

**PART 777—MITIGATION OF ENVIRONMENTAL IMPACTS TO PRIVATELY OWNED WETLANDS**

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SOURCE: 45 FR 50730, July 31, 1980, unless otherwise noted.

**§ 777.1 Purpose.**

To provide policy and procedures for the evaluation and mitigation of adverse environmental impacts to privately owned wetlands caused by new construction of Federal-aid highway projects.

**§ 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 required to avoid new construction in wetlands unless the head of the agency determines that: (a) There is no practicable alternative to such construction, and (b) the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.

**§ 777.5 Federal participation policy.**

(a) Those measures which the Federal Highway Administration (FHWA) and a State highway agency (SHA) find to be appropriate and necessary to mitigate adverse environmental impacts to privately owned 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 the acquisition of land or interests therein for the purpose of mitigating environmental damages when privately owned wetlands are directly affected by a Federal-aid highway project.

[45 FR 50730, July 31, 1980, as amended at 52 FR 8250, Mar. 17, 1987]

**§ 777.7 Evaluation of impacts.**

(a) The extent of Federal-aid participation in measures to mitigate adverse highway impacts to privately owned wetlands should be directly related to:

- (1) The importance of the impacted wetlands, and
- (2) The highway impact on the wetlands.

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

- (1) The primary functions of the wetlands (e.g., flood control, wildlife habitat, erosion control, etc.);
- (2) The relative importance of these functions to the total wetland resource of the area; and
- (3) Other factors such as uniqueness, esthetics, etc.

(c) A determination of the highway impact should focus on how the project affects the stability and quality of the wetlands. This evaluation should consider the short- and long-term effects on the wetlands and the importance of any loss such as:

- (1) Flood control capacity,
- (2) Erosion control potential,
- (3) Water pollution abatement capacity, and
- (4) Wildlife habitat value.

[45 FR 50730, July 31, 1980, as amended at 52 FR 8250, Mar. 17, 1987]

**§ 777.9 Mitigation of impacts.**

There are a number of actions that can be taken to minimize the impact of highway projects on privately owned wetlands. In order to qualify for Federal-aid highway funding, actions to

minimize impacts should be considered in the order listed.

(a) First consideration must be given to the mitigation of wetland impacts within the highway right-of-way limits. This should include the enhancement of existing wetlands and the creation of new wetlands in the highway median, borrow pit areas, interchange areas, and along the roadside.

(b) There may, in some specific cases, be compelling reasons and sufficient justification to institute mitigation measures other than those set forth in paragraph (a) of this section. In these instances, the SHA may propose and the Regional Federal Highway Administrator may approve the following mitigation measures for implementation outside the highway right-of-way on a case-by-case basis. Such measures should be designed to reestablish, to the extent reasonable, a condition similar to that which would have existed if the project were not built.

(1) The use of Federal-aid funds to improve existing publicly owned wetlands. Improvements to existing wetlands can take such forms as water-level control and planting of wetland vegetation.

(2) The use of Federal-aid funds to purchase replacement wetlands. The first effort should be to create new wetlands or to restore wetlands. If this is not possible, then consideration should be given to the acquisition of interests in existing privately owned wetlands. In any case, the public interest in replacement wetlands must be sufficient to ensure that the area is maintained as a wetland.

**§ 777.11 Other considerations.**

(a) The development of measures proposed to mitigate wetlands impacts should include consultation with appropriate State and Federal agencies.

(b) The definition of wetlands on a project will be in accordance with the definition issued by the U.S. Army Corps of Engineers (33 CFR 323.2(c)).

(c) The acquisition of proprietary interests in replacement wetlands as a mitigation measure may be in fee simple or by easement, as appropriate.

(d) An SHA may acquire privately owned lands in cooperation with another public agency. 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 cost of acquiring lands, or interests therein, to provide replacement lands with equivalent wetlands functions for privately owned wetlands that are directly affected by a Federal-aid highway project is eligible for Federal participation.

(g) Federal-aid funds are not eligible for use to maintain or manage wetlands areas. Therefore, construction, improvement or acquisition of wetlands should not be considered unless arrangements can be made to assure the maintenance and viability of the wetlands resource.

(h) The acquisition of replacement wetlands as a mitigation measure is not mandatory and is applicable only where permitted by (or consistent with) State law.

(i) The policy set forth in this part does not extend to the acquisition of interests in lands outside of the highway right-of-way for the purpose of mitigating impacts caused by the taking of privately owned lands (not wetlands) that have value as wildlife habitat which may be affected by a Federal-aid highway project.

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