

## STATEWIDE FINDING

By Federal Highway Administration and  
South Dakota Department of Transportation

### Regarding Wetlands For South Dakota Federal-aid Highway Projects

#### Regulatory Setting:

Executive Order (EO) 11990 titled "Protection of Wetlands" and U.S. Department of Transportation Order 5660.1A (DOT Order) titled "Preservation of the Nation's Wetlands" emphasize the important functions and values inherent in the Nation's wetlands. These orders direct Federal agencies to avoid new construction in wetlands unless the head of the agency determines that:

- 1) There is no practicable alternative to such construction, and
- 2) The proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.

EO 11990 requires each agency to develop procedures for Federal actions whose impacts are not significant enough to require the preparation of an Environmental Impact Statement (EIS) under Section 102(2)(c) of the National Environmental Policy Act (NEPA), as amended. 23 CFR Part 777, "Mitigation of Impacts to Wetlands and Natural Habitat" includes the Federal Highway Administration's procedures for evaluation and mitigation of adverse environmental impacts to wetlands and natural habitat resulting from Federal-aid projects funded under Title 23, U.S. Code.

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

23 CFR 777.2 defines "natural habitat" as a complex of natural, primarily native or indigenous vegetation, not currently subject to cultivation or artificial landscaping, a primary purpose of which is to provide habitat for wildlife, either terrestrial or aquatic. This definition of natural habitat excludes rights-of-way that is acquired with Federal transportation funds specifically for highway purposes.

The United States Army USACE of Engineers (USACE) is responsible for the implementation of Section 404 of the Clean Water Act and Section 9 and 10 of the Rivers and Harbors Act of 1899. Approved jurisdictional determinations (AJDs) and preliminary jurisdictional determinations (PJDs) are tools used by the USACE to help implement these statutes. Both types of JDs specify what geographic areas will be treated as subject to regulations by the USACE under one or both statutes. The USACE' Regulatory Guidance Letter (RGL) No. 16-01 explains the difference between the two types of JDs and provides guidance for their application in the permitting process.

#### Application:

This program-wide wetland finding (Finding) applies to 'wetlands' and 'natural habitat' as defined under 23 CFR 777.2. Wetlands or other aquatic resources which are created solely as a result of excavation, impoundment, or other activities occurring in upland areas, including features constructed to maintain and preserve the highway within the highway rights-of-way, do not constitute Natural Habitat.

This Finding applies to all transportation improvement projects that: primarily involve preservation and reconstruction of transportation facilities on existing alignment; are classified as Categorical Exclusions (CEs); are permitted under a USACE nationwide permit; and include all practicable measures to minimize harm to wetlands. This Finding applies only to the following transportation construction activities that are not part of a larger undertaking:

1. Widening of the existing highway facility to meet current design practices;
2. Existing drainage improvements such as regrading ditches; replacement, rehabilitation, or extension of drainage structures; and maintenance of drainage devices;
3. Safety improvements to existing transportation facilities for minor alignment adjustments, flattening of fill slopes, installation of guardrail, and scour protection; and
4. New non-motorized facilities only where the facility closely parallels the existing transportation facility within the existing transportation facility right-of-way.

**Coordination:**

Effects on wetlands are considered through project coordination with the USACE, United States Fish and Wildlife service (USFWS), South Dakota Department of Game, Fish and Parks (GF&P), South Dakota Department of Environment and Natural Resources (DENR), and local Tribes during the NEPA evaluation process. The SDDOT and FHWA evaluate wetland resources and consider practicable avoidance alternatives or options throughout the design process.

For projects that apply to this Finding and include wetlands or natural habitat, SDDOT coordination with the USACE will be completed in accordance with RGL 16-01. All aquatic resources identified by the USACE will be used to evaluate avoidance alternatives and quantify impacts and mitigation requirements. The SDDOT will coordinate with the USACE regarding annual monitoring reports and acceptance of mitigation requirements permitted by the USACE.

For projects where no WOUS are identified, SDDOT will coordinate with FHWA to evaluate avoidance alternatives, quantify impacts and determine mitigation requirements. For consistency, this process is intended to follow the same principles and practices used by the USACE. The SDDOT will coordinate with the FHWA regarding annual monitoring reports and acceptance of these mitigation requirements.

**Justification:**

The primary goal of the SDDOT is to provide safe, efficient, cost-effective, and environmentally responsible transportation facilities and services. To achieve this goal, a large portion of the Federal-aid highway program is committed to preservation and reconstruction of existing highways along existing alignments in accordance with the current edition of the SDDOT Design Manual, AASHTO Roadside Design of Highways and Streets, and the Highway Safety Manual.

South Dakota contains a variety of wetland types within different geological and ecological regions of the State. These wetlands can vary from depressional wetlands (i.e., prairie potholes of eastern South Dakota), riverine wetlands (i.e., associated with floodplains along perennial, intermittent and ephemeral streams), or slope wetlands (i.e., many of western South Dakota's linear wetlands and springs). Other wetland types exist within the state, though the above-mentioned are the most prominent and most likely to be impacted by SDDOT construction projects.

Transportation improvement projects that require the use of wetlands are generally in areas with high concentrations of wetlands, particularly in the prairie pothole region of the State, which is literally dotted with small wetland areas. Where wetlands exist, they typically exist along either side of the highway. Transportation projects are typically linear in nature and impact portions of wetlands that exist within the right-of-way or adjacent to the right-of-way. Often, these wetlands were disturbed during previous construction projects and are low-functioning because of their exposure or proximity to the highway.

Alternatives to avoid the use of wetlands would require construction of the transportation facility primarily on a new alignment. While construction on new alignment potentially could avoid or minimize the use of wetlands, these alternatives in most cases, would require significant environmental impacts to upland areas not previously disturbed by highway construction. Further, providing access to properties from a new alignment would typically require other environmental impacts and may affect the functionality or use of the property (i.e., divide properties, farmland, pastures, and farmsteads). Reconstruction on primarily new alignment is not considered practicable and in most cases, would not meet the project's purpose and need.

**Mitigation:**

If it is determined that avoidance alternatives are not practicable, then measures to minimize harm will be considered and included in the project based on best management practices. Where mitigation is needed, preference will be given first to available mitigation banks, second to approved in-lieu fee programs, and finally to permittee responsible sites. When appropriate, suitable right-of-way can be acquired to replace similar functioning wetlands to provide on-site or off-site mitigation.

Compensatory mitigation will be implemented in accordance with regulations outlined under 33 CFR 332 (i.e., compensatory mitigation rule).

Replacement of wetland impacts will be completed in a manner that considers FHWA's program-wide 'net gain' goal (23 CFR 777.11(g)) through enhancement, creation, and/or preservation. The net gain goal will be assessed annually by the SDDOT and reported to FHWA by December 31 of each year. This goal will include all wetland impacts including those with losses of less than 0.1 acre. The net gain goal will be based on acres of wetland impacts to acres of wetlands replaced. If the net gain goal is not met during the reporting year, the deficiency will be made up within the next year. The SDDOT will consult with FHWA to determine an acceptable method for making up this deficiency such as increasing the amount of permittee responsible mitigation on a project or group of projects to be completed the following year, purchase of credits through a wetland bank or purchase of credits through the in-lieu fee program.

**Finding:**

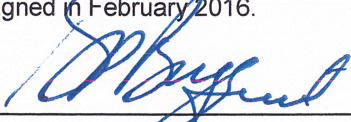
This review finds there is no practicable alternative to the proposed construction in wetlands for SDDOT projects where the project:

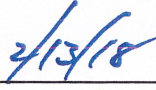
1. Is a transportation construction activity as defined within the application section of this document;
2. Is a Federally-funded action;
3. Is a CE under NEPA in accordance with 23 CFR 771 and follows the current 'Programmatic Agreement between the FHWA and the SDDOT regarding the DOT's process for determining Categorical Exclusions';
4. Requires a permanent loss of less than 1.0 acre of wetland and each project will provide for replacement of permanent wetland impacts greater than 0.1 acre per discrete aquatic resource with an equivalent wetland function and value;
5. Is constructed under this Finding includes all practicable measures to minimize harm to wetlands;
6. Will fully restore temporary wetland impacts to a condition (i.e., function-for-function replacement or better) that existed prior to the project within the established service area;
7. Has been coordinated with the Resource Agencies and they have not expressed concerns over the proposed project action to wetlands; and
8. Meets the terms and conditions of a COE Nationwide Permit.

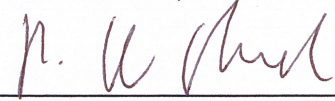
### Terms, Renewal, and Termination

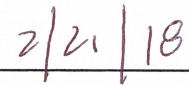
Both agencies recognize that the regulations and guidance on wetlands evolve and may lead to revision of this Statewide Finding Regarding Wetlands. The representatives of FHWA, USACE and SDDOT will meet every 5 years from the signature date of this document, or sooner if warranted, to review the effectiveness of this Finding and to make modifications as necessary.

Execution of this Finding and implementation of its terms by all parties provides evidence that all parties have reviewed this Finding and agree to the provisions for its implementation. This Finding is effective upon the date of the last signature below. This document replaces in its entirety the South Dakota Wetland Finding signed in February 2016.

  
\_\_\_\_\_  
Name: Darin Bergquist  
Title: Secretary  
South Dakota Department of Transportation

  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Name: R. Kirk Fredrichs  
Title: Division Administrator  
South Dakota Division Federal Highway  
Administration

  
\_\_\_\_\_  
Date