resources.

NEPA practitioners regularly balance impacts to natural and physical resources and use each as factors in alternatives screening. For example, an alternative that would result in displacement of 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.

Generally, 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 can be provided to the USACE in a separate Guidelines evaluation document.

The NEPA requirement will usually 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 makes clear that an eliminated alternative is not the LEDPA. Criteria categories 1-5 above were developed to help guide the determination on whether or not an alternative is practicable (technology, logistics, and cost in light of overall project purpose), has more or less impacts to aquatic resources, or would result in other significant adverse impacts to the natural environment or other resources. 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 Guidelines process is sequential and considers avoidance, minimization, and then compensatory mitigation as a last resort. The USACE review during this early stage in project development focuses on only avoidance and minimization. Consideration of compensatory mitigation at this stage would nullify differences in resource impacts among the alternatives.

Practitioners are advised to include natural resource impacts in alternatives screening. If this information is not included up front, it must be provided to obtain concurrence on alternatives to be evaluated in detail. In addition to coordination with the USACE, coordination with commenting agencies is highly recommended to verify the level of detail and limitations of the information to be used for alternative screening. Compensatory mitigation will not be considered during these early stages.

Functional Assessment
The USACE has the flexibility to consider aquatic resource functions in their Guidelines 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 a low functioning resource. Implementation of a USACE-approved functional assessment, such as Functional Assessment of Colorado Wetlands or the Colorado Stream Quantification Tool, is required for projects with greater than 0.5 acre of permanent wetland impacts or for projects that may require stream mitigation. A functional analysis should also be provided when 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 the lead federal agency and CDOT (as appropriate) will provide the USACE for this concurrence point request. A response from the USACE is required within 30 calendar days, unless otherwise negotiated:

- 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
- Studies supporting 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 alternatives screening.

After the lead federal agency has developed a project Purpose and Need and evaluation criteria, the next concurrence point is 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 alternatives 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 do not meet the Purpose and Need, or are clearly not practicable, will not be included in the range of alternatives for concurrence. Other screening criteria, including natural, cultural, and community impacts, may be used by project teams to narrow the range of alternatives. However, alternatives that will be discussed in the "Considered but Eliminated" section of the Alternatives chapter of a document will be presented to the USACE with the rationale behind why they do not meet the Purpose and Need or were otherwise considered not practicable.

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

Submittal for Concurrence

Below is a list of items the lead federal agency and CDOT (as appropriate) will provide the USACE for this concurrence point request. A response from the USACE is required within 30 calendar days, unless otherwise negotiated:

- The limits of the study area displayed on a map containing as much information as possible for natural resources, including waters of the United States, within the study area
- Alignment descriptions and general design elements
- Discussion of operational or geometric safety attributes (positive and negative) of each alternative
- A survey of waters of the United States

- Alternatives screening table documenting whether each alternative meets the Purpose and Need, practicability criteria, and other screening criteria
- Screening report or draft Alternatives Considered chapter from EA or DEIS, if appropriate

Concurrence Point #3 - Preferred Alternative and Apparent LEDPA

The intention of FHWA and CDOT is to select a preferred alternative that can 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.

Under an EIS, the preferred alternative is identified in the DEIS, and the lead federal agency publishes a combined FEIS/ROD. FHWA, under 49 U.S.C. §304a and 23 U.S.C. §139(n), requires to the maximum extent practicable, and unless certain conditions exist, that they develop a single document that combines the FEIS and Record of Decision (ROD).

Prior to issuance of the DEIS, the lead federal agency or CDOT will submit a copy of the DEIS to the USACE for their review with a request for comments within 30 calendar days, unless otherwise negotiated. The USACE response would include their opinion regarding what alternative appears to be the LEDPA.

The lead federal agency or CDOT should seek concurrence from the USACE at this time (Pre-DEIS) and prior to additional public disclosure regarding the preferred alternative. The request for concurrence should identify the preferred alternative supported by the rationale for decision making and data supporting the preferred alternative as the apparent LEDPA. Practitioners are advised that definitions of what is practicable, whether 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 expand, 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 preferred alternative as the apparent LEDPA.

For EA projects using the merger process, the concurrence request could be submitted either prior to publication of the EA or prior to issuing the Finding of No Significant Impact (FONSI).

Submittal for Concurrence

Below is a list of items the lead federal agency and CDOT (as appropriate) will provide the USACE for this concurrence point request. A response from the USACE is required within 30 calendar days, unless otherwise negotiated (Note: some of these items may be provided as a reference to sections and/or pages in the DEIS):

- Administrative draft of the DEIS or EA

- Description of the preferred alternative, including alignment description and general design elements
- The limits of the study area displayed on a map containing information for natural resources, including waters of the United States, in the study area
- Updated alternatives screening table documenting whether each alternative meets the Purpose and Need, practicability criteria, and natural resource impacts
- Direct, indirect, and cumulative effects of the preferred alternative on waters of the United States
- Conclusion that the preferred alternative appears to be the LEDPA with a summary of the supporting data
- A timeframe for DA permit application submittal

The DA permit application should be submitted at least 15 days prior to the completion of the DEIS to ensure the USACE public notice process can align with the release of the DEIS. The USACE concurrence would typically state that the preferred alternative is the apparent LEDPA, but the final decision on the LEDPA will occur when the USACE authorizes the project under the CWA.

If at the completion of the FEIS/ROD the design has sufficient details for the USACE to make a decision on the permit application, the USACE will time their public review period required for their DA permit to coincide with the distribution of the FEIS. 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 USACE will not provide concurrence, and subsequently the permit application may be denied.

Next Steps

FEIS/ROD or FONSI

After the information in the DEIS or EA has been considered along with agency and public comments, the lead federal agency will confirm the preferred alternative and prepare the FEIS/ROD or FONSI. If there are substantial changes to the preferred alternative or the impacts on waters of the United States, Concurrence Point #3 must be revisited.

A similar analysis will be used for Supplemental EISs: Concurrence Point #3 will be revisited only if the preferred alternative or impacts to waters of the United States have changed substantially.

Timely Authorizations for Major Projects (Title 23 U.S.C. §139(d)(10)) states that except as provided in 23 U.S.C. §139(d)(10)(C), all authorization decisions necessary for the construction of a major project shall be completed by not later than 90 days after the date of the issuance of a record of decision. The head of the lead agency may extend the deadline if:

(i) Federal law prohibits the lead agency or another agency from issuing an approval or permit within the period[…];
(ii) the project sponsor requests that the permit or approval follow a different timeline; or
(iii) an extension would facilitate completion of the environmental review and authorization process of the major project.

Permit Application and Compensatory Mitigation
The DA permit application must identify compensatory mitigation for unavoidable impacts to wetlands and other waters of the United States. 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 proposed mitigation appears to provide mitigation to compensate for aquatic resource losses in accordance with applicable regulatory requirements. The compensatory mitigation plan may be conceptual at the time that the DA permit application is submitted for review. This information should be of sufficient detail for the USACE to determine that the proposed mitigation adequately replaces aquatic resource functions lost or adversely affected by the project. From the information provided, the USACE must be able to determine that the mitigation proposal complies with the Guidelines, the 1990 USACE/USEPA Mitigation MOA, the Mitigation Rule [33 CFR Part 332], and any subsequent regulation or policy.

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 332.4 (c)(1)(i), a final mitigation plan must be approved by the USACE before they can issue a permit.

General Provisions
This agreement will be revisited by signatory agencies every 10 calendar years to assess its effectiveness and recommend and implement changes, as necessary, to maintain it as a useful working agreement. The signatory agencies may agree to assess and amend the agreement before the 10 years if they determine there is a need. This agreement shall not affect any pre-existing or independent relationships or obligations between the signatory agencies, and no signatory agency may act on behalf of any other signatory agency. Nothing in this agreement shall be construed as obligating any of the signatory agencies to the expenditure of funds in violation of any federal or state laws.

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

MILLER.MATTHEW.T.1071190931 Digitally signed by MILLER.MATTHEW.T.1071190931 Date: 2025.11.03 13:52:50 -07'00' Date

Lieutenant Colonel Matthew T. Miller, Commander, United States Army Corps of Engineers, Albuquerque District

JOHN MARTIN CATER Digitally signed by JOHN MARTIN CATER Date: 2025.09.03 16:23:48 -06'00' Date

John M. Cater, P.E., Division Administrator, Colorado Division, Federal Highway Administration

Signed by: Marcus D. Wilner 475BEE0D288040D... Date 10/20/2025

Marcus Wilner, Division Director, Central Federal Lands Highway Division, Federal Highway Administration

DocuSigned by: Keith Stefanik 63C1F827D40E4B3... Date 10/17/2025

Keith Stefanik, P.E. Chief Engineer, for Shoshana M. Lew, Executive Director, Colorado Department of Transportation

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Appendix A – NEPA/404 Merger Process Outline

Initiating the process:

- FHWA will send an invitation to the USACE to become a cooperating agency and request initiation of the merger process. FHWA informs participating agencies (EPA and USFWS) that the merger process will be initiated.

Concurrence Point –1 - Purpose and Need/Screening Criteria:

- FHWA and CDOT Project Team (PT) will present the Draft Purpose and Need, Goals and Objectives, and Evaluation Criteria to the USACE for concurrence.
- The PT will identify the criteria that will be used to screen alternatives.

Concurrence Point –2 - Alternatives to be Evaluated in Detail:

- The PT will present results of alternatives screening (provide documentation that supports screening of alternatives) to the USACE for concurrence.
- The PT will identify primary pros/cons of remaining alternatives with respect to aquatic ecosystems and other potentially significant effects.

Concurrence Point –3 - Preferred Alternative and Apparent LEDPA:

Prior to the issuance of the DEIS or EA, the PT will provide to the USACE, for concurrence, the following:

- Results of detailed analysis
- Recommendation that the preferred alternative appears to be the LEDPA

NEXT STEPS

FEIS/ROD or FONSI

Prior to the issuance of the FEIS/ROD or FONSI, the PT will review the project to determine if there are substantial changes to the preferred alternative or the impacts on waters of the United States that would require additional environmental review or supplementation. If that is the case, Concurrence Point #3 (Preferred Alternative and Apparent LEDPA) must be revisited.

Permit Application and Compensatory Mitigation:

The permit application will include the following:

- Estimated unavoidable impacts of the preferred alternative to waters of the United States
- Conceptual compensatory mitigation plan*

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

Appendix B – Acronyms and Terms

CDOT	Colorado Department of Transportation
CEQ	Council on Environmental Quality
CFL	Central Federal Lands
CFLHD	Central Federal Lands Highway Division
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
FONSI	Finding of No Significant Impact
FRA	Federal Railroad 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
Other entities	Other entities with projects funded and/or approved by FHWA
PEL	Planning and Environmental Linkages
PT	Project Team
ROD	Record of Decision
USACE	US Army Corps of Engineers
USEPA	US Environmental Protection Agency
USFWS	US Department of Interior Fish and Wildlife Service

Appendix C – References

NEPA Laws and Regulations

- NEPA of 1969 (NEPA of 1969 reference document can be accessed at the following URL: https://www.epa.gov/nepa)

FHWA NEPA Regulations

- 23 CFR 771 – Environmental Impact and Related Procedures (23 CFR 771 – Environmental Impact and Related Procedures can be accessed at the following URL: https://www.ecfr.gov/current/title-23/chapter-I/subchapter-H/part-771)

CDOT Guidance

- NEPA Manual (The CDOT NEPA Manual can be accessed at the following URL: https://www.codot.gov/programs/environmental/nepa-program/nepa-manual)

NEPA Guidance

- Project Development and Documentation Overview (The Project Development and Documentation Overview can be accessed at the following URL:

https://www.environment.fhwa.dot.gov/legislation/nepa/overview_project_dev.aspx)

- USDOT Purpose and Need Paper (The USDOT Purpose and Need Paper can be accessed at the following URL: https://www.environment.fhwa.dot.gov/legislation/nepa/memo_purpose_need.aspx/)
- The Development of Logical Project Termini (The Development of Logical Project Termini can be accessed at the following URL: https://www.environment.fhwa.dot.gov/legislation/nepa/guidance_project_termini.aspx)
- FHWA Technical Advisory (6640.8A): Guidance for Preparing and Processing Environmental and Section 4(f) Documents (The FHWA Technical Advisory (6640.8A): Guidance for Preparing and Processing Environmental and Section 4(f) Documents can be accessed at the following URL: https://www.environment.fhwa.dot.gov/legislation/nepa/guidance_preparing_env_documents.aspx)
- CEQ Guidance (The CEQ Guidance can be accessed at the following URL: https://www.energy.gov/nepa/history-ceq-nepa-regulations-and-guidance)

Clean Water Act Regulations and Guidance

- Clean Water Act Section 404(b)(1) Guidelines (40 CFR 230) (The Clean Water Act Section 404(b)(1) Guidelines (40 CFR 230) can be accessed at the following URL: https://www.ecfr.gov/current/title-40/chapter-I/subchapter-H/part-230)
- Memo of Agreement, EPA and Corps: Mitigation Under 404(b)(1) Guidelines (The Memo of Agreement, EPA and Corps: Mitigation under 404(b)(1) Guidelines can be accessed at the following URL: https://www.epa.gov/cwa-404/memorandum-agreement-regarding-mitigation-under-cwa-section-404b1-guidelines-signed-0)
- Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, 33 CFR Parts 325 and 332. 2008 (The Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, 33 CFR Parts 325 and 332. 2008 can be accessed at the following UR:: https://www.ecfr.gov/current/title-33/chapter-II/part-332)
- Definition of Waters of the United States, 33 CFR Part 328 (The Definition of Waters of the United States, 33 CFR Part 328 can be accessed at the following URL: https://www.ecfr.gov/current/title-33/chapter-II/part-328)

Appendix D – Dispute Resolution

All agencies agree to work cooperatively to avoid and resolve conflicts. The agencies agree to explore issues thoroughly and expeditiously 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 that cannot be resolved, the impasse will be elevated as follows:

Order of Dispute Resolution	First Contact	Second Contact	Third Contact	Fourth Contact
USACE	Project Manager	Field Office/Branch Supervisor	Regulatory Branch/Division Chief	District Engineer
FHWA	Area Engineer/ Environmental Program Manager	Program Delivery Engineer	Assistant Division Administrator	Division Administrator
CFLHD	Environmental Protection Specialist	Supervisory Environmental Protection Specialist	PP&E Branch Chief	Division Administrator
CDOT	Project Coordinator	Regional Planning and Environmental Manager	Regional Transportation Director	Executive Director

When the parties at the lowest organizational level of the agencies have agreed to elevate disagreement, a meeting will occur within 15 working days, whenever possible. 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 the issue will be elevated 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 elevated 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 the agencies 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, it is the ultimate responsibility of the USACE to make a final 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 USACE District Engineer will refer the permit application to the USACE Division Engineer [see 33 CFR 325.8(b) and (c)].