



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

January 2019

## **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 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 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 a federal section 404 permits in compliance with the CWA. In May 2015, FHWA, CDOT, and USACE signed a merger agreement to ensure that both NEPA and CWA requirements were satisfied during development of the FHWA documentation. This 2019 merger agreement will update and supersede the May 2015 merger agreement.

## **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 was developed through a collaborative process to identify and develop methodologies for integrating the NEPA and CWA 404(b)(1) alternative analyses. 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, 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. A CDOT action that involves the discharge of dredged or fill material into a water of the US generally requires a CWA section 404 permit from the USACE. If the section 404 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 own NEPA compliance and have a more formal role and input into project development, which will assist them in determining whether 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 the project Purpose and Need statement that is defined by the FHWA and CDOT, as well as development and analysis of alternatives.

In a typical CWA section 404 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 serves as the basis for the USACE CWA section 404(b)(1) 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 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 demonstrate to the USACE that the LEDPA has not been screened out 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 alternative with the least impacts to the aquatic ecosystem, providing the alternative does not have other significant adverse environmental consequences. The alternatives screening process should be designed to provide information regarding impacts to the aquatic ecosystem, impacts to the non-aquatic natural environment, and Purpose and Need. 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.”

### **Planning and Environmental Linkages (PEL) and Use of Planning Products**

PEL is a study process used to identify transportation issues, priorities, and environmental concerns. Subject to coordination with FHWA, the PEL study is able to link planning to environmental processes to streamline information that can be carried forward and used during the NEPA process. Early resource agency scoping and involvement are an important part of PEL that 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 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 are 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 FHWA, USACE, and CDOT determine it is in the overall best interest of the public. This decision will be made by considering potential impacts to waters of the US, 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 early consultation with the USACE on the subject.

## **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 involves a reduction of proposed impacts to waters of the US to thresholds below the requirement of an IP, the CDOT and FHWA project team will decide whether to advance further under the merger process. If the team decides they should exit the process and future design has no risk of increasing impacts to waters of the US, CDOT will send a letter to the USACE explaining the circumstances and intent. 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, CDOT 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 USACE.

## **Roles and Responsibilities**

### **USACE**

The USACE is the lead federal agency for section 404 permitting process. 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, or EA, as appropriate. USACE agrees to provide input to ensure that the information being presented may also be used for section 404 compliance. 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. 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, and the preferred alternative is potentially the LEDPA, and the proposed Compensatory Mitigation adequately offsets impacts to aquatic resources.

### **FHWA**

The 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. Under this

agreement, FHWA will encourage adherence to NEPA and CWA requirements, assist in the determination to enter the merger process, encourage joint development of Purpose and Need, and review and approve Purpose and Need, evaluation criteria, alternatives, and the preferred alternative. In the event that a project has modal components involving other bureaus of the Department of Transportation (e.g. Federal Transit Administration and Federal Aviation Administration), FHWA may be a co-lead agency.

## 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. CDOT is the permit applicant for CWA Permits. CDOT, in conjunction with FHWA, will have the primary role for implementing this merger agreement. Among CDOT responsibilities will be to provide project information to cooperating agencies, as well as invite them to 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 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 are not fit 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<sup>1</sup>:

- 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 the 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 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 that federal agencies enter consultation with the USFWS if a proposed federal action may 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]). 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

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<sup>1</sup> 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 section 404(b)(1) 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

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 Section 404(b)(1) 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 internal FHWA and CDOT review. A concurrence point meeting with the USACE is recommended 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 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 FHWA has not received a response at the end of 30 days, FHWA 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 FHWA and any co-lead federal agencies. USACE will send CDOT a duplicate copy.

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, 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 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. 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 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. 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(s) 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 the development of the project's entire Purpose and Need statement, be given 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).

FHWA guidance clarifies 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, 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:

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) **Aquatic Resource Impacts**

What are the impacts to aquatic resources? 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*

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 404(b)(1) 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.

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.

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 CWA section 404(b)(1) 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 make clear that an eliminated alternative is not the LEDPA. Criteria 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, and 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 CWA 404(b)(1) analysis 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 between the alternatives.

Practitioners are advised to include natural resource impacts in alternative screening. If this information is not included up front, it will need to be obtained for concurrence for alternatives to be evaluated in detail. In addition to coordination with 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 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 a low functioning resource. Implementation of a USACE-approved functional assessment, such as FACWet, is required for projects with greater than 0.5 acre of permanent wetland impacts. Functional assessment 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 FHWA and CDOT 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 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, 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 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 do not meet the Purpose and Need or are clearly not practicable will not be forwarded to USACE as part of the concurrence on the alternatives to be evaluated in detail. Other screening criteria, including natural, cultural, and community impacts, may be used by project teams to narrow the alternatives. However, alternatives that will be discussed in the “Considered but Eliminated” section of the Alternatives chapter of a document will be presented to 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 FHWA and CDOT 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 in the study area
- Alignment descriptions and general design elements
- Discussion of operational or geometric safety attributes (positive and negative) of each alternative
- An assessment of waters of the US
- 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 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 FHWA publishes a combined FEIS/ROD. The USDOT, under 23 CFR §139(n), requires to the maximum extent practicable, and unless certain conditions exist, that the Department develop a single document that combines the FEIS and ROD. FHWA’s Colorado Division and CDOT have adopted this practice.

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 calendar days, unless otherwise negotiated. The USACE review would include their opinion regarding what alternative appears to be the LEDPA.

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 FONSI.

#### *Submittal for Concurrence*

Below is a list of items the FHWA and CDOT 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):

- DEIS / draft sections of 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 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 US
- Conclusion that the preferred alternative appears to be the LEDPA with a summary of the supporting data

Due to the preliminary level of design used during the NEPA process for CDOT and FHWA projects, and although there are mitigation commitments in the FEIS/ROD, usually not enough information is available for CDOT to submit a section 404 permit. Therefore, concurrence is generally that the preferred alternative is the apparent LEDPA, but the final decision on the LEDPA will occur when USACE issues the section 404 permit.

## **Next Steps**

### **FEIS/ROD**

After the information in the DEIS or EA has been considered along with agency and public comments, CDOT will confirm their preferred alternative and prepare the FEIS/ROD or EA. If there are substantial changes to the preferred alternative or the impacts on waters of the US, 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 US have changed substantially.

If at the completion of the FEIS/ROD the design has sufficient details for USACE to make a decision on the permit application, they will time their public review period required for their section 404 permit to coincide with the distribution of the FEIS (Note: USACE must receive a complete application not less than 15 days prior to issuance of the FEIS to facilitate concurrent review). 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.

### **Permit Application and Compensatory Mitigation**

The section 404 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. 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 section 404 permit application is submitted for review. This information should be of sufficient detail for the USACE to determine 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, 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. To facilitate compliance with deadlines in Executive Order 13807 for “Major Infrastructure Projects,” the USACE must receive a detailed mitigation plan no later than publication of the ROD.

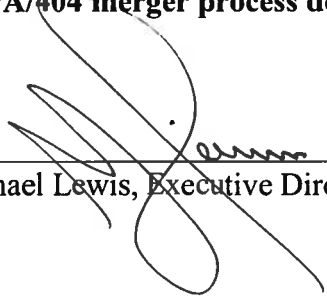
For design/build projects, CDOT will include information in the contract documents about the terms of the section 404 permit, and the timelines associated with changes to

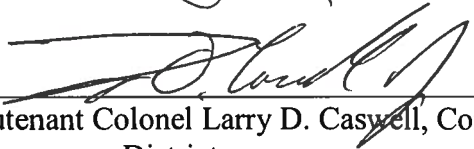
the permit so that the construction contractor is aware that changes to the permit could affect their construction schedule.

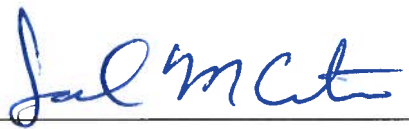
**General Provisions**

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. 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.**

  
Date 1/7/19  
\_\_\_\_\_  
Michael Lewis, Executive Director, Colorado Department of Transportation

  
Date 24 JAN 19  
\_\_\_\_\_  
Lieutenant Colonel Larry D. Caswell, Commander, US Army Corps of Engineers,  
Albuquerque District

  
Date 1/10/2019  
\_\_\_\_\_  
John M. Cater, 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 EA (or DEIS if the 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 the 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
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

### Federal NEPA Laws and Regulations

- NEPA of 1969
- CEQ Regulations 40 CFR 1500 - 1508
- EO 13807 – Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure

### 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
- Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, 33 CFR Parts 325 and 332. 2008

## 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 elevated as follows:

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

When the parties at the lowest organizational level of the agencies have agreed to elevate disagreement, 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 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 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, it is the ultimate responsibility of 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 Part 325.8(b) and (c)].