U.S. Department of Transportation

Federal Guidance on the Use of the TEA-21 Preference for Mitigation Banking to fulfill Mitigation Requirements under Section 404 of the Clean Water Act

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I. Purpose

This document provides interagency guidance on applying the preference for wetlands mitigation banking mandated in the Transportation Equity Act for the 21st Century (TEA-21) to compensatory mitigation requirements under Section 404 of the Clean Water Act (CWA). This guidance will assist agency field personnel and the sponsors of Federal aid highway projects by clarifying the factors to be considered in implementing that preference consistent with existing regulations and policy. Relevant laws, regulations, and guidance are listed in Appendix A.

II. Background

A. **TEA-21.** Enacted June 9, 1998, as Public Law 105-178, TEA-21 established a preference for mitigation banking to compensate for unavoidable losses to wetlands or other natural habitat caused by transportation projects receiving Federal assistance under Title 23 of the US Code. Eligibility to use Federal funds is authorized by the following statutory provision with emphasis added:

> *In accordance with all applicable Federal law (including regulations), participation in natural habitat and wetland mitigation efforts related to projects funded under this title, which may include participation in natural habitat and wetland mitigation banks, contributions to statewide and regional efforts to conserve, restore, enhance, and create natural habitats and wetland, and development of statewide and regional natural habitat and wetland conservation and mitigation plans, including any such banks, efforts, and plans authorized under the Water Resources Development Act of 1990 (Public Law 101-640) (including crediting provisions). Contributions to the mitigation efforts described in the preceding sentence may take place concurrent with or in advance of project construction; except that contributions in advance of project construction may occur only if the efforts are consistent with all applicable requirements of Federal law (including regulations) and State transportation planning processes. With respect to participation in a natural habitat or wetland mitigation effort related to a project funded under this title that has an impact that occurs within the service area of a mitigation bank,* ***preference shall be given, to the maximum extent practicable, to the use of the mitigation bank*** *if the bank contains sufficient available credits to offset the impact and the bank is approved in accordance with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 Fed. Reg. 58605 (November 28, 1995)) or other applicable Federal law (including regulations).* [emphasis added]

B. **Federal Highway Administration (FHWA) Regulations.** In January of 2001, the FHWA revised its regulations to conform with wetland and natural habitat mitigation provisions in TEA-21, stating the requirements for the use of natural habitat and wetlands mitigation banks and other forms of compensatory mitigation to offset impacts associated with Federal aid highway projects, including eligibility requirements, and technical and administrative guidance. In the "Discussion of Comments" section of this rulemaking, FHWA recognizes the value and benefits mitigation banking can provide when compensating for unavoidable impacts caused by linear highway projects. The wetland and natural habitat mitigation provisions in TEA-21 deal with issues of eligibility, e.g., how and when Federal-aid highway funds can be used for these activities. Language in TEA-21 and the FHWA wetland regulation states that, to the maximum extent practicable, preference shall be given to the use of mitigation banks where:

- the wetland impact occurs within the service area of an existing mitigation bank,
- the bank contains sufficient credits to offset the impact,
- the bank used has been approved as adhering to the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 FR 58605, November 28, 1995), and
- selection of the eligibility preference is "in accordance with all applicable Federal laws, including regulations."

C. **Corps of Engineers (Corps) Regulations.** Under 33 CFR 323, the Corps determines appropriate conditions for issuance of Section 404 permits for discharge of fill into waters of the United States, including requirements for compensatory mitigation. In the case of highway projects, these conditions and requirements are to be sufficiently specific to ensure that losses or degradation of waters of the United States are adequately compensated, and will be appropriate to the extent and nature of the impacts of the highway proposal being permitted. The Corps further has the authority to determine if mitigation proposed by the permittee (in the case of Federal-aid Highway projects, typically the State Transportation Agency) adequately compensates for those losses. However, within those constraints, the conditions will allow sufficient flexibility for the Corps to consider the availability of suitable locations, constructibility, overall costs, technical requirements, and logistics.

D. **Section 404(b)(1) Guidelines (The Guidelines).** The Guidelines require that no discharge of dredged or fill material in waters of the U.S. be permitted unless appropriate and practicable steps have been taken to minimize adverse impacts associated with the discharge [40 CFR 230.10(d)]. The Guidelines establish a mitigation sequence, under which compensatory mitigation is required to offset losses to the aquatic environment (including temporary losses) after all appropriate and practicable steps have been taken to first avoid and then minimize those impacts. Compliance with these mitigation-sequencing requirements is an essential environmental safeguard to ensure that CWA objectives for the protection of wetlands are achieved. The Section 404 permit program relies on the use of compensatory mitigation to offset unavoidable aquatic impacts by replacing lost functions.

E. **1990 Memorandum of Agreement concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines (1990 MOA).** Under this MOA, the Environmental Protection Agency (EPA) and the Department of the Army clarified the program's mitigation policies. The 1990 MOA states that mitigation "should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site," and that "if on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area if practicable (i.e., in close proximity and, to the extent possible, the same watershed)." The 1990 MOA further states that "there may be circumstances warranting a combination of on-site and off-site mitigation to compensate for losses" and that mitigation banking may be an acceptable form of compensatory mitigation. The agencies recognize the general preference for restoration over other forms of mitigation (e.g. creation), given the increased chance for ecological success.

F. **The 1995 Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (Banking Guidance).** The Banking Guidance further explained the Agencies' policy on mitigation banks for the purpose of providing compensatory mitigation for authorized adverse impacts to wetlands and other aquatic resources. According to the Banking Guidance, "In general, use of a mitigation bank to compensate for minor aquatic resource impacts (e.g., numerous small impacts associated with linear projects; impacts authorized under nationwide permits) is preferable to on-site mitigation." The overall goal of a mitigation bank is to provide economically efficient and flexible mitigation opportunities, while fully compensating for wetland and other aquatic resource losses in a manner that contributes to the long-term ecological functioning of the watershed within which the bank is to be located. The goal will include the need to replace essential aquatic functions that are anticipated to be lost through authorized activities within the bank's service area. As described in the Banking Guidance, permittees may use mitigation credits from a bank, approved through the established Mitigation Banking Review Team (MBRT), as compensation, in whole or in part, for unavoidable losses to the aquatic environment. Mitigation banks will generally be functioning in advance of project impacts and thereby reduce the temporal losses of aquatic functions and values and reduce uncertainty over the ecological success of the mitigation.

G. **The 2000 Federal Guidance on the Use of In-Lieu Fee Arrangements (ILF Guidance).** The ILF Guidance outlines the circumstances where in-lieu-fee mitigation may be used to satisfy compensatory mitigation requirements. In-lieu-fee mitigation occurs in circumstances where a permittee provides funds to an in-lieu-fee sponsor instead of either completing project-specific mitigation or purchasing credits from a mitigation bank approved under the Banking Guidance. However, the ILF Guidance states that "where on-site mitigation is not available, practicable, or determined to be less environmentally desirable, use of a mitigation bank is preferable to in-lieu-fee mitigation where permitted impacts are within the service area of a mitigation bank approved to sell mitigation credits, and those credits are available." In addition, FHWA has issued guidance regarding eligibility for participation with Federal-aid highway funds for in-lieu-fee mitigation. The FHWA guidance adopts the substantive requirements articulated in the ILF

Guidance and is available on FHWA's website at
http://www.fhwa.dot.gov/environment/wetland/inlieu.htm.

H. **Corps Regulatory Guidance Letter (RGL), No. 02-2, Guidance on Compensatory Mitigation Projects.** As provided for in the RGL, agencies are encouraged to use current scientific knowledge of wetland functions and current methods of assessing impacts to wetland functions in the regulatory program. Agencies will use the same approach to evaluate potential gains at mitigation sites as they did in evaluating losses at impacts sites, in terms of amounts, types, and location(s). This will ensure that potential mitigation sites provide the most ecologically beneficial replacement of functions. Local watershed needs will be considered in conditioning permits and selecting mitigation alternatives to ensure that broad scale watershed and landscape management objectives are met by the selected mitigation approach. Mitigation approaches that can be considered as part of the full range of compensatory alternatives include restoration, enhancement, creation, and preservation, as indicated in the regulations and guidance cited above. Potential alternatives may include both on-site and off-site approaches. Out-of-kind mitigation may also be considered, depending on landscape and watershed needs, consistent with the above regulations, and as articulated in guidance.

I. **Determination of Compensatory Mitigation.** Under CWA Section 404, the day-to-day determination of what mitigation most suitably compensates for the unavoidable impacts to aquatic resources rests with the Corps. The signatory agencies recognize the benefits that mitigation banking provides to the environment while also providing greater flexibility to applicants needing to comply with the mitigation requirements. Field personnel for the agencies are encouraged to utilize the following list of factors when formulating mitigation plans and before reaching a decision regarding mitigation. Documenting how these factors have been considered in the mitigation determination is key to ensuring a consistent approach to the application of the TEA-21 banking preference. The development of localized agreements is strongly encouraged. These could establish region-specific procedures and priorities, account for the variety of aquatic resources nationwide, and enhance the predictability of the decision-making process.

III. Factors for Consideration. Sections A and B below are intended to illustrate a two-step process for considering factors relevant to the TEA-21 mitigation banking preference which mandates that mitigation banking be used, to the maximum extent practicable, in preference to other approaches (on-site project by project mitigation) in providing compensatory mitigation in the Federal aid highway program. The first step is to evaluate whether banking will suitably compensate for the proposed project's impacts. The second step addresses the circumstance where there is more than one suitable method for compensating for unavoidable impacts, comparable to an approved bank, as determined by the Corps under Section 404.

A. **Determining the Suitability of Banking as Compensatory Mitigation.** The following four criteria are factors used in determining if a bank serves as suitable compensatory mitigation.

1. **Use of a Mitigation Bank vs. On-site Mitigation.** In general, mitigation banks should be used in preference to on-site mitigation to compensate for numerous, small aquatic resource impacts associated with linear projects such as highways. Sponsors of Federal aid highway projects should identify all candidate banks, approved through the MBRT, that may be considered as part of a proposal to mitigate for such impacts associated with these projects. If there are impacts that affect specifically identified, locally important aquatic resource functions that a bank cannot provide (e.g., local flood water control, local water quality enhancement, habitat for a species or population with a very limited geographic range or narrow environmental requirements), consideration should be given to practicable opportunities to replace these lost functions at or near the impact site(s). Such circumstances may warrant a combination of on-site and bank mitigation to compensate for the full suite of functional losses to the maximum practicable extent.

2. **Impacts within an Approved Bank Service Area.** Under the Banking Guidance, approved banks have a designated service area. Service area boundaries are typically defined by watershed (e.g., US Geological Survey Hydrologic Unit Codes) and ecoregion boundaries, and represent the area where a bank can reasonably be expected to provide appropriate compensation for impacts to wetlands and other aquatic resources in that area. As a general matter, in order to utilize a mitigation bank, authorized impacts should occur within that bank's designated service area.

3. **In-kind vs. Out-of-kind Mitigation Determinations.** In the interest of achieving functional replacement, in-kind compensation of aquatic resource impacts is generally preferred (e.g., if impacts are to stream resources then, a mitigation bank should provide appropriate stream mitigation). However, this factor alone should not preclude the use of an available bank providing out-of-kind mitigation if it is practicable and environmentally preferable to address watershed needs. Additional guidance to inform this determination is forthcoming in the interagency guidance regarding on-site versus off-site and in-kind versus out-of-kind mitigation, as well as making mitigation determinations in a watershed context.

4. **Availability of Credits.** If authorized impacts fall within a suitable bank's service area, it should be determined whether or not the necessary amount of credits are available to compensate for the impacts. A bank's instrument contains an estimate of the total potential credits available at that bank; however, generally, credits only become available for debiting or purchase incrementally, as specific management activities are completed and/or specific performance standards are met. Highway sponsors may use appropriate credits from more than one bank if the impacts of the action are within the service area of each bank. In circumstances where a combination of mitigation banking and on-site mitigation is available, practicable, and needed to mitigate impacts, a bank should be used to provide the off-site component.

B. **Deciding among mitigation alternatives.** To the extent that a mitigation bank will provide suitable compensation for impacts caused by a Federal aid highway project to waters of the United States, the bank should be approved under the Section 404 permit process as mitigation

for the project impacts. Authorized impacts may fall within the service area of more than one approved mitigation bank. In these circumstances, and where other suitable mitigation alternatives have been identified, the FHWA and State DOT will choose among suitable alternatives based on availability and practicability,[1] and will determine whether or not the banking preference has been implemented to the greatest extent practicable in order to establish the eligibility of a project's mitigation costs for federal-aid funding.

IV. Role of Early Coordination in Mitigation Planning

A. **Streamlining Environmental Review.** TEA-21 also requires that Federal Agencies work together to streamline environmental review of transportation projects. The goal of this provision is to integrate the review process and allow State and Federal Agencies to better address important considerations such as analysis of alternatives and cumulative environmental impacts of transportation projects as well as mitigation plans for the compensation of aquatic resource impacts.

B. **National Environmental Policy Act (NEPA) and CWA Section 404.** Early coordination on the development of mitigation plans in the NEPA stage of environmental review can result in the identification of information needed to satisfy relevant environmental statutes, including Section 404, in a timely manner, reduce uncertainty and delays, and is likely to result in more cost effective mitigation. Advance mitigation planning will also provide the public with a meaningful opportunity to provide comments to the sponsor and resource agencies. This benefits both the highway sponsor and the resource agencies by providing for advanced planning of mitigation efforts, allowing for greater flexibility and, in some circumstances, a broader range of options for compensatory mitigation, including mitigation banking.

C. **Participation in Mitigation Banking Process.** To this end, the agencies agree that it is beneficial for highway sponsors to engage early in mitigation planning, including the identification of candidate banks to compensate for project impacts and, to the extent appropriate, exchange information with the MBRT. The Banking Guidance states "it is appropriate for representatives from state, tribal and local regulatory and resource agencies to participate where an agency has authorities and/or mandates directly affecting or affected by the establishment, use or operation of a bank." Early coordination and identification of potential mitigation needs can provide highway sponsors and resource managers with the opportunity to integrate mitigation for impacts to aquatic resources with other project and regional mitigation objectives. Early planning also allows the identification of key aquatic resource issues in advance and the opportunity to guide mitigation options in the most environmentally effective manner (e.g., the identification of restoration priorities that allow the selection of restoration over preservation to contribute to the agencies goal of overall no net loss of wetlands.

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[1] FHWA defines practicable as meaning "available and capable of being done after taking into consideration cost, existing technology, and logistics, in light of overall project purposes." (23 CFR 777.2). The Corps and EPA, for Section 404 purposes, also define practicable in this manner and consider such as a factor in determining the overall suitability of alternatives and mitigation according to the Section 404(b)(1) Guidelines. (40 CFR 230.10(a)(2)).

D. **Localized Agreements.** Regional and district offices of the agencies are encouraged to form localized agreements to further promote early coordination among the signatory agencies. The purpose of the agreements would be to develop comprehensive mitigation plans, outlining procedures and priorities for their locale in order to effectively and efficiently implement this guidance.

V. General

A. This guidance does not alter or modify any of the guidance described above and the signatory agencies will employ this guidance in concert with the 1995 Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 *Federal Register*, No. 43, pg. 12286).

B. The statutory provisions and regulations mentioned above contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. This guidance does not impose legally binding requirements on the signatory agencies or any other party, and may not apply to a particular situation in certain circumstances. The signatory agencies retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance when they determine that it is appropriate to do so. Such decisions will be based on the facts of a particular case and applicable legal requirements. Therefore, interested parties are free to raise questions and objections about the substance of this guidance and the appropriateness of its application to a particular situation.

C. This guidance does not affect the responsibility of any party to comply with all applicable federal and state laws and regulations.

D. This guidance is based on evolving information and may be revised periodically without public notice. The signatory agencies welcome public comments on this guidance at any time and will consider those comments in any future revision of this guidance.

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Appendix A: Authorities

This guidance is issued in accordance with the following statutes, regulations, and policies. It is intended to clarify provisions within these existing authorities and does not establish new requirements.

a. The Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178 [23 USC 103(b)(6)(M) and 23 USC 133(b)(11)]
b. Clean Water Act Section 404 [33 USC 1344].
c. Rivers and Harbors Act of 1899 Section 10 [33 USC 403 et seq.].
d. FHWA Regulations [23 CFR Part 777]. Mitigation of Impacts to Wetlands and Natural Habitat.
e. Environmental Protection Agency, Section 404(b)(1) Guidelines [40 CFR Part 230]. Guidelines for Specification of Disposal Sites for Dredged or Fill Material.
f. Department of the Army, Section 404 Permit Regulations [33 CFR Parts 320-331]. Policies for evaluating permit applications to discharge dredged or fill material.
g. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines [February 6, 1990].
h. Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks [November 28, 1995].
i. Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act [November 7, 2000].
j. FHWA Federal Guidance on the Use of In-Lieu-Fee arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act [November 7, 2000].
k. Corps Regulatory Guidance Letter, 02-2, Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 [December 24, 2002].
l. National Environmental Policy Act [42 USC 4321 et seq.], including the Council on Environmental Quality's implementing regulations [40 CFR Parts 1500-1508].