



U.S. Department  
of Transportation

**Federal Highway  
Administration**

# Memorandum

Subject **INFORMATION:** Use of Private Wetland  
Mitigation Banks as Compensatory Mitigation  
for Highway Project Impacts

From Associate Administrator  
for Program Development

To Regional Administrators  
Federal Highway Lands Program Administrator

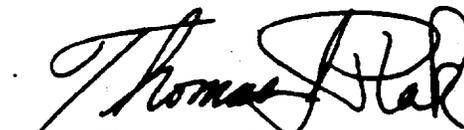
Date **JL 5 1995**

Reply to  
Attn. of **HEP-42**

Attached are answers to some questions that were asked about the use of private wetland mitigation banks to mitigate highway project impacts. Although they were originally posed by the Pennsylvania Division, they are generally applicable to mitigation of wetland impacts on Federal-aid highway projects. The responses represent current FHWA and Federal policy and authority relative to NEPA, ISTEA, and Section 404. Some aspects were addressed previously in the attached memorandum, "Funding for Establishment of Wetland Mitigation Banks," dated October 24, 1994.

This guidance complies with the proposed "Interagency Federal Guidelines for the Use of Wetland Mitigation Banks," published for comment by the Corps of Engineers and the Environmental Protection Agency in the *Federal Register* dated March 6.

I hope that these answers are helpful. If you have additional questions concerning Federal-aid participation in the funding of wetland banks, including private banks, please contact Dr. Paul Garrett, (202) 366-2067, or Mr. Fred Bank, (202) 366-5004, of my staff.

  
Thomas J. Ptak

2 Attachments

FHWA:HEP-42:PGarrett:nb:6/12/96:x62067

Revised:6/14/95

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cc: HPD-1, HEP-1, HEP 30, HEP-31, HEP-32,  
HEP-30(GCleckley), HCC-31(VCherwek),  
HRW-21(RMoeller), HEP-42(PGarrett),  
HEP-42(2Files)



# **The Use of Private Wetland Mitigation Banks to Mitigate Highway Project Impacts Questions and Answers**

In all cases where a private, entrepreneurial wetland mitigation bank is to be used to compensate for wetland impacts associated with Federal-aid highway projects, the private bank developer should have a written agreement with the Corps of Engineers (COE) to operate the bank, or a 404 permit (or equivalent, in the case of State assumption of 404 responsibilities), prior to offering mitigation credits for sale. The legal requirements for certain aspects of wetland banking are just being formulated as the use of private, entrepreneurial wetland banks is a new, largely untried, approach. The answers posed to the following questions are therefore subject to revision.

1. Are the ISTEA provisions sufficient authority to allow payment for wetland bank credits without any other ownership interest being transferred to the Department?

**Answer:** There must be a guarantee that a sufficient public interest is maintained to ensure that the bank will remain in a wetland condition for perpetuity. This could be accomplished through various arrangements, including a deeded easement issued to a public resource agency (e.g., United States Fish and Wildlife Service or a State natural resources agency) or a nonprofit public entity (e.g., Nature Conservancy) with a demonstrated resource management record. Other arrangements might be a covenant running with the land with a reversionary clause if the wetland is not maintained, or a Section 6(f) reverter-type agreement that allows later changes in the wetland if the FHWA-approved replacement is done. In addition, a written management plan must be approved by the FHWA that shows that conditions to sustain a wetland are present and will be maintained in the future. "Maintained", in this case, means that any physical maintenance, protection, or biological amendments (such as pest or fire control) is provided for by the bank operator or future land owner/manager.

2. Would any restrictions established by 23 CFR Part 777, entitled "Mitigation of Environmental Impacts to Privately Owned Wetlands," or any other mitigation provisions, apply? If so, what is the impact of Part 777 or other mitigation provisions on the proposal?

**Answer:** Yes. The mitigation must be for an identified current or future wetland impact caused by a highway project. The mitigation should be approved and accepted by the Federal (COE) and State wetland regulatory agencies through the Section 404 (or State equivalent) permit process.

Other limitations for Federal-aid participation are set forth in the memorandum from the Associate Administrator for Program Development entitled "Funding for Establishment of Wetland Mitigation Banks."

23 CFR Section 777.7 establishes criteria that should be applied to development of wetland banks and wetland mitigation in general. Proposed mitigation should consider the kinds of wetlands impacted, the functions and values they provide to society, and the severity of impacts. Impact analysis and proposed mitigation should focus on established functions, such as flood control, erosion control potential, water quality enhancement, and wildlife habitat values.

The development of mitigation measures should include consultation with appropriate Federal and State agencies. Wetlands should be classified and delineated in accordance with the regulatory definition issued by the COE in its Section 404 regulatory program.

Mitigation may consist of restoration, enhancement, or preservation of existing wetlands, or planning and construction of new wetlands. Compensatory mitigation should attempt to replace lost or impaired wetland functions and values on a no-net loss basis as the primary objective.

3. Do the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Act) apply to land acquisitions by the private party for the bank?

**Answer:** Yes. The FHWA's policy has been to apply the provisions of the Uniform Act to all persons whose property is acquired or who are displaced if any part of the project is Federally funded. However, an acquisition made by a private organization, without eminent domain authority would be covered by the simplified Uniform Act procedures set forth in 49 CFR 24.101(a)(2). In such cases, the acquiring organization must provide the seller with the information described in 49 CFR 24.101(a)(2)(i) and (ii), and provide relocation benefits to any tenant forced to move as a result of acquiring the property, as provided by 49 CFR 24.2(g)(2)(viii).

4. Do the requirements of the National Environmental Policy Act (NEPA) apply to the establishment of the bank by the private party?

**Answer:** Yes, NEPA generally applies to any action where Federal money is involved. The NEPA requirements should be met when the private party obtains a Section 404 permit approval from the COE to operate the bank.

5. Are there any Federal laws, regulations or policies relating to public bidding or competitive negotiation that would prohibit a sole source contract being negotiated for a pilot project?

**Answer:** Unless sole source procurement in this case is justified under State law, the State DOT should use competitive bidding. The FHWA would defer giving a final answer on this question until it has more details of the proposal.

6. Are there any other Federal laws, regulations or policies not indicated above that would impact on the proposal?

**Answer:** Other laws that might be applicable, depending on the facts of a particular situation, are the Endangered Species Act, the Farmland Protection Policy Act, the Historic Preservation Act, and Section 4(f). The Historic Preservation Act (and Section 4(f) in the case of a historic property) would be applicable if the site for the wetland bank would affect a historic structure or an archaeological site. Section 4(f) could also come into play if the creators of the bank were to use any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge or any land from an historic site of national, State, or local significance. The Farmland Protection Policy Act requires Federal agencies, before taking or approving any action that results in the conversion of farmland to nonagricultural use, to examine the adverse effects and consider alternatives to lessen them. Any Federal law that applies to a Federal approval is potentially applicable.

7. Is there any difference in your answers if a pre-existing wetland bank was involved, rather than one to be established concurrently with the highway project?

**Answer:** No. The key concern of the FHWA in either case would be that the wetlands created by the FHWA funds be used for mitigation of highway project impacts to wetlands.