The purpose of this memorandum is to reiterate and clarify previous FHWA guidance on wetland and natural habitat mitigation. Specifically, it emphasizes that wetland and natural habitat mitigation measures, such as wetland and habitat banks or statewide and regional conservation measures, are eligible for Federal-aid participation when they are undertaken to create mitigation resources for future transportation projects.

A 1995 memorandum, Guidelines for Federal-aid Participation in the Establishment and Support of Wetland Mitigation Banks, provided direction on the eligibility of measures to mitigate impacts to wetlands under the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). The Transportation Equity Act for the 21st Century (TEA-21) expanded the eligibility provisions to include other natural habitat. The appropriate provisions in the statutes and guidance materials were incorporated into 23 CFR Part 777, Mitigation of Impacts to Wetlands and Natural Habitats and 23 CFR Part 710.513, Environmental Mitigation.

The ISTEA, TEA-21, and the ensuing regulations all clearly define compensatory mitigation activities such as, natural habitat and wetland banks, contributions to statewide and regional efforts to conserve, restore, enhance, and create natural habitats and wetlands, and development of statewide and regional natural habitat and wetlands conservation and mitigation plans as eligible projects. Thus, under 23 CFR Part 710.513 and 23 CFR Part 777, they are eligible for participation using either National Highway System or Surface Transportation Program Federal-aid funds. Under these authorities, such activities may occur **concurrent with or in advance of** the construction of highway or other transportation projects funded under Title 23, or even in advance of completion of project level environmental reviews, as long as the efforts are...
consistent with all applicable requirements of Federal law (including the Uniform Relocation Assistance and Real Property Acquisition Policies Act, as amended) regulations, and State transportation planning requirements.

Mitigation banks and other activities done in advance of, and anticipation of, actual project impacts are subject to the same requirements and regulations as any other construction project. Under 23 CFR Part 710.513, a State may acquire property for appropriate environmental mitigation, including wetlands banking and habitat mitigation. A project agreement with the FHWA for such mitigation is necessary for the property acquisition costs to be eligible for Federal-aid participation. Conditions for eligibility of mitigation of impacts to wetlands and natural habitat are given in 23 CFR 777.

In the case of wetland or other mitigation banks, the State DOT and FHWA division office should identify potential future wetlands and habitat mitigation needs for a reasonable time frame and establish a need for the mitigation credits. The transportation planning process should guide the determination of future mitigation needs.

There should also be coordination with the resource and regulatory agencies to determine the suitability of banking for mitigating project impacts before participation with Federal-aid funds is approved. Issues involving in-kind/out-of-kind and on-site/off-site compensation, as well as avoidance and minimization should be resolved in setting up an interagency banking agreement that will allow maximum use of the bank and provide reasonable compensatory mitigation for project impacts. This will ensure that the use of Federal-aid funds in banking projects is a reasonable expenditure.

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