U.S. Department of Transportation
Federal Highway Administration

Memorandum

Subject **INFORMATION:** Interagency Wetland Banking Guidelines (your memorandum, 11/15/94, copy attached)

Date DEC 7 1994

From Chief, Division of Environmental Analysis

Reply to Attn of HEP-42

To Fran Mardula, Attorney Adviser
Division of Regulations and Administrative Law (MAR-224)

There are two major issues we are concerned with in the draft wetland banking guidelines: 1) the role of the Mitigation Review Team; and 2) the timing of withdrawal of credits from the bank(s).

Of the two, the timing of credit withdrawal is much more contentious and potentially problematic. We suggest as one alternative solution that a range of expected performance be established, from the low end of reasonably anticipated results (for example, 20 percent of the expected optimum), up to 100 percent of the expected optimum, based on some easily observed or measured specific indicators, such as plant cover, size or density, plant species composition, wildlife use, or even water quality. The indicators would need to be indexed against existing wetlands to ensure that performance criteria are not too high or too low, but reflect what is possible under given conditions from year to year considering weather and watershed changes. Initial debits could be limited to an amount near the low end of the scale, with more becoming available as conditions at the bank site improve, up to the maximum anticipated (or more if the site proves to be better than expected). Periodic assessments of bank conditions could be used to verify remaining credits. These assessments could be performed by representatives of the Mitigation Review Team, the Bank Sponsor, or the Corps of Engineers (COE).

We recommend that initial withdrawal of some credits be allowed when agency approval is given for funding of federally sponsored banks (such as FHWA for highway banks), an acceptable banking site is identified, and a conceptual site development plan is approved by the Mitigation Review Team.

We feel that habitat is the limiting function in most wetland mitigation efforts, and reflects the integrated result of the wetland site and conditions. Therefore, regardless of whether other functional objectives of a wetland mitigation project are fully met, the mitigation is not complete until lost habitat capacity is compensated. The example of floodplain benefits (for floodwater storage) versus habitat benefits is poorly chosen.

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Flood water storage capacity is provided by an unimproved excavation of the floodplain border which may provide little or no biological or water quality wetland functions.

A problem in establishing too many constraints is that flexibility in the field is limited (some might say arbitrariness). We feel that very general guidelines would give maximum flexibility to the field without constraining the COE and highway agencies from developing appropriate agreements.

Our other concerns are with the requirements for establishment of mitigation ratios, the use of wetland preservation as a compensation alternative, performance criteria, and monitoring. Mitigation ratios should be based on some measure of wetland functional capacity, not on an arbitrary multiple designed to compensate for uncertainty in establishing the bank. The final amount of credits available in most banks might not be known for some time, based on results obtained. However, some minimum amount of mitigation credits can be established early, with the potential for more available credits based on monitoring results.

In our view, inflated compensation ratios for preservation banks are not warranted. Conditions for allowing preservation banks require that the wetland to be preserved must be at risk of loss or degradation. In that case, preservation offers two advantages - a fully functioning wetland and its supporting landscape can be maintained, and the uncertainty of results is eliminated.

Performance criteria should be indexed to local existing reference wetlands. Conditions in natural wetlands vary from year to year with meteorological and land use conditions. Monitoring should include both replacement and reference wetlands to make sure that performance criteria are reasonable. In some cases, replacement wetlands might offer advantages over natural wetlands. Performance criteria and monitoring should be based on easily measurable field indicators of site condition that, as directly as possible, reflect the functional capacity of the wetland.

We would like to have a representative accompany you to the next meeting of the Interagency Wetland Committee. Please advise us of the meeting schedule. For additional information, please contact Fred Bank at 366-5004, or Paul Garrett at 366-2067, of my staff.

Cindy Burbank

Cynthia J. Burbank

Attachment

FHWA:HEP-42:PGarrett:nb:x62067:12/1/94
Disk:Paul's, File name:MARAD.MEM
cc: HPD-1, HEP-1, HEP-40, HEP-41,
HEP-30(ECleckley), HEP-31, HEP-32,
HEP-42/Files(2), HEP-42(PGarrett)

Guidelines for Federal-aid Participation in the Establishment and Support of Wetland Mitigation Banks

I General Authority

The FHWA and other government agencies involved in managing impacts to wetlands and other natural resources have made notable progress in implementing mitigation "banking" procedures and projects. The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) specifically identifies the following as eligible for Federal-aid participation (Section 1006, 1007):

(1) banking of wetlands mitigation concurrent or in advance of project construction;

(2) contributions to statewide and regional efforts to conserve, restore, enhance and create wetlands;

(3) development of statewide and regional wetlands conservation and mitigation plans.

II National Wetlands Policy

These guidelines are consistent with the White House policy statement on wetlands, *Protecting America's Wetlands: A Fair, Flexible, and Effective Approach*. The Administration stated five principles for Federal wetlands policy, which included the following:

(1) a goal of no net loss of the Nation's remaining wetlands, and the long-term goal of increasing the quality and quantity of the Nation's wetlands resource base;

(2) fair, efficient, flexible, and predictable regulatory programs;

(3) increased emphasis on non-regulatory programs, including advance planning, restoration, inventory, and research to accomplish long-term wetland gains;

(4) expanded Federal partnerships with State, Tribal, and local governments and the private sector to restore and protect wetlands; and

(5) implementation of policy based on the best scientific information available.

III Wetland Mitigation Banking-Establishment/Management Costs

Wetland mitigation banking programs implemented by State transportation agencies offer unique opportunities to more effectively consolidate, manage, and protect ecological and wetlands resources while maintaining more workable alternatives for transportation and development. On-site mitigation remains the first and preferable alternative where feasible. However, by moving the location of mitigation away from transportation projects and development centers, mitigation often can be better integrated with supporting ecosystems, more effectively managed, provide more services to society, and allow for better planning of business, commercial, and residential development.

A common problem in establishing wetlands mitigation projects is protecting and managing environmental resources at a mitigation or banking site throughout and after the initial period of establishment. **Wetland establishment should be considered successful, and therefore complete, when the construction activity at the site is completed and the desired wetland features which were to be established are in place and in a viable, self-sustaining state, or have been accepted by participants in the mitigation agreement as fully functional.** Establishment periods may be from as little as 1-3 years on some mitigation sites up to 20 years on slow-maturing sites. For sites where the wetland mitigation is not successfully established at the end of the agreed-to establishment period, the agreed-to establishment period may be extended for a discrete period if FHWA finds that such an extension will result in the successful completion of the mitigation objectives.

Because of gradual demands for mitigation, some mitigation banks may have credits available for extended periods of time. During the time between the successful establishment of the wetland bank and the credits are exhausted, it is essential that the mitigation wetlands be protected and managed to ensure that credits will be available when needed. **It is consistent with FHWA policy that costs associated with protecting banked mitigation credits be considered eligible for Federal-aid participation. These costs include, but are not limited to, such items as replacement or repair of fencing or drainage structures, irrigation, replacement, and management of vegetation plantings, or other activities required to ensure the availability and persistence of mitigation resources during the period when credits are still being withdrawn, during the establishment period of the bank, or during other predetermined, agreed-to time-frames needed to effectively ensure success of the purpose and objectives of establishing the bank. This can be assumed to be for the duration of FHWA participation in a general or site-specific mitigation banking agreement, or until any other preestablished termination date for use of the bank.**

IV Property Acquisition Criteria

If Federal funds are involved in any part of the project for which the mitigation is intended, the acquisition of property interests for purposes of wetland banking will necessarily be accomplished in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, Pl 91-646 (42 U.S.C. 4601). If acquisitions are site specific and subject to use of the power of eminent domain, all provisions of the Uniform Act implementing regulations at 49 CFR 24 are applicable.

If acquisitions are not site specific and eminent domain authority will not be used, then the acquisition could be defined as "voluntary": and only the limited requirements of 49 CFR 24.101 (a)(1) and (2) would apply. If however, the acquisition would displace tenant occupants, the relocation assistance provisions of 49 CFR 24 would also apply.

Establishment of mitigation banks often requires the acquisition of a property interest, either through easement or fee title. The ISTEA and 23 CFR 777.9 (b) authorize the use of Federal-aid funds to purchase, or establish, replacement wetlands for impacts to private wetlands, with priority given to restoration or creation of wetlands. The public interest in replacement wetlands must be sufficient to ensure that the area is maintained as a wetland. This can be accomplished by a restrictive covenant or easement that is attached to the title of the property, or by transfer of title in fee to a public or quasi-public, non-profit resource management interest or agency. Upfront costs associated with easements, covenants, or property transfers are eligible for Federal-aid participation, and should encompass activities necessary to ensure that wetland functions are perpetuated and protected at mitigation sites.

V Sale of Mitigation Credits

Mitigation credits in wetland banks established with Federal-aid transportation funds for the purpose of mitigating anticipated impacts of highway or surface transportation projects may not be sold to other entities unless the credits will be used for mitigating impacts of Federal-aid transportation projects.