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[Proposed Rules]
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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 777

[FHWA Docket No. 96-8]
RIN 2125-AD78

Mitigation of Impacts to Wetlands

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: In accordance with the President's Regulatory Reinvention Initiative, the FHWA proposes to amend its regulation outlining the procedures to be followed in mitigating the impacts of Federal-aid highway projects and programs to wetlands. The current regulation has become outdated as a result of advances in the science of wetland management and the amendments made by sections 1006(d) and 1007(a) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (Pub. L. 102-240, 105 Stat.1914) to the statutory provisions of title 23, United States Code (U.S.C.). The ISTEA amendments significantly alter the range and timing of alternatives eligible for Federal-aid participation for mitigation of wetland impacts due to Federal-aid highway projects. Accordingly, this proposal would revise the current regulation to conform to the ISTEA amendments, thereby providing more flexibility to State highway agencies in determining eligibility of mitigation alternatives for Federal participation. This proposal would broaden the scope of the current regulation to encompass all wetlands mitigation projects eligible for Federal participation, not just those involving privately owned wetlands.

DATES: Comments must be received on or before August 16, 1996.

ADDRESSES: Submit written, signed comments to FHWA Docket No. 96-8, Federal Highway Administration, Room 4232, HCC-10, Office of the Chief Counsel, 400 Seventh Street, SW., Washington, D.C. 20590. All comments received will be available for examination at the above address between 8:30 a.m. and 3:30 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notice of receipt of comments must include a

self-addressed, stamped postcard.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Garrett, Office of Environment and Planning, HEP-42, (202) 366-9173, or Mr. Brett Gainer, Office of the Chief Counsel, HCC-32, (202) 366-1372, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Executive Order (E.O.) 11990, "Protection of Wetlands," requires all Federal agencies to "avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands" (42 FR 26961, May 25, 1977). Specifically, this

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order directs Federal agencies to avoid new construction in wetlands unless (1) there is no practicable alternative to such construction, and (2) the proposed action includes all practicable measures to minimize harm to wetlands resulting from such construction. The Department of Transportation subsequently issued DOT Order 5660.1A, Preservation of the Nation's Wetlands, which provided departmental policy and instruction for implementing E.O. 11990. Copies of these documents are available for inspection and copying pursuant to 49 CFR Part 7, App. D.

The provisions of E.O. 11990, the Clean Water Act (33 U.S.C 1344 et seq.), and the DOT Order proclaim that wetlands are a valuable national resource and that special efforts are required of all Federal agencies to preserve the beneficial values inherent in them. Wetlands are a valuable resource for a number of reasons. They provide habitats for numerous plants and animals, including many commercially important species. In addition, wetlands can reduce the severity of flooding, control erosion, and remove contaminants from polluted waters. Consequently, wetland preservation has become a matter of concern to Federal and State agencies charged with resource management responsibilities and has been emphasized by resource conservation groups.

Under E.O. 11990 each Federal agency must avoid, whenever practicable, impacts to wetlands. Therefore, a highway location or design which will impact a wetland must be evaluated for its natural functions and values, in addition to all relevant social, economic, and physical environmental values. Inevitably, there will be instances when reasoned and balanced judgments will result in the location of highways in wetlands and in the destruction or modification of those resources. In such cases, E.O. 11990 requires that "all practicable measures to minimize harm to the wetland(s) be incorporated into the project." In addition, section 404 of the Clean Water Act, entitled Permits for Dredged or Fill Material, requires that a permit be obtained through the U. S. Army Corps of Engineers for proposed discharges of dredged or

fill material into waters of the United States, including wetlands (33 CFR 320-330; (Regulatory Program)). The Regulatory Program and associated guidelines (40 CFR 230-233) require, among other things, assessment of the functions and values of wetlands to be impacted by proposed discharges of dredged or fill material as part of the Public Interest Review Process. Furthermore, permits issued by the Corps of Engineers under authority of the Regulatory Program may contain conditions requiring mitigation to compensate for impacts to wetlands that result in a loss of wetlands functions and values to society.

Another Federal statute applicable to Federal-aid highway projects involving impacts to wetlands is section 4(f) of the Department of Transportation Act <SUP>1 (49 U.S.C. 303 and 23 U.S.C. 138). Section 4(f) provides protection for certain environmentally significant, publicly owned land areas including parks, wildlife refuges, and waterfowl refuges. When such lands must be used for a federally-assisted highway project, section 4(f) requires all possible planning to minimize harm to the protected area. If wetlands included in these publicly owned 4(f) lands are used for or impacted by a highway project, current FHWA policy permits Federal-aid highway funds to be used in the acquisition, restoration, or creation of replacement wetlands or improvement of existing wetlands as mitigation. Federal participation must be based on a determination that such mitigation measures are necessary to meet the section 4(f) requirement that all possible planning and measures be undertaken to minimize harm. Federal assistance in these instances often involves the use of Federal-aid funds for activities outside the right-of-way. The FHWA regulations implementing section 4(f) are found at 23 CFR 771.135.

\1\ Section 4(f) of Pub. L. 89-670, 80 Stat. 934, was repealed by Pub. L. 97-449, 96 Stat. 2444, and enacted without substantive change at 49 U.S.C. 303. Section 138 of title 23, U.S.C., remains unchanged. Because of common usage and familiarity, the term section 4(f) continues to be used by the Department of Transportation in matters relating to 49 U.S.C. 303 and 23 U.S.C. 138.

The FHWA has long recognized that the importance of wetland preservation is not limited to publicly owned wetlands. Privately owned wetlands are often an important component of local, State, and Federal wetland management programs. In addition, the requirements of E.O. 11990 and section 404 of the Clean Water Act apply to wetlands regardless of ownership. Consequently, the FHWA is required to find that proposed Federal-aid projects include all practicable measures to minimize harm to privately owned wetlands adversely impacted by the projects. The current part 777, which this NPRM proposes to amend, was promulgated to address these requirements.

Discussion of Proposed Rulemaking

Congress included provisions in the ISTEA granting the FHWA more flexibility to authorize the use of Federal-aid highway funds for mitigation of impacts to wetlands caused by federally-funded highway projects. These provisions are codified at 23 U.S.C. 103(i)(13) and

133(b)(11), and pertain to projects eligible for National Highway System (NHS) and Surface Transportation Program (STP) funds, respectively. Consequently, the FHWA is proposing to amend its regulations to authorize the expenditure of Federal-aid highway funds for mitigation of impacts to wetlands due to federally-funded highway projects.

Mitigation activities may include, but are not limited to, participation in wetlands mitigation banks, contributions to statewide and regional efforts to conserve, restore, enhance and create wetlands, and development of statewide and regional wetlands conservation and mitigation plans, including any such banks, efforts, and plans authorized pursuant to the Water Resources Development Act of 1990 (Pub. L. 101-640, 104 Stat. 4604). Contributions toward such efforts may take place concurrent with or in advance of project construction, but contributions may occur in advance of construction only if such mitigation efforts are consistent with all applicable requirements of Federal law and State planning processes.

Most significantly, measures found by a State highway agency and the FHWA to be appropriate and necessary to mitigate significant adverse impacts to publicly or privately owned wetlands would be eligible for Federal participation where the impacts actually result from an FHWA action. Appropriate mitigation measures could include the acquisition of additional land or interests in land for the purpose of mitigating adverse environmental impacts to wetlands which actually result from a Federal-aid highway project.

The justification for the cost of proposed mitigation measures should be considered in the same context as any other public expenditure; that is, the proposed mitigation would have to represent a reasonable public expenditure when weighed against other social, economic, and environmental values, and the benefit realized would have to be commensurate with the proposed expenditure. Decisions on mitigation measures would be required to take into account consideration of traffic needs, safety, durability, and economy of maintenance of the highway.

As previously mentioned, the proposed amendments to 23 CFR 777 formally express the FHWA's current

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policy and incorporate the eligibility criteria set forth in the ISTEA with respect to mitigation of impacts to both publicly and privately owned wetlands which actually result from Federal-aid highway projects or an FHWA action. The explanation of Federal participation policy already included in Sec. 777.5 is expanded in the proposed regulation. The proposed regulation would also include additional guidance and procedures to be followed in the evaluation (Sec. 777.7) and mitigation of impacts (Secs. 777.9, 777.11).

The requirements of 23 CFR 777 apply to the mitigation of impacts to wetlands which actually result from federally-funded highway projects or programs. The requirements and policies stated therein do not apply to highways or other projects funded by other Federal, State, or private agencies or entities.

Section-By-Section Analysis

The following section discusses both the current provisions of 23 CFR 777 and the proposed changes to that regulation contained in this NPRM.

Section 777.1

Section 777.1 would be amended to expand the applicability of the regulation to Federal-aid participation in mitigation of all impacts to publicly or privately owned wetlands which actually result from Federal-aid highway projects. The existing regulation applies only to privately owned wetlands.

Section 777.2

Section 777.2 would be a new section. This section would contain definitions for administrative, scientific, and technical terms found in the amended regulation.

Section 777.3

Section 777.3, Background, would be amended to include discussion of the ISTEA provisions which increased the eligibility for Federal-aid participation of efforts to mitigate the wetlands impacts of highway projects funded under the provisions of the National Highway System (ISTEA Sec. 1006 (23 U.S.C. 103)) and Surface Transportation Program (ISTEA Sec. 1007 (23 U.S.C. 133)). As in the existing regulation, this section would also cite the authority and requirements of E.O. 11990 to minimize wetlands losses and DOT Order 5660.1A for implementing wetland mitigation in FHWA programs.

Section 777.5

The FHWA wetlands policy and practice, incorporating expanded scientific knowledge and management experience, have recognized that wetland mitigation includes a wider range of impacts, alternatives, and activities than were known or understood when the existing regulation was promulgated in 1980. The science and technology of wetland mitigation have identified methods and needs for effective wetland mitigation that were not well known at the time the existing regulation was issued. The amended Sec. 777.5, Federal Participation Policy, would expand applicability of the regulation to include all impacts to wetlands which actually result from Federal-aid highway projects. The kinds of activities needed to mitigate wetland impacts include the general areas of planning, design, right-of-way acquisition, construction, and establishment. Specific tasks and activities which fall within these general areas are identified and included in the amended section as eligible for Federal-aid participation. Specific project criteria for Federal participation in wetlands mitigation activities are restated from the existing regulation, and are consistent with 23 CFR 771, Environmental Impacts and Related Procedures. The "test of reasonableness" in the existing regulation for the expenditure of public funds for wetlands mitigation is included in the NPRM. This test is based on commensurate social, economic, and

environmental values and benefits of wetlands mitigation relative to costs of the mitigation and benefits of the highway project or program.

Section 777.7

Section 777.7, Evaluation of Impacts, currently provides that the extent of Federal participation in mitigation measures should be directly related to the importance and functional capacity of the impacted wetlands and the extent of wetland losses due to highway impacts.

In both the existing regulation and NPRM, Section 777.7 relates the cost of Federal-aid participation in wetland mitigation activities to the importance of the wetlands impacted in the project area. As amended, this section would refer to scientific functional assessment methodologies as the appropriate tool for evaluating wetlands resources and impacts, and would recognize the need for interdisciplinary, interagency coordination in evaluating wetlands functions and values. General functions of wetlands would be identified using current scientific terminology and concepts of wetlands analysis.

Section 777.9

Section 777.9, Mitigation of Impacts, identifies general categories of actions, taken to mitigate the impact of highway projects on wetlands, which are eligible for Federal-aid participation. Federal participation is not, however, limited to these activities, if other alternatives are practicable, more ecologically desirable, and represent a more effective expenditure of public funds. The existing Sec. 777.9 states specific requirements for the protection of wetlands established as compensatory mitigation. Two criteria for Federal-aid participation in wetland mitigation are that the mitigation must represent a reasonable expenditure of public funds and be in the public interest.

In Sec. 777.9(a) of the NPRM, the Environmental Protection Agency's Clean Water Act Sec. 404(b)(1) guidelines (40 CFR 230) are referenced to establish the required sequence of alternatives that must be considered for mitigation of wetlands impacts. The 404(b)(1) guidelines require that, where practicable, avoidance and then minimization of wetland impacts be given first consideration. Under Sec. 777.9(a)(2) of the NPRM, once practicable avoidance and minimization measures had been exhausted, the regulation would establish the objective of selecting ecologically desirable and practicable compensatory mitigation alternatives consistent with the 404(b)(1) guidelines. The requirement to consider compensatory mitigation within the highway right-of-way before other, possibly more ecologically desirable and reasonable alternatives outside of the right-of-way, would be removed by this NPRM. The existing Sec. 777.9(b) contains the requirement that the public interest in wetlands restored, enhanced, or created as part of mitigation for wetlands impacts due to Federal-aid highway projects must be sufficient to ensure that they will be maintained as wetlands. This requirement would be moved to Sec. 777.11(b). Section 777.9(a)(3) would be added, and would list examples of the specific kinds of activities eligible for Federal-aid participation when existing wetlands are being enhanced or restored.

A new Sec. 777.9(b) would be added, and would cite and explain the specific mitigation alternatives listed in the ISTEPA eligible for Federal-aid participation. The activities listed in the ISTEPA are related to wetlands banking, planning, and resource inventory. These activities are not exclusive, and other activities listed in this regulation would also be eligible. This paragraph would

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conform the regulation to ISTEPA provisions allowing the use of Federal-aid highway funds to pay for costs of wetland mitigation activities as needed to mitigate impacts caused by Federal-aid highway projects and programs.

Section 777.11

Like any other activity in which Federal funds participate, the use of those funds is governed by various restrictions and conditions established by Federal law and agency policy in order to protect the public interest and provide for sound program management. A number of these considerations are set forth in Sec. 777.11, Other Considerations, including consultation requirements and provisions for ownership and management of acquired lands. Depending upon the extent of mitigation justified under the provisions of Sec. 777.7, Sec. 777.11(f) currently permits Federal participation in the acquisition of replacement land for privately owned wetlands directly impacted by a Federal-aid highway project. Such privately owned lands thus acquired, above and beyond wetlands purchased for use as highway right-of-way, will thereafter be retained in public ownership and dedicated to future use as wetlands. The replacement ratio for wetlands directly affected by a Federal-aid highway project should be determined based on use of a scientific methodology of wetland functional assessment and best professional judgment, in combination with interagency coordination and considerations of fiscal responsibility and a desire to minimize adverse impacts on the local tax base of converting land from private to public ownership.

In both the existing regulation and the NPRM, Sec. 777.11(a) emphasizes the need for consultation with appropriate State and Federal agencies concerning impacts to wetlands on Federal-aid highway projects. Section 777.11(b) of the NPRM, furthermore, would require that the public interest in all compensatory wetland mitigation projects, where wetlands have been purchased, enhanced, restored, or created with Federal-aid highway funds, be sufficient to ensure that the wetlands are permanently protected. This includes both private and public wetlands mitigation banks. The current Sec. 777.11(b), which sets forth the definition of wetlands to be used in applying the regulation, would be moved to Sec. 777.2, Definitions. Sections 777.11 (c) through (g) of both the existing regulation and the NPRM are intended to state the conditions and requirements for acquisition of interests in lands for purposes of mitigating wetlands impacts due to Federal-aid highway projects. For its part, Sec. 777.11(g) would emphasize that the objective of wetlands mitigation in the Federal-aid highway program is to implement the policy of no-net-loss in area or functional capacity. To that end, this paragraph would declare eligible

for Federal-aid participation certain activities intended to ensure the viability of compensatory mitigation wetlands during the period of establishment. These would include, but would not be limited to, such activities as repair or adjustment of water control structures, pest control, irrigation, fencing modifications, and replacement of plantings. The NPRM would encourage mitigation bank managers to determine the establishment period in the mitigation agreement itself prior to beginning any mitigation activities.

The NPRM would allow Federal-aid participation in the mitigation of impacts to both publicly or privately owned wetlands if such impacts actually resulted from Federal-aid highway projects. This proposal would not, however, require States to undertake mitigation efforts. Instead, part 777 would continue to provide policy and procedures for the evaluation and mitigation of adverse environmental impacts to wetlands which actually result from new construction of Federal-aid highway projects. Therefore, the FHWA believes the current Sec. 777.11(h)--with its explicit statement that the program is not a mandatory one--is no longer necessary and the NPRM would delete this provision. Finally, Sec. 777.11(i) of the existing regulation, which addresses mitigation of ecological impacts in non-wetlands, would be deleted. Since this NPRM would apply solely to wetlands issues, the FHWA has determined that the current Sec. 777.11(i) would not be applicable to the policy set forth in this proposal. The FHWA has also determined that this paragraph is not consistent with 23 U.S.C. 133(b)(1), added by the ISTEA, which allows States to obligate STP funds to mitigate damage to wildlife, habitat, and ecosystems caused by a transportation project funded under title 23, United States Code.

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable, but the FHWA may issue a final rule at any time after the close of the comment period. In addition to late comments, the FHWA will also continue to file in the docket relevant information that becomes available after the comment closing date, and interested persons should continue to examine the docket for new material.

Executive Order 12866 (Regulatory Planning and Review and DOT Regulatory Policies and Procedures)

The FHWA has considered the impact of this document and has determined that it is neither a significant rulemaking action within the meaning of Executive Order 12866 nor a significant rulemaking under the regulatory policies and procedures of the Department of Transportation. This rulemaking would amend FHWA regulations regarding mitigation of impacts to privately owned wetlands, which have become outdated because of provisions in Secs. 1006 and 1007 of the ISTEA authorizing greater flexibility for Federal participation in mitigating impacts to wetlands. These amendments have been codified at 23 U.S.C. 103 and 133.

This rulemaking would not cause any significant changes to the amount of funding available to the States under the STP or NHS programs or add to the process by which States receive funding. The provisions of this proposed rulemaking would not require the additional expenditure of Federal-aid or State highway funds. Thus, it is anticipated that the economic impact of this rulemaking would be minimal. In addition, it would not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs; nor will amendment of this regulation raise any novel legal or policy issues. Therefore, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601-612), the FHWA has evaluated the effects of this rule on small entities and has determined that amendment of the FHWA regulations regarding mitigation of impacts to wetlands would not have a significant economic impact on a substantial number of small entities. Amending this regulation would not affect the amount of funding available to the States through the STP or NHS programs, or the procedures used to

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select the States eligible to receive these funds. Furthermore, States are not included in the definition of "small entity" set forth in 5 U.S.C. 601. For these reasons, and for those set forth in the analysis of E.O. 12866, the FHWA hereby certifies that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this action does not raise sufficient federalism implications to warrant the preparation of a federalism assessment. Amendment of this FHWA regulation concerning the mitigation of impacts to wetlands would not preempt any State law or State regulation. No additional costs or burdens would be imposed on the States as a result of this action, and the States' ability to discharge traditional State governmental functions would not be affected by this rulemaking.

Executive Order 12372

Catalog of Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

This action does not create a collection of information requirement for the purposes of the Paperwork Reduction Act of 1995, 44 U.S.C.

3501-3520.

National Environmental Policy Act

The FHWA has analyzed this rulemaking for the purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4347). This NPRM would not, in and of itself, constitute a major Federal action significantly affecting the quality of the human environment. Instead, it would increase the flexibility available to States when deciding how to mitigate impacts to wetlands caused by those Federal-aid highway projects they undertake. Such impacts and appropriate mitigation measures would be evaluated pursuant to NEPA on a project-by-project basis by the States and the FHWA. Accordingly, promulgation of this NPRM would not require the preparation of an environmental impact statement.

Regulatory Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 777

Flood plains, Grant programs--transportation, Highways and roads, Wetlands.

Issued on: June 4, 1996.
Rodney E. Slater,
Federal Highway Administrator.

In consideration of the foregoing, the FHWA proposes to revise part 777 of title 23, Code of Federal Regulations, as set forth below.

PART 777--MITIGATION OF IMPACTS TO PRIVATELY OWNED WETLANDS

1. Part 777 is revised to read as follows:

Sec.

777.1 Purpose.

777.2 Definitions.

777.3 Background.

777.5 Federal participation policy.

777.7 Evaluation of impacts.

777.9 Mitigation of impacts.

777.11 Other considerations.

Authority: 42 U.S.C. 4321 et seq.; 49 U.S.C. 303; 23 U.S.C. 101(a), 103, 109(h), 133(b)(1), 133(b)(11), 133(d)(2), 138, 315; E.O. 11990; DOT Order 5660.1A; 49 CFR 1.48(b).

Sec. 777.1 Purpose.

To provide policy and procedures for the evaluation and mitigation of adverse environmental impacts to wetlands which actually result from new construction of Federal-aid highway projects.

Sec. 777.2 Definitions.

In addition to those contained in 23 U.S.C. 101(a), the following definitions shall apply as used in this regulation:

Biogeochemical transformations. Those changes in chemical compounds and substances which naturally occur in ecosystems. Examples are the carbon, nitrogen, and phosphorus cycles in nature, in which these elements are incorporated from inorganic substances into organic matter and recycled on a continuing basis.

Compensatory mitigation. Activities such as wetland restoration, enhancement, or creation, performed to replace or compensate for the loss of wetlands functional capacity actually the result of Federal-aid highway construction projects. Compensatory mitigation usually occurs in advance of or concurrent with the impact to be mitigated, but may occur after such impacts in special circumstances.

Ecologically desirable. A state or condition desired or wanted as the result of a mitigation agreement that provides additional wetland functional capacity.

No-net-loss of wetlands. A wetland resource conservation and management principle, under which, over the long term, loss of wetlands area or functional capacity is offset by gains in wetland area or functional capacity due to wetland restoration, enhancement, preservation, or creation.

On-site, in-kind mitigation. Compensatory wetland mitigation which replaces wetlands functional capacity lost as a result of a highway project on the same site or in the immediate vicinity of the impacts.

Wetland or wetlands. The terms wetland and wetlands have the same meaning as the definition issued by the U. S. Army Corps of Engineers (33 CFR 328.3(b)) and the U.S. Environmental Protection Agency (40 CFR 230.3).

Wetlands banking and related measures. Efforts, or contributions to efforts, to restore, create, enhance, or, in exceptional circumstances, preserve wetlands functional capacity, usually undertaken outside the area of potential effect of proposed highway projects and intended expressly to compensate for unavoidable adverse wetlands impacts caused by such projects, when compensation could not be achieved or would not be as environmentally beneficial if located at individual project sites.

Wetland enhancement. Increasing wetland functional capacity by modifying the site conditions of an existing wetland. Examples include, but are not limited to, alteration of hydrologic regime, vegetation management, fencing, pest control, and fertilization.

Wetland establishment period. The period required to establish wetland functional capacity in a compensatory wetland mitigation project sufficient to compensate losses due to impacts of Federal-aid highway projects. The establishment period may vary depending on the specific wetland type being developed.

Wetland functional capacity. The ability of a wetland to perform natural functions, such as provide wildlife habitat, store surface water, or perform biogeochemical transformations, as determined by a scientific assessment methodology. Natural functions of wetlands include those listed by the

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U.S. Army Corps of Engineers at 33 CFR 320.4(b)(2) (i) through (viii).

Wetland restoration. Reestablishment of wetlands functional capacity at a site at which such capacity formerly existed but has since essentially been eliminated.

Wetlands mitigation credit. A unit of wetlands mitigation, defined either by (1) area or (2) a measure of functional capacity through application of a scientific functional assessment methodology.

Sec. 777.3 Background.

Executive Order 11990, Protection of Wetlands, and DOT Order 5660.1A, Preservation of the Nation's Wetlands, emphasize the important functions and values inherent in the Nation's wetlands. Federal agencies are directed 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. Sections 1006 and 1007 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (Pub. L. 102-240, 105 Stat. 1914)(codified at Secs. 103 and 133 of title 23, United States Code, respectively) identify additional approaches for mitigation and management of wetland impacts which actually result from highway projects as eligible for Federal participation.

Sec. 777.5 Federal participation.

(a) Those measures which the Federal Highway Administration (FHWA) and a State Highway Agency (SHA) find appropriate and necessary to mitigate adverse environmental impacts to wetlands are eligible for Federal participation where the impacts actually result from an FHWA action. The justification for the cost of proposed mitigation measures should be considered in the same context as any other public expenditure; that is, the proposed mitigation represents a reasonable public expenditure when weighed against other social, economic, and environmental values, and the benefit realized is commensurate with the proposed expenditure. Mitigation measures shall give like consideration to traffic needs, safety, durability, and economy of maintenance of the highway.

(b) It is FHWA policy to permit, consistent with the limits set forth in this part, the expenditure of Federal-aid highway funds for activities required for the planning, design, construction, and establishment of wetlands mitigation projects, and acquisition of land or interests therein.

Sec. 777.7 Evaluation of impacts.

(a) The reasonableness of the public expenditure should be directly related to:

(1) The importance of the impacted wetlands, as determined through a scientific functional assessment methodology and interagency coordination with the appropriate resource management agencies; and

(2) The highway impact on the wetlands, as determined through a scientific functional assessment methodology.

(b) Evaluation of the importance of the impacted wetlands should consider:

(1) The wetlands' functional capacity;

(2) The relative importance of these functions to the total wetland resource of the area; and

(3) Other factors such as uniqueness, esthetics, or cultural values.

(c) A determination of the highway impact should focus on the short- and long-term effects of the project on the wetlands' functional capacity.

Sec. 777.9 Mitigation of impacts.

(a) Actions eligible for Federal funding. There are a number of actions that can be taken to minimize the impact of highway projects on wetlands. The following actions qualify for Federal-aid highway funding:

(1) Where practicable, avoidance or minimization of wetland impacts through realignment and special design or construction features. In accordance with the Environmental Protection Agency's Clean Water Act Section 404(b)(1) guidelines (40 CFR 230 et seq.), avoidance and then minimization must be given first consideration in the sequence for mitigating wetlands impacts.

(2) After practicable avoidance and minimization measures have been exhausted, other ecologically desirable compensatory mitigation alternatives consistent with the Section 404(b)(1) guidelines, either inside or outside of the right-of-way. This may include on-site mitigation, when that alternative is determined to be ecologically desirable and practicable, improvement of existing degraded or historic wetlands through restoration or enhancement, or creation of new wetlands from non-wetland areas. Restoration or enhancement of wetlands is generally preferable to construction or creation of new wetlands from non-wetland areas. Under this approach, first consideration should be given to the development of compensatory mitigation on publicly owned lands.

(3) Improvements to existing wetlands. Such activities may include, but are not limited to, construction of water level control structures, establishment of wetland vegetation, recontouring of the site, installation or removal of irrigation or water distribution systems, pest control, installation of fencing and other measures to protect, enhance, or restore the wetland character of the site.

(4) Wetlands mitigation banking and related measures.

(b) Participation in wetlands mitigation banks. If the development

or acquisition of wetland mitigation credits in wetland mitigation banks, either on or off-site, is determined to be the most ecologically desirable and practicable alternative for compensatory mitigation, the first alternative in mitigation bank use should be those established as publicly owned resources. These can be--

- (1) Restored or enhanced wetlands on public lands;
 - (2) Single purpose publicly owned banks, established by and for the use of a highway agency with Federal-aid participation; or multipurpose publicly owned banks, established with public, non-Federal-aid funds, in which credits may be purchased by highway agencies using Federal-aid funds on a per-credit basis; or
 - (3) Other forms of mitigation banks in which credits are purchased by State highway agencies to mitigate wetlands impacts actually the result of Federal-aid highway projects.
- (c) Contributions to statewide and regional efforts to conserve, restore, enhance and create wetlands. Federal-aid funds may participate in the development of statewide and regional wetlands conservation plans, including any efforts and plans authorized pursuant to the Water Resources Development Act of 1990. Contributions to these efforts may occur in advance of project construction only if such efforts are consistent with all applicable requirements of Federal law and regulations and State transportation planning processes.

Sec. 777.11 Other considerations.

- (a) The development of measures proposed to mitigate wetlands impacts should include consultation with appropriate State and Federal agencies.
- (b) Federal-aid funds may not participate in the replacement of wetlands absent sufficient assurances that the area will be maintained as a wetland.
- (c) The acquisition of proprietary interests in replacement wetlands as a mitigation measure may be in fee simple

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or by easement, as appropriate. The acquisition of "mitigation credits" in wetland mitigation banks should be accomplished through a legally recognized instrument, such as permanent easement or deed restriction, which provides for protection and permanent continuation of the wetland nature of the mitigation.

(d) A State Highway Agency (SHA) may acquire privately owned lands in cooperation with another public agency or third party. Such an arrangement may accomplish greater benefits than would otherwise be accomplished by the individual agency acting alone.

(e) An SHA may either transfer the title of lands acquired outside the right-of-way, without credit to Federal funds, to an appropriate public agency (e.g., U.S. Fish and Wildlife Service or State natural resource agency) or enter into an agreement with such agency to manage such lands. When such transfer occurs, there shall be an explicit agreement that the lands or interests therein transferred shall remain in the grantee agency's ownership or control so long as the lands continue to serve the purpose of the original acquisition. In the event

the area transferred no longer serves the purpose of the original acquisition, the lands or interests therein transferred shall revert to the SHA for proper disposition.

(f) The reasonable costs of acquiring lands or interests therein to provide replacement lands with equivalent wetlands functional capacity are eligible for Federal participation.

(g) The objective in mitigating impacts to all wetlands in the Federal-aid highway program is to implement the policy of no-net-loss in area or functional capacity. Certain activities to ensure the viability of compensatory mitigation wetlands during the period of establishment are eligible for Federal-aid participation. These include, but are not limited to, such activities as repair or adjustment of water control structures, pest control, irrigation, fencing modifications, and replacement of plantings. The establishment period should be specifically determined by the mitigation agreement among the mitigation bank managers prior to beginning any mitigation activities.

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