

**MEMORANDUM OF AGREEMENT
BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION, COLORADO DIVISION
AND THE COLORADO DEPARTMENT OF TRANSPORTATION
REGARDING THE PROGRAMMATIC APPROVAL OF
CERTAIN WETLAND FINDINGS**

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

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

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

WHEREAS, many Federal-aid projects that are located in wetlands have minor impacts that can be mitigated with standard best management practices; and

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

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

NOW, THEREFORE, it is hereby agreed that:

1. Wetland Findings for Federal-aid transportation undertakings that are located in wetlands and that satisfy the procedures and conditions of the Guidelines for Programmatic Approval of Wetland Findings may be approved by the CDOT Natural Resource Unit Manager, Environmental Programs Branch.
2. Wetland Findings for all other Federal-aid transportation undertakings will be forwarded to the FHWA Colorado Division Administrator or designated representative for approval. Approval of Wetland Finding documents associated with EA's and EIS's will be approved through the signature of the NEPA document, assuming appropriate coordination occurs between CDOT EPB and the regional offices.
3. Representatives of the FHWA Colorado Division and the CDOT Environmental Programs Branch (EPB) will meet annually to review the

effectiveness of this agreement and to make changes as necessary and agreed upon by both parties.

4. If either signatory to this Agreement determines that the terms of the Agreement cannot be met or believes a change is necessary, that signatory can request an amendment or addendum, which will be executed in the same manner as the original Agreement and the 2006 revision.
5. Changes to the Guidelines may be approved by the FHWA Division Administrator or the CDOT Executive Director or their designated representatives provided the terms and conditions of this Agreement are upheld.

IN WITNESS THEREOF, the parties hereto have executed this Agreement on this, the 21st day of April, 2006.

Colorado Department of Transportation

By: Thomas E Norton Date: 4-21-06
Executive Director

Federal Highway Administration, Colorado Division

By: David A. Nicot Date: 4-25-06
Division Administrator

**GUIDELINES FOR PROGRAMMATIC APPROVAL OF WETLAND FINDINGS
DEVELOPED AND AGREED UPON BY
THE FEDERAL HIGHWAY ADMINISTRATION, COLORADO DIVISION
AND
THE COLORADO DEPARTMENT OF TRANSPORTATION
February 2006**

I. Introduction

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

Since 1977 the Colorado Department of Transportation (CDOT) has prepared Wetland Finding documents on all Federal-aid transportation projects with impacts to wetlands. These finding documents have been forwarded to the Federal Highway Administration (FHWA), Colorado Division Administrator for a final determination that the requirements of E.O. 11990 have been satisfied. For many transportation projects wetland impacts are minor and actions taken to avoid, minimize, and mitigate impacts can be fairly consistent from one project to another. For these types of projects Wetland Finding documents generally include standardized impact avoidance and minimization and mitigation measures as the conditions that support the finding that:

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

These Guidelines outline the circumstances under which the FHWA Colorado Division Administrator has delegated authority and responsibility to the CDOT Environmental Programs Branch (EPB) Natural Resource Unit Manager to approve Programmatic Wetland Finding documents. Certain parameters must first be met, and these are described in Part III (Applicability of the Programmatic Wetland Finding) and Part IV (General Conditions). Use of the Programmatic Wetland Finding allows CDOT to proceed with a Federal-aid project that impacts wetlands without FHWA’s review and approval of the Wetland Finding document prepared for that project.

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

II. Definition of a Wetland

Wetlands include those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. The FHWA and CDOT uses this definition for wetlands provided by the U.S. Army Corps of Engineers.

III. Applicability of the Programmatic Wetland Finding

The Programmatic Wetland Finding may be applied for all Federal-aid transportation projects that meet all 10 criteria below:

1. The project is being prepared as a categorically excluded minor project as defined in 23 C.F.R. 771.117.
2. Project activities will involve at least 500 ft² of permanent impacts or 1,000 ft² of combined temporary and permanent impacts.
3. **Less than one acre** of wetland will be impacted either temporarily, permanently, or in a combination of the two.
4. All practicable alternatives to avoid and minimize impacts have been addressed and documented in the Wetland Finding, as specified by E.O. 11990 and the FHWA Technical Advisory T6640.8A (October 30, 1987).
5. If no wetland functional assessment is being used to determine wetland compensation requirements, the wetland creation mitigation ratio should be 1:1, regardless of jurisdictional status.
6. No state or federally threatened or endangered species will be impacted by project activities involving wetlands and/or waters of the U.S.
7. The project will not impact a Gold Medal Trout Stream, a designated National Wild and Scenic River or other areas of special ecological concern (i.e. spawning ground, etc.).
8. Selection of mitigation site(s) involves consideration of TEA-21 interagency guidance (July 11, 2003) providing for "a preference for mitigation banking to compensate for unavoidable losses to wetlands or other natural habitat caused by transportation projects receiving Federal assistance under Title 23 of the US Code".
9. On-site mitigation should only be considered based on the valuable local wetland functions (i.e. wildlife habitat, flood attenuation) that would be

unacceptably lost if mitigation were to be conducted off-site. These locally important functions should be documented if on-site mitigation is preferred.

10. The project is authorized under a Clean Water Act Section 404 **Nationwide** permit, or the project does not require a Section 404 permit.

When any one or more of the above criteria cannot be met, the project does not fall into the category of a Programmatic Wetland Finding that can be issued by CDOT. In this case the CDOT will forward the Wetland Finding document to the FHWA for review and approval by the Division Administrator.

IV. General Conditions

Projects with wetland impacts that satisfy the criteria listed under Part III of these Guidelines must incorporate all applicable conditions listed below. These conditions are CDOT best management practices developed to minimize impacts to wetlands as a result of construction activities. These conditions apply equally to projects that are not processed under this programmatic agreement. The practices discussed below are intended to be in conformance with guidelines specified in the following CDOT documents: *Erosion Control and Stormwater Quality Guide*; and *Standard Specifications for Road and Bridge Construction* (2005).

1. During the planning and construction of a project, all measures shall be taken to avoid disturbance to existing wetlands and adjacent riparian vegetation. Sensitive areas will be fenced to protect aquatic resources (i.e. wetlands, riparian habitats, stream channel, etc.).
2. Erosion control shall be addressed on all projects to the extent warranted by the type of work and character of the project. Temporary and permanent erosion and sediment control measures shall be installed at the earliest practicable time, consistent with good construction practices, and shall be maintained as necessary throughout the operation of the project. These measures will be identified in the final construction plans and attached to the Wetland Finding document, if possible.
3. When possible, work shall be performed during low flows/dry periods, and the use of heavy equipment in wetland areas will be minimized. Where practical, equipment shall be operated away from wetlands.
4. Temporary fill in wetlands will require the use of geotextile fabric prior to placement of fill material. Earthen work platforms or geotextile mats will be used when designated by a CDOT Biologist or Landscape Architect to protect temporarily impacted wetlands.
5. When clearing scrub-shrub wetlands, prior to temporary fill placement, vegetation should be trimmed to the existing ground line, and the root masses left in place.

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

V. Processing the Programmatic Wetland Finding

Wetland Findings for Federal-aid projects prepared by CDOT staff or by their contractors will be forwarded to the CDOT EPB office for review by the staff Wetlands Specialist

and Landscape Architect. The Wetland Finding document will then be given to the CDOT EPB Natural Resource Unit Manager for approval. Findings prepared for projects that meet the applicability of Part III and that incorporate the best management practices of Part IV of these Guidelines may be approved programmatically by the CDOT Manager without the review and approval of FHWA. A copy of the approved document containing the CDOT Manager's signature will be sent to the appropriate CDOT regional office.

VI. Coordination with the Division of Wildlife

CDOT is required by the U.S. Fish and Wildlife Coordination Act and FHWA policy to coordinate wetland impacts with the U.S. Fish and Wildlife Service or a designated state agency. In Colorado, the Colorado Division of Wildlife (CDOW) carries the responsibility, and coordination with the CDOW is required prior to completion of all Wetland Findings unless:

1. Impacts occur to Corps of Engineers Section 404 jurisdictional wetlands that are covered by the Memorandum of Agreement Regarding Senate Bill 40 Certification (SB 40), January 2003 (signed in December 2004), and formal SB 40 application is not required, or
2. Impacts occur to Section 404 non-jurisdictional wetlands and the resulting impacts will not exceed any of the following criteria:
 - a. Wetlands to be permanently filled total 0.25 acre or less at any single location,
 - b. Wetlands to be temporarily filled total 0.50 acre or less at any single location,
 - c. Wetlands to be permanently and temporarily filled on a single project cumulatively total 0.75 acre or less.

Where these conditions are satisfied, coordination with the CDOW will not be required prior to approval of a Programmatic Wetland Finding.

VII. Effective Date

These Guidelines and the use of the Programmatic Wetland Finding become effective on the date of execution of the Memorandum of Agreement (MOA) Regarding the Programmatic Approval of Certain Wetland Findings and will remain in effect until canceled by either or both parties to the agreement. Changes to the Guidelines may be approved by the signatories above or their designated representatives provided the terms and conditions of the MOA are upheld.