a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33(a)(2) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

2. Section 558.195 is amended in the table in paragraph (d) by adding an entry following ''13.6 to 27.2 (0.0015 to 0.003 pct)'' and before ''Chlortetracycline approximately 400'' to read as follows:

§ 558.195 Decoquinate.

* * * * *

(d) * * *

Decoquinate in grams per ton	Combination in grams per ton	Indications for use	Limitations	Sponsor
*	*	*	*	*
	Monensin 5 to 30	Cattle fed in confinement for slaughter; for prevention of coccidiosis caused by *Eimeria bovis* and *E. zuernii*, and improved feed efficiency.	Feed only to cattle fed in confinement for slaughter. Feed continuously as the sole ration to provide 22.7 mg of decoquinate per 100 lb body weight per day and 50 to 360 mg of monensin per head per day. Feed at least 28 days during period of exposure to coccidiosis or when it is likely to be a hazard. Do not feed to animals producing milk for food. Also see (c)(1) of this paragraph and § 558.355(d)(8). Monensin as monensin sodium provided by 000986 in § 510.600(c) of this chapter.	046573
*	*	*	*	*

3. Section 558.355 is amended by adding paragraph (f)(7) to read as follows:

§ 558.355 Monensin.

* * * * *

(f) * * *

(7) Monensin may also be used in combination with decoquinate as in § 558.195.

Dated: December 20, 2000.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 00–33217 Filed 12–28–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 777

[FHWA Docket No. FHWA–97–2514; 96–8]

RIN 2125–AD78

Mitigation of Impacts to Wetlands and Natural Habitat

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: This document revises the rule concerning the eligibility for Federal-aid transportation funding of activities to mitigate impacts to wetlands and natural habitats due to highway projects funded pursuant to provisions of title 23, U.S. Code. It updates the FHWA's wetlands regulation to conform with wetland and natural habitat mitigation provisions contained in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and the Transportation Equity Act for the 21st Century (TEA–21), which allow increased flexibility for Federal funding participation under title 23, U.S. Code, in mitigation measures for impacts of federally funded highway projects to wetlands and natural habitats

EFFECTIVE DATE: January 29, 2001.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Garrett, Office of Natural Environment, (303) 969–5772, ext. 332, email address: *paul.garrett@fhwa.dot.gov;* FHWA, 555 Zang Street, Lakewood, CO 80228, office hours are from 8 a.m. to 5 p.m., m.t., Monday through Friday, except Federal holidays; or Mr. Robert J. Black, Office of the Chief Counsel, HCC–30, (202) 366–1359, email address: *robert.black@fhwa.dot.gov,* 400 Seventh Street, SW., Washington, D.C. 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m, e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

Internet users may access all comments received by the U.S. DOT Dockets, Room PL–401, by using the universal resource locator (URL): *http:/*

/dms.dot.gov. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

An electronic copy of this document may be downloaded by using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661. Internet users may reach the Office of the Federal Register's home page at *http://www.nara.gov/fedreg* and the Government Printing Office's web page at *http://www.access.gpo.gov/nara.*

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A. Background

The FHWA issued a notice of proposed rulemaking (NPRM) June 17, 1996, at 61 FR 30553, and supplementary notices of proposed rulemaking (SNPRMs) June 18, 1997, at 62 FR 33047, and April 7, 1999, at 64 FR 16870.

This final rule establishes the following:

1. The criteria for participation with Federal highway funds (title 23, U.S. Code) in costs of mitigation of impacts to wetlands and natural habitats;

2. A preference in compensatory mitigation of wetlands and natural habitats impacts due to highway projects funded pursuant to title 23, U.S. Code, for mitigation banks, where the impacts are within the service area of the bank, and the bank has been properly permitted; and

3. The requirements for evaluation of wetlands impacts due to such projects and implementation of mitigation consistent with current technology and wetlands science.

This regulation does not establish a requirement to implement mitigation of impacts to resources regulated under the Clean Water Act (33 U.S.C. 1344), the Section 404 regulatory program, or to other resources regulated under other Federal, State, or local regulations, or to unregulated natural habitat resources. It establishes requirements for eligibility of such actions for Federal funding participation and the banking preference only.

Approximately 50 percent of our nation's wetlands have been lost in the last two hundred years. Section 404 of the Clean Water Act (CWA) established the regulatory program of the U.S. Army Corps of Engineers (33 CFR Parts 320–330) to permit discharges of dredged and fill material in wetlands and other waters of the United States, and helps to protect the nation's wetlands resources, functions, and values by requiring environmental review for the issuance of such permits. The permit review process requires a sequencing analysis of alternatives to avoid and minimize wetlands impacts as much as practicable in accordance with 40 CFR 230.10(a) (the Section 404 (b)(1) guidelines), and consideration of compensatory mitigation for unavoidable impacts.

Executive Order 11990, Protection of Wetlands, (42 FR 26961; 3 CFR, 1977 comp., p. 121) directs Federal agencies to avoid to the extent possible adverse impacts associated with the destruction or modification of wetlands, and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative. Other Federal programs designed to conserve and protect wetlands include the Emergency Wetlands Protection Resources Act of 1986 (16 U.S.C. 3921–3931), the North American Waterfowl Management Plan (16 U.S.C. 4401(a)(12)), and the Wetlands Reserve Program (16 U.S.C. 3837). Private organizations, such as Ducks Unlimited, have been established to help conserve, restore, and protect wetlands as waterfowl habitat. In addition, there are State and local wetlands protection programs and regulations that must be met when planning and building highway projects.

The FHWA implements the regulatory and national policy requirements stated above. The ISTEA (Pub. L. 102–240, 105 stat. 1914), and the TEA–21 (Public Law 105–178, 112 Stat. 107), both recognized changes in wetlands management regulations, procedures and processes, and included important new authorities for participation in costs of wetlands mitigation with Federal transportation funds. Accordingly, the FHWA decided to update and revise its regulation concerning mitigation of wetlands. At the same time, in accordance with new language in the TEA–21, eligibility for use of Federal transportation funds was established for mitigation of impacts to natural habitats.

In the NPRM published on June 17, 1996 (61 FR 30553), the FHWA proposed to amend 23 CFR Part 777, Mitigation of Impacts to Privately-owned Wetlands, in order to update the previous, obsolete regulation in light of changes brought about by the ISTEA. The ISTEA significantly altered the range and timing of alternatives eligible for Federal-aid participation for mitigation of wetland impacts due to Federal-aid highway projects. Accordingly, the June 17, 1996, NPRM revised the current regulation to conform to the ISTEA's requirements, providing more flexibility to State highway agencies in determining eligibility of alternatives for Federal participation. This proposal also broadened the scope of the current regulation to encompass all wetlands mitigation projects eligible for Federal participation, not just those involving privately-owned wetlands.

Subsequently, the FHWA determined that certain language in the regulation proposed in the NPRM, which was carried over from the original rulemaking published in 1980, could be interpreted in an unnecessarily restrictive manner. Part 777, as then written, stated that it applied to ''the evaluation and mitigation of adverse environmental impacts to privately owned wetlands caused by new construction of Federal-aid highway projects.'' (23 CFR 777.1). The NPRM retained this language, with the exception of the words ''privately owned.'' The FHWA believed this provision was unnecessarily restrictive, because under current law Federal-aid funds may be used to improve or restore wetlands affected by past Federal-aid highway projects, even when no current Federal-aid project is taking place in the vicinity.

Four provisions of title 23, U.S. Code, sanction such ''historic wetlands'' restoration projects. First, both the National Highway System and Surface Transportation Programs, created by the ISTEA, allow States to use Federal-aid funds for wetlands mitigation activities. 23 U.S.C. 103(b)(6)(m) and 133(b)(11). These provisions are identically worded, and allow the expenditure of Federal-aid highway funds towards efforts to conserve, restore, enhance, and create wetlands. Both provisions state that contributions to such mitigation efforts may take place concurrent with or in advance of project construction. The FHWA believes this phrase may be fairly interpreted as permissive, rather than restrictive and, therefore, States are permitted by these two provisions to use Federal-aid funds for the stated purposes concurrent with or in advance of project construction. Nothing in the language of sections 103(b)(6)(M) or 133(b)(11) forbids States from doing so after a project has been completed. No specific prohibition having been written into these provisions, the FHWA does not believe one is to be implied.

Two other provisions of title 23, U.S. Code, when read together, also provide a basis for funding so-called historic wetlands restoration projects. The first is 23 U.S.C. 133(b)(1), which permits Surface Transportation Program (STP) funds to be spent for ''mitigation of damage to wildlife, habitat, and ecosystems caused by a transportation project funded under this title.'' Under 23 U.S.C. 101, the term ''project'' means ''an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed.'' This definition is broad enough to encompass not just new or even recent projects, but any highway that has been constructed using title 23, U.S. Code, funds.

A final category of funding for which historic wetlands projects may be eligible is that available under the STP for transportation enhancement activities (TEAs) (23 U.S.C. 133(e)(5)). The definition of TEAs (23 U.S.C. 101) does not limit them to those related to particular ''projects'' (as defined in section 101), and does not specify any particular time frame in which they must take place. Historic wetlands projects could qualify for STP funds if legitimately tied to one of the categories of TEAs set forth in the definition, such as, scenic beautification, mitigation of water pollution due to highway runoff, or maintaining habitat connectivity while reducing wildlife mortality due to motor vehicles.

Accordingly, the FHWA issued an SNPRM, dated June 18, 1997 (62 FR 33047), which further amended Part 777 by revising § 777.1 to read: ''To provide policy and procedures for evaluation and mitigation of adverse environmental impacts to wetlands resulting from projects funded pursuant to the provisions of title 23, United States Code.''

That SNPRM also made a technical amendment to the text of the June 17, 1996, NPRM, and revised the heading of the regulation to read, ''Mitigation of Impacts to Wetlands.''

The TEA–21 established a preference for use of mitigation banks to provide compensatory mitigation for unavoidable wetlands impacts caused by federally funded highway projects, and for impacts to natural habitat. The TEA–21 provides that, for projects funded under title 23, U.S. Code, having a wetland impact within the service area of a mitigation bank, to the maximum extent practicable preference shall be given to the use of the mitigation bank, if the bank contains sufficient credits to offset the impact and is approved in accordance with the Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks (60 FR 58605, November 28, 1995) (Federal Guidance). The Federal Guidance presents guidance for the use of ecological mitigation banks as compensatory mitigation in the Section 404 regulatory program for unavoidable impacts to wetlands and other aquatic resources.

B. Who Is Affected by the New Regulation?

The new regulation addresses the eligibility of mitigation activities for impacts to wetlands and natural habitats for funding under title 23, U.S. Code. The FHWA and State departments of transportation (DOTs), who are responsible for administering title 23, U.S. Code, funds and implementing highway projects, are the primary agencies affected by the new regulation. State departments of transportation will have increased flexibility in planning and implementing mitigation for impacts to wetlands and other waters of the United States, and to natural habitats caused by highway projects funded pursuant to title 23, U.S. Code. This increased flexibility will affect advance planning for wetlands conservation by other agencies as well through interagency coordination and cooperative projects. Providers of services to mitigate wetlands impacts, such as private wetlands mitigation banking companies, and wetland regulatory agencies, including the U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, and State regulatory agencies, will also be affected by the regulation through the increased flexibility and the mitigation banking preference. The changes in the new regulation should reduce the permit review times for the Section 404 regulatory program by increasing the flexibility offered to State highway agencies in mitigating impacts to wetlands, facilitate project development, and result in greater efficiency in providing mitigation for unavoidable impacts.

C. What Does the Rule Do and What Changes Were Made in the Final Rule Due to Comments Received on the Proposed Rule?

The final rule establishes a preference for wetland mitigation banking in mitigating wetlands impacts caused by projects funded under title 23, U.S. Code, broadens the regulation to provide eligibility for use of title 23 Federal highway funds to mitigate for impacts to wetlands caused by current or past highway projects funded under title 23, U.S. Code, and to mitigate impacts to natural habitat. The NPRM did not address mitigation of impacts to natural habitat, however, this issue was discussed in the SNPRM April 7, 1999 at 64 FR 16870. The final rule also recognizes the eligibility of environmental restoration activities established in the TEA–21 on highway projects funded pursuant to title 23, U.S. Code.

Specific changes in the final rule from those published in the NPRM and the SNPRMs are the following:

Section 777.2 Definitions

In the definition of ''compensatory mitigation,'' the phrase ''Activities such as'' is deleted in order to limit the definition to the specific activities cited.

The definition of ''ecologically desirable'' is deleted in response to comments recommending its removal. The banking preference in the TEA–21 is not restricted to the most ecologically desirable mitigation alternative; therefore, the definition is not needed.

The definition of natural habitat is changed to add the word ''currently'' in the phrase ''not currently subject to cultivation.'' Also, a new sentence is added at the end of the definition. These changes were made to more clearly define the scope of the term.

The definition for ''net gain of wetlands'' is changed to make it more consistent with the Federal Guidance and Section 404(b)(1) guidelines. The phrase ''at a ratio greater than 1:1'' is added to clarify the definition.

A definition for ''practicable'' is added to make this regulation consistent with the regulatory program language found at 33 CFR Parts 320–330 and 40 CFR Part 240.

The definition for ''wetland or habitat enhancement'' is revised to make it consistent with the Federal Guidance and to broaden the definition with respect to control and management of pests necessary for enhancement.

The definition for ''wetland or habitat establishment period'' is changed in response to comments to clarify the distinction between establishment and maintenance of wetland mitigation sites. Maintenance activities are not eligible for participation with Federal-aid highway funds (23 U.S.C. 116(a)), whereas certain activities for wetland or habitat establishment for the purpose of project mitigation have been identified as eligible.

A definition for ''wetland or habitat preservation'' is added to make this regulation consistent with the Federal Guidance.

The definition for ''wetland or habitat restoration'' is changed in response to

comments to make it consistent with the Federal Guidance.

The definition of ''wetlands and habitat banking and related measures'' is changed in response to a commenter's request to make it consistent with the Federal Guidance. The definition is now titled ''mitigation bank.''

The definition of ''wetlands or habitat mitigation credit'' is changed in response to comments to make it consistent with the Federal Guidance.

Section 777.3 Background

This section is revised for clarity and to add regulatory references. Paragraph (b) is added to make the references to title 23, U.S. Code, formerly in paragraph (a), more clear. Paragraphs (c), (d), and (e) are added to provide reference to Federal regulations and guidance pertinent to wetlands and habitat mitigation activities, at the request of several commenters.

Section 777.7 Evaluation of Impacts

Paragraph (a) is revised to use appropriate regulatory language (''shall'' rather than ''should'') and to clarify the applicability of the regulation relative to participation with title 23, U.S. Code, funds. Paragraph (b) is revised to make it clearer. Paragraph (c) is revised to emphasize concurrent environmental analyses and processes, and to incorporate a reference to regulatory guidance relative to recognized wetlands functions and mitigation of impacts found at 33 CFR 320.4.

Section 777.9 Mitigation of Impacts

Paragraph (a) is revised to make it clearer that this section applies to mitigation activities eligible for participation with Federal-aid highway (title 23) funds and to remove requirements not found in the TEA–21, but stated elsewhere (at 40 CFR Part 230). Paragraph (b) is revised to remove a perceived bias against commercial wetlands banks in the proposed regulation. Paragraphs (c) and (d) are added to make the regulation more consistent with guidance on wetlands and natural habitat mitigation in the TEA–21 and to incorporate the FHWA's current legal interpretation on eligibility of mitigation activities for participation with title 23, U.S. Code, funds.

Section 777.11 Other Considerations

Paragraphs (b) and (c) are revised to make them consistent and clearer, and to include performance bonds as a sufficient assurance that a mitigation site would be properly maintained as a wetland or natural habitat. Paragraph (g) is changed to eliminate unnecessary language outside the authority of title 23, U.S. Code.

D. Why Did the FHWA Change the Rule?

This rule was changed to implement new authority for participation with Federal highway funds in mitigation for wetlands and natural habitat impacts due to federally funded highway projects. It also recognizes new needs, requirements, and methods to successfully implement compensatory mitigation, and implements changes in interpretation of existing regulations to allow restoration or mitigation of such impacts due to already-completed projects which were not mitigated when the projects were built.

E. Discussion of Comments

All comments received on the NPRM were carefully considered in the decision to publish a final rule. A total of 33 comments were received: 3 from Federal agencies, 22 from State agencies, 1 from a State legislature, 3 from non-governmental organizations, 3 from private wetland banking organizations or companies, and 1 from 3 U.S. Senators.

Comments in general supported the increased flexibility provided by changes in the regulation to conform with new authority established in the ISTEA and the TEA–21 for mitigating impacts to wetlands and natural habitat. However, concerns were expressed that this new authority: (1) Might become a requirement with respect to unregulated resources; (2) might lead to inappropriate use of permits and compensatory mitigation; (3) might de-emphasize the Section 404(b)(1) guidelines; and (4) might lead to lack of emphasis on the National Environmental Policy Act (NEPA) in the project development process.

As previously stated, this regulation does not establish any requirement to mitigate impacts to wetlands, waters of the United States, or natural habitats, or to carry out environmental restoration of historic or past impacts to such resources. It establishes requirements for participation with title 23, U.S. Code, Federal-aid highway funds in costs of mitigation activities (avoidance, minimization, rectification, reduction, compensation (40 CFR 1508.20)) or environmental restoration activities authorized under the TEA–21 associated with highway projects funded under title 23, U.S. Code, only. Part 771 of title 23, CFR, establishes the general project environmental process, impact review requirements, and mitigation policy under NEPA for federally funded highway projects. Specific mitigation requirements for wetlands and waters of the United States are established at 33 CFR Part 320, 40 CFR Part 230, and by other applicable State or local regulations. Federal requirements for conservation measures for habitat of federally listed species are found in 50 CFR Part 402—Interagency Cooperation—Endangered Species Act of 1973, as amended, and related guidance, and State regulations as applicable.

Part 771 is the FHWA regulation implementing NEPA; it addresses appropriate analysis of impacts to the natural and human environment, and use of title 23, U.S. Code, funds for mitigation of impacts in general. Other Federal guidance and regulations regarding mitigation for impacts to wetlands and aquatic resources include: the U.S. Fish and Wildlife Service (USFWS) draft regulations concerning compatible uses of Federal wildlife refuges, found at 64 FR 49055 (September 9, 1999); the USFWS policy on mitigation, found at 46 FR 7644 (January 23, 1981); the Federal Guidance; and the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1508).

Since the ISTEA was passed, the FHWA has implemented the additional flexibility that the ISTEA provided to participate in wetland mitigation that was not found in the old regulation through internal memoranda and technical guidance. The FHWA has encouraged progressive approaches to wetlands mitigation, including development of mitigation banking agreements and restoration of past impacts which were not mitigated when the highway projects were constructed. State DOTs have been allowed all possible flexibility in developing compensatory mitigation approaches for unavoidable wetlands impacts with Federal highway funds, and have been encouraged to seek out new methods and technology for mitigation. The FHWA has participated in wetland technical workshops, and published a technical manual on mitigation of wetlands, National Cooperative Highway Research Program (NCHRP) Report 379, ''Guidelines for the Development of Wetland Replacement Areas,'' [1] to improve the value and performance of compensatory mitigation.

[1] Report 379 dated 1996 is available for purchase at a cost of $65 from the Transportation Research Board bookstore at 2001 Wisconsin Avenue, NW., Green Building, Room 346, Washington, DC 20007, (202) 334–3213; or online at: *http://www.nas.edu/trb*. It is available for inspection and copying as provided in 49 CFR Part 7.

In addition to supporting the increased flexibility in participation with Federal transportation funds for mitigation, several comments also generally supported mitigation banking for mitigation of highway impacts. Highway projects are linear, often resulting in many, small, incremental impacts. On-site mitigation sometimes results in isolated wetlands that might not provide benefits commensurate with costs and time required to establish wetland functions. Due to the presumed larger size of the mitigation wetlands established through banking, and the controls that are recommended by the Federal Guidance under the Section 404 permit authority, wetlands banks could provide more wetland values and benefits per acre and should receive sufficient management to ensure their functions will be sustained into the future.

Additional comments and responses are as follows:

Several commenters requested that a citation to the Section 404(b)(1) guidelines (40 CFR Part 230) be included; others thought it was not necessary. The Section 404(b)(1) guidelines are regulatory in nature and apply to environmental review and mitigation of impacts under Section 404 permit authority. The citation is now provided in § 777.3.

Several commenters requested citation of the Environmental Quality Council National Environmental Policy Regulations (40 CFR Parts1500–1508). These regulations are now cited in § 777.7.

One commenter requested information on the location and cost of mitigation banks established with Federal highway funds or by State Departments of Transportation (DOTs). The FHWA does not collect or maintain this data.

Several commenters requested preparation of an environmental impact statement (EIS) on this rulemaking. Typically, promulgation of rules by the FHWA is a categorical exclusion (23 CFR 771.117(c)(20)). Further, this rulemaking is not a proposal for a major Federal action significantly affecting the environment. Impacts to wetlands and waters of the United States due to federally funded highway projects, and the appropriateness of the mitigation provided for those impacts, are assessed for each project under NEPA through two paths. One is the NEPA process by the State DOT and the FHWA (23 CFR Part 771), and a second is through the public interest review process for Section 404 permits as required under NEPA by the U.S. Army Corps of Engineers (33 CFR 320.4).

This rulemaking does not establish additional mandatory mitigation requirements for wetlands or natural habitats, nor does it alter the Section 404 Regulatory Program or the requirements of the Section 404(b)(1) guidelines to avoid and minimize wetlands impacts. The U.S. Army Corps of Engineers has revised the nationwide permit (NWP) program under Section 404 (65 FR 12817), effective June 5, 2000. Requirements for notice and mitigation of impacts on NWPs have been strengthened, not relaxed. Therefore, the FHWA does not agree that promulgation of this final rule requires the preparation of an EIS.

One non-governmental organization stated that the Federal highway program caused the loss of ''thousands of acres of wetland.'' Losses of wetlands due to Federal highway projects which involved individual Section 404 permits have averaged about 2,000 acres per year on a program-wide basis over the past three years. During the same period, compensatory mitigation for these unavoidable impacts has been provided at a ratio of approximately 2:1 on a program wide basis. The FHWA will continue to pursue a goal of providing compensatory mitigation sufficient to help reach the national goal of a net gain in wetlands functions and values.

One commenter asserted that this rule will encourage greater use of Section 404 general permits through participation in mitigation with Federal highway funds, and will result in more wetlands losses. The recent changes to the nationwide permit program do not broaden the use of general permits, instead they strengthen the requirements for use of such permits which apply to highway projects, and increase the level of environmental review and mitigation required. Therefore, the FHWA does not believe that this rule will encourage wetland losses. However, it will enable better mitigation on highway projects; not just compensatory mitigation, but also avoidance and minimization, and will result in an improvement in the performance of compensatory mitigation sites.

Numerous comments were received on the definitions (§ 777.2). Several commenters suggested revision of the definition of compensatory mitigation to delete ''wetland buffer areas,'' ''usually occurs,'' and ''Compensatory mitigation * * * after such impacts in special circumstances.'' Most of these commenters emphasized avoidance and minimization of adverse wetlands impacts to the maximum extent practicable, and implementation of compensatory mitigation before impacts occur to avoid temporal (temporary) loss of wetlands functions and values. Some commenters opposed allowing the use of mitigation banks or off-site compensatory mitigation.

The Congress, in the ISTEA, made use of wetland mitigation banks eligible for Federal funding on National Highway System and Surface Transportation Program projects (23 U.S.C. 133). Further, the TEA–21 establishes a preference for the use of mitigation banks to offset unavoidable losses due to Federal-aid highway projects. Therefore, the FHWA cannot disallow their use.

The U.S. Army Corps of Engineers, in its recent notice regarding revision of the Nationwide Permit Program (64 FR 39252, July 21, 1999), stated: ''The establishment and maintenance of vegetated buffers adjacent to open waters and streams will protect, restore, and enhance water quality and aquatic habitat. Vegetated buffers can be used to provide out-of-kind compensatory mitigation for wetland impacts where the District Engineer determines that such mitigation for wetland impacts is the best, ecologically, for the aquatic environment.'' This approach is consistent with watershed management concepts in wetlands and aquatic resource protection and conservation currently being advanced by the Administration (Protecting America's Wetlands: A Fair, Flexible, and Effective Approach, White House Office for Environmental Policy, 1993) and many State resource agencies.

Off-site compensatory mitigation has been accepted by the U.S. Army Corps of Engineers as a means of obtaining replacement of lost wetlands functions and values where it is determined to be suitable. In some cases, on-site mitigation is not available or practicable. Off-site alternatives might provide the opportunity to re-establish wetlands functions where other alternatives cannot be implemented or would be ineffective.

One commenter asserted that allowing compensatory mitigation to ''occur after such impacts under special circumstances,'' invites abuse of flexibility and is not consistent with the Federal Guidance. In fact, the Federal Guidance states: ''Compensatory mitigation is typically implemented and functioning in advance of project impacts, * * *.'' The FHWA recognizes that it is preferable for compensatory mitigation to be accomplished before or concurrently with impacts. However, our current interpretation of eligibility of mitigation activities for participation with Federal highway funds, based on

provisions in the ISTEA and the TEA–21, allows mitigation of project impacts after the fact, to the extent that mitigation and environmental restoration projects related to transportation projects can be undertaken well after the highway construction project has been completed and is in use, and there is no active federally funded highway construction project in the vicinity. Therefore, we are leaving the definition as written.

Comments by Federal agencies were submitted concerning the definition of mitigation banks for wetlands and natural habitats, to the effect that the definition should be consistent with the Federal Guidance. We agree with this comment, and therefore have changed the definition of mitigation bank to agree with that found in the Federal Guidance, with the addition that the definition also applies to natural habitat. A comment was also submitted requesting that ''related measures'' be defined separately from ''mitigation bank.'' Upon review of section 1106 of the TEA–21 (23 U.S.C. 103), no mention of the term ''related measures'' was found. The FHWA believes that this term falls within a range of activities that would normally be associated with other definitions in the regulation. Therefore, no definition is included for ''related measures,'' and the term is removed from the definition and other sections where it appeared.

Several State departments of transportation commented on the definition of natural habitat to exclude highway rights-of-way from the definition in accordance with 23 CFR 1.2. The FHWA agrees with these comments. Once established through title or easement, highway rights-of-way are excluded from the definition of natural habitat. Their primary purposes are transportation related. This is not intended to preclude the use of rights-of-way for purposes of maintaining wildlife passage across highways by structures or other means, or for enhancing natural habitats, when consistent with transportation uses.

Comment was also made that the definition of natural habitat could be interpreted as precluding the restoration of cultivated or artificially landscaped areas to natural habitat conditions. All cultivated or landscaped areas were at one time occupied by naturally occurring, native vegetation. They usually can be restored to natural habitat through deliberate restoration processes.

Several commenters suggested changes to the definition of ''Net gain of wetlands'' (1) To exclude preservation as a means of achieving a net gain, (2) to delete the phrase ''at a ratio greater than 1:1,'' and (3) to include natural habitat in a net gain definition and policy. The FHWA agrees that preservation is not capable of achieving a net gain of wetland area. However, the FHWA believes that, under exceptional circumstances, preservation can protect existing, high value wetlands that are at risk of development, degradation, or loss, and result in a gain in wetlands' functional capacity in the long run. Preservation is also permitted under the Federal Guidance and Section 404(b)(1) guidelines. Deleting the phrase ''at a ratio greater than 1:1'' will not substantively change the meaning or interpretation of the definition. We also maintain that this definition is confined to eligibility of mitigation activities funded pursuant to title 23, U.S. Code; in other words, the federally funded highway program. Wetlands have been identified through special national programs and policies for particular management attention and protection as unique and critical national resources, for example the National Clean Water Action Plan has specific wetland elements included. In addition, the FHWA has established specific performance objectives in its National Strategic Plan and Performance Plan for conservation of wetlands.

The FHWA also recognizes the mandate to conserve and protect the habitat of species listed as threatened or endangered under the Federal Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*) and other biological species of special concern under NEPA and other related regulations and policies. Through participation in the ESA Section 7 process (16 U.S.C. 1536), conservation measures for protection and recovery of listed species on Federal highway projects are implemented. Part 771 provides for the mitigation of significant, adverse impacts of Federal highway projects. Neither FHWA policy nor regulations preclude participation with Federal transportation funds in mitigation for impacts to natural habitat which would provide compensation ratios greater than 1:1 where appropriate. This regulation does not prohibit such appropriate compensation for natural habitat losses, and the FHWA believes that the ESA and other conservation objectives are adequately met under those policies and requirements. Therefore, the definition is left as it is.

One commenter objected to the use of the definition for ''service area'' provided in the Federal Guidance. This definition has been generally accepted in the Section 404 regulatory program and provides sufficient flexibility to obtain useful, timely, cost-effective mitigation. In the interest of consistency, the definition used in the Federal Guidance will be retained in this regulation.

Several commenters suggested revision or deletion of the definition of ''wetland or habitat enhancement.'' We agree that the written definition was not as clear as we would like, and therefore have partially replaced it with the definition of ''enhancement'' from the Federal Guidance. However, we have left examples of activities which can be carried out to enhance wetlands for purposes of determining eligibility for Federal participation with Federal highway funds.

One commenter expressed a concern with the definition of ''wetland or habitat enhancement,'' saying that allowing enhancement or improvement of areas surrounding wetlands (i.e., buffer zones) should not be considered mitigation and should not receive credit for mitigating impacts to wetlands. The TEA–21 provides for participation with Federal highway funds to mitigate impacts to wetlands and other, non-wetland, habitats. Mitigation of impacts to wetlands are required as a condition of permits issued under Section 404 of the CWA, and the appropriate mitigation credits granted to a mitigation project are determined by the U.S. Army Corps of Engineers through that process. The definition as written allows for the use of Federal highway funds for mitigation of impacts of federally funded highway projects to wetland and non-wetland habitats, is accurate, and has not been changed.

One non-governmental organization requested that the term ''pest control'' be replaced with ''integrated pest management.'' We agree with this last comment, and have changed the section to that effect.

One commenter complained that the definition of ''wetland or habitat establishment period'' was too vague. Therefore, the definition has been changed to indicate more of the purpose. The intent of defining an establishment period is to allow participation with Federal highway funds in corrective measures necessary to fully establish compensatory mitigation. The definition is necessary and remains in the regulation.

One commenter requested that the definition of ''wetland or habitat functional capacity'' be deleted. Section 404 regulations require that functions of wetlands being impacted in a proposed action or project permitted under Section 404 authority be assessed to determine the extent of impacts on waters of the United States and to

evaluate the importance of the wetlands being impacted. The concept of functional capacity is implicit in the Section 404 Regulatory Program, is an essential element in the hydrogeomorphic functional assessment approach (HGM) being developed by the U.S. Army Corps of Engineers (62 FR 33607, June 20, 1997), and is defined therein. The FHWA supports the development and application of HGM to highway projects where it is practicable. Therefore, this definition remains in the regulation.

One commenter asked for a definition of ''scientific functional assessment.'' Functional assessment of wetlands is defined by the U.S. Army Corps of Engineers as ''a process by which the capacity of a wetland to perform a function is measured.'' (Technical Report WRP–DE–9, U.S. Army Corps of Engineers, 1995). This definition is expanded and further refined in the Section 404(b)(1) guidelines (40 CFR 230.20–230.50). Both of these definitions are science-based in that they refer to or require factual data concerning the observation and measurement of conditions that exist in wetlands and the processes which occur there. This is the type of analysis to which the FHWA refers in the term ''scientific functional assessment.'' This process is required by the public interest review when a Section 404 permit is issued for compliance with the Section 404(b)(1) guidelines. The Section 404(b)(1) guidelines are ''substantive environmental standards by which all 404 permit applications are evaluated.'' (Joint Memorandum to the Field, USEPA and USACE; Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements (August 23, 1993)).

One commenter suggested changing the definition for ''wetland or habitat mitigation credit'' to that found in the Federal Guidance; another suggested that this definition be deleted. The hydrogeomorphic approach developed by the U.S. Army Corps of Engineers facilitates using the concept of mitigation credits by presenting an area-based functional capacity index which can be used to determine appropriate ratios of compensation. Thus, the concept of mitigation credits can be applied to on-site, project-specific mitigation as well as to mitigation banks. Therefore, we have left the definition as it was, and added a statement that, with respect to mitigation banks, the definition means the same as that in the Federal Guidance.

A Federal agency commented on the definition for ''wetland or habitat restoration,'' suggesting removal of the phrase ''but have essentially been eliminated.'' We agree that this phrase is unnecessary, and have eliminated it.

The remaining comments apply to the body of the regulation, §§ 777.3 through 777.11.

One commenter requested that a paragraph referring to the Section 404 regulatory program be included in § 777.3, background. We agree with this comment and have included a reference to the U.S. Army Corps of Engineers Regulatory Program, 33 CFR Parts 320–330.

One commenter requested that a description of the preference for the use of mitigation banks for compensatory mitigation of impacts related to projects funded pursuant to title 23, U.S. Code, as stated in the TEA–21, be included in § 777.3. That preference relates to participation in mitigation costs on such projects, and is stated in § 777.9, Mitigation of Impacts.

One commenter requested that monitoring of mitigation projects be included in § 777.5, Federal Participation, paragraph (b). Monitoring of mitigation activities and results is an essential activity to ensure successful completion of mitigation. Therefore, the section is changed to specifically include monitoring as an eligible activity.

Several commenters requested § 777.5(a) require consultation by the State DOTs with Federal and State resource agencies to determine what measures are needed to fully mitigate adverse impacts to wetlands. Consultation with resource agencies is carried out under the requirements of the Section 404 public interest review process on all permits which have greater than minimal effects on waters of the United States. The Section 404(b)(1) guidelines are likewise universally applied to the Section 404 Permit process. The interagency review process is also referenced in §§ 777.7 and 777.11.

One commenter asked that a requirement for compliance with Section 404 of the CWA, requirements and other relevant statutes be added to § 777.7, Evaluation of impacts. The FHWA agrees, therefore a paragraph is added to that effect. A commenter also recommended that indirect and cumulative impacts be added to the statement in this section. The evaluation of such long term impacts is addressed in § 777.7(c).

Several State departments of transportation commented in reference to § 777.7, that the cost of mitigation often exceeded the ''value'' of the wetland resource impacted, and that the area of mitigation required to satisfy a Section 404 permit condition far exceeded the area of wetland impacted. 33 CFR 320.4(r)(2) states:

> All compensatory mitigation will be for significant resource losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment. Also, all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable * * *.

Natural resource values are very difficult to determine, since common practice in our society is to assign value to a service, an object, or a parcel of land, in monetary terms. Natural resources that do not receive or encourage direct public or private ''use'' in some manner, for instance recreation or economic gain, are typically valued very low in monetary terms, lower than their importance to a healthy ecosystem might be. Means of valuing resources include ''replacement cost,'' ''willingness to pay'' for use or access, and ''user economic expenditures'' value, wherein the economic benefit is calculated based on average expenditures for those uses. None of these approaches effectively measures the importance of a particular ecological element to the healthy, normal, functioning of ecosystems. They do approach some measure of the economic significance of the resource. However, wetlands have been identified as being of national importance and significance by law, executive order, and regulation. Therefore, we assume that they are significant in the functioning of the ecosystems within which they occur, despite our inability at this time to put an ''appraised'' dollar value or significance rating on their ecosystem relationships. For this reason, FHWA policy is that reasonable costs of mitigation, in all its forms, are eligible for participation with Federal highway funds, and are consistent with agency and national resource conservation objectives, as exemplified by such programs as the National Clean Water Action Plan, Wetlands Reserve Program, and North American Waterfowl Management Plan.

Several commenters requested clarification of the applicability of § 777.9, Mitigation of impacts, to the TEA–21, section 1108(a)(7), Surface Transportation Program, Eligibility of projects (23 U.S.C. 133(b)(14)). This section of the TEA–21 adds the following to the list of activities eligible for Federal transportation funds under this section:

(14) Environmental restoration and pollution abatement projects (including the retrofit or construction of storm water treatment systems) to address water pollution or environmental degradation caused or contributed to by transportation facilities, which projects shall be carried out when the transportation facilities are undergoing reconstruction, rehabilitation, resurfacing, or restoration; except that the expenditure of funds under this section for any such environmental restoration or pollution abatement project shall not exceed 20 percent of the total cost of the reconstruction, rehabilitation, resurfacing, or restoration project.

The commenters raised the question whether or not the 20 percent limit applied to mitigation of current impacts due to projects funded under Title 23. The FHWA's interpretation of this section is that the 20 percent limit for ''four r'' projects (reconstruction, rehabilitation, resurfacing, or restoration) applies to past or existing impacts or pollution caused by the original highway project or subsequent construction projects on the highway, not to mitigation of impacts anticipated by a proposed new activity.

Several commenters also recommended that if the participation of Federal highway funds in mitigation of past wetlands impacts were allowed, a specific pool of funds be set aside for such ''wetland mitigation retrofit activities'' with a specific funding limit.

''Wetland mitigation retrofit'' we take to mean the mitigation of historical or past wetlands impacts due to highway projects which were not successfully compensated or mitigated at the time of construction. The TEA–21 does not subdivide Transportation Enhancement (TE) funds into separate accounts that can only be used for specified TE projects. Wetland mitigation retrofit projects are treated like any other TE project and are eligible for TE funding on a case-by-case basis.

One commenter requested that the term ''wetland'' in § 777.9(a)(1) be changed to ''waters of the United States,'' and that the following phrase, ''avoidance and minimization must be given first consideration in mitigating wetlands impacts' be replaced with ''impacts to wetlands and other waters of the United States must be avoided and minimized to the maximum extent practicable, prior to consideration of compensatory mitigation measures.''

One of the reasons this regulation is being revised is specific authority in the TEA–21, which refers to ''natural habitats and wetlands* * *.'' Therefore, the regulation will retain references to wetlands, and not waters of the United States. However, the FHWA recognizes that the Section 404 regulatory program (33 CFR Parts 320–330) regulates discharges in ''waters of the United States'' (33 CFR 328.3), which include aquatic resources other than wetlands. Eligibility of funding for mitigation of these impacts is addressed under Part 771. The FHWA recognizes the need to satisfy the requirements for mitigation established in the Section 404(b)(1) guidelines in permitting projects, and also established in section 1106 of the TEA–21, which amended 23 U.S.C. 103(b)(6)(M) in part, as follows : ''In accordance with all applicable Federal law (including regulations), participation in natural habitat and wetland mitigation efforts* * *.'' We interpret this as a reference to 33 CFR Part 320, General Regulatory Policy, 40 CFR Part 230, Section 404(b)(1) guidelines, and other Federal regulations related to wetlands and natural habitats. It is not the intent of the FHWA to duplicate regulatory requirements in this regulation that have been independently established. Therefore, this reference and the accompanying language are removed from the section and have been placed in § 777.3, Background.

A commenter suggested that § 777.9(a)(2) specify that the compensatory wetland mitigation implemented must be the most preferred environmentally in accordance with the Section 404(b)(1) guidelines. This change is beyond the scope and intent of this regulation, therefore, the requested change was not made.

Several commenters suggested that the service area of a mitigation bank (§ 777.9(a)(4)) be defined as the USGS hydrologic unit in which it occurs. This is not consistent with the Federal Guidance. Further changes were also requested specifying the proximity of mitigation to impacts. These decisions are made by the U.S. Army Corps of Engineers, in conditioning Section 404 permits, and are not within the scope of this regulation.

A commenter also suggested, in reference to § 777.9(a)(4), that compensatory mitigation be allowed only within the same hydrologic unit, and that out-of-kind mitigation should be acceptable only if specifically recommended by resource agencies. Such a requirement is beyond the scope of the statute and this regulation. General guidelines for siting of mitigation banks are found in Section II.B(2) of the Federal Guidance. Requirements for siting of compensatory mitigation are determined by the U. S. Army Corps of Engineers as conditions to the issuance of a permit in accordance with the Section 404(b)(1) guidelines. Therefore we are not changing the language in this section.

A commenter recommended that § 777.9 include sequencing requirements for non-wetland, natural habitats, similar to that required by 40 CFR 230 for wetlands. Sequencing, as defined in the Section 404(b)(1) guidelines, is the requirement to avoid or minimize impacts before considering compensatory mitigation. Such a requirement is beyond the scope of this regulation and the TEA–21 authorities. Therefore, a sequencing requirement for natural habitat was not added to the regulation.

Comment was made on this section requesting that clarification be provided in the final rule for the language in the TEA–21 which states a preference for the use of mitigation banks, to the effect that an eligible bank (impacts within service area, credits available, approved and permitted by the COE in accordance with the Federal Guidance) be used to the maximum extent practicable to mitigate some of the wetland impacts on a highway project, even if the bank does not have sufficient credits available to mitigate all the project's impacts.

The TEA–21, section 1106 (23 U.S.C. 103(b)(6)(M)) states:

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 wetlands, 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 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 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 FR 58605) or other applicable Federal law (including regulations).

The U.S. Army Corps of Engineers, as the agency administering the Section 404 regulatory program, has the primary

responsibility to determine the most appropriate compensatory mitigation approach for unavoidable impacts to wetlands and waters of the United States, including the use of a mitigation bank, under Section 404, CWA, 33 CFR Part 320, and 40 CFR Part 230. 33 CFR 320.4(r) presents the regulatory guidance for mitigation of impacts to waters of the United States in the Section 404 permit process.

The FHWA, in determining eligibility for participation with Federal-aid funds for mitigation costs, sees no reason why the use of a permitted mitigation bank as partial mitigation for project impacts should not be an eligible expense when approved as a condition for issuance of a Section 404 permit. Ultimately, the decision upon which compensatory mitigation approach to use for unavoidable impacts rests with the U.S. Army Corps of Engineers under the Section 404 permit program authority and U.S. Environmental Protection Agency under the provisions of Section 404(c).

One commenter suggested that § 777.9(a)(4) explicitly require mitigation banks to be certified as functioning before credits can be issued against project impacts. This comment is appropriate to the Federal Guidance and the Section 404 regulatory program, but beyond the scope of this regulation. Therefore § 777.9(a)(4) was not changed in this regard.

A wetlands mitigation banker commented on § 777.9(b), objecting to the phrase ''is determined to be the most ecologically desirable and practicable alternative for compensatory mitigation.'' Upon reviewing the regulatory process, and in light of the other qualifying statements in the TEA–21, the FHWA believes that the phrase is unnecessary, and therefore it is deleted from the final rule. It should be clear under the Section 404 regulations, including the Section 404(b)(1) Guidelines, that a cooperative impact and functional assessment process using science-based information will be employed as necessary to determine the appropriate compensatory mitigation approach.

One commenter requested clarification of § 777.9(c), Contributions to statewide and regional efforts to conserve, restore, enhance and create wetlands or natural habitats, with respect to the eligibility of ''in-lieu-fee'' mitigation programs for participation with Federal-aid highway funds. In-lieu-fee programs are those in which funds are collected in specific amounts per unit of impact and are then administered by the regulatory agency to pay for compensatory mitigation according to pre-established objectives and plans. The FHWA has not developed specific guidance for participation with Federal-aid highway funds in in-lieu-fee programs at this time. However, in so far as in-lieu-fee programs are defined within the guidelines provided in the TEA–21, comply with other applicable Federal and State laws (including regulations), and are not contrary to the public interest, they are eligible for participation. The TEA–21 implicitly states that in-lieu-fee mitigation programs are eligible for Federal participation, as follows (section 1106; 23 U.S.C. 103 (b)(6)(M)):

> * * * participation in natural habitat and wetland mitigation banks, contributions to statewide and regional efforts to conserve, restore, enhance, and create natural habitat and wetland, and development of regional natural habitat and wetland conservation and mitigation plans, * * *

Accordingly, this regulation makes no specific prohibition against participation in in-lieu-fee programs, other than the existing stipulation that they be in accordance with other applicable Federal laws (including implementing regulations and guidance) and State transportation planning processes. It is in the public interest that the FHWA ensure, through appropriate documentation, cooperative agreements, and performance contracts, as well as direct monitoring and oversight where appropriate, that in-lieu-fee programs having participation with Federal highway funds provide effective compensation for unavoidable impacts due to federally funded highway projects.

A Federal agency expressed concern about the use of ''public lands'' for compensatory wetland mitigation (§ 777.9(b)). The intent of the FHWA's mitigation policy and this regulation concerning the siting of mitigation is to achieve the highest possible balance of ecological values and public benefits within available mitigation opportunities, costs, and legal authorities. It is not the intent of the FHWA to establish a policy which preempts management of public lands by the responsible agency, nor place unnecessary constraints on compensatory mitigation alternatives. Therefore, the reference to public lands has been removed from the regulation. We have established no prohibition against alternatives for compensatory mitigation on private lands, nor any requirement to mitigate on publicly-owned lands.

The Federal Guidance states the following in Section II B(1) ''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 functioning of a watershed . . . Banks may be sited on public or private lands. Cooperative arrangement between public and private entities to use public lands for mitigation banks may be acceptable. In some circumstances, it may be appropriate to site banks on Federal, State, tribal, or locally-owned resource management areas(. . .). The siting of banks on such lands may be acceptable if the internal policies of the public agency allow use of its land for such purposes, and the public agency grants approval. Mitigation credits generated by banks of this nature should be based solely on those values in the bank that are supplemental to the public programs already planned or in place, . . .''

One State department of transportation suggested that § 777.9(d) disallow the eligibility of Federal highway funds for mitigation or restoration of impacts to wetlands from historical or past highway projects without promulgation of additional specific and proscriptive guidelines for implementation. The concern was that this eligibility would result in requirements for such mitigation from regulatory agencies without legal authority.

The TEA–21 authorizes the use of Federal highway construction funds (title 23, U.S. Code) to mitigate or restore current or past wetlands losses caused by federally funded highway projects, but establishes no requirements in this regard. This final rule addresses the eligibility of wetland mitigation activities for Federal highway funding participation, and does not establish requirements for mitigation or ecological restoration of any type or extent. 33 CFR 320.4(r)(2) clearly states that mitigation required under a Section 404 permit issued for a current project is meant to address direct impacts of the permitted project, and not the impacts due to prior or other current activities or projects, as follows: ''All compensatory mitigation will be for significant resource losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment. Also, all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.'' The FHWA opposes extensions of requirements for mitigation which are not properly authorized by regulation or law.

A non-governmental conservation organization requested § 777.9(d) require mitigation to meet specific conditions for participation with Federal transportation funds. The conditions suggested were that mitigation must: (1) improve ecological conditions of the regional watershed, (2) be scientifically measurable as compensation, (3) be accompanied by a long term management plan, (4) have established success criteria, and (5) have a specific time frame for implementation. While the FHWA agrees with the intent of these conditions, we do not believe it necessary that they be added to this regulation since they can be stipulated under the Section 404 permit conditions.

One commenter requested that § 777.11(a) be changed to state that consultation with State and Federal resource agencies ''must'' occur, rather than ''should'' occur. The FHWA believes that ''shall'' is the appropriate language for this regulation, and therefore § 777.11(a) is changed to use ''shall.''

One commenter requested clarification of the term ''sufficient assurances'' in § 777.11(b). By this the FWHA means legally recognized documents or agreements, such as easements, title restrictions, or, mitigation banking instruments legally approved under Section 404 authority. Another commenter suggested that ''sufficient assurances'' include a performance bond. We agree with this comment and have changed § 777.11(b) to include performance bonds in the examples of ''sufficient assurances.''

One commenter recommended that § 777.11(b) include a bonding requirement for private mitigation banks. The U.S. Army Corps of Engineers has the authority to establish bonding requirements for mitigation banks approved in accordance with the Federal Guidance. State DOTs can require performance bonding of private banks where consistent with State law, and bonding in some cases is suggested to ensure completion of mitigation. Additional bonding authority to require bonding is unnecessary. Therefore, this regulation will not establish a universal bonding requirement for participation in mitigation banks with title 23 Federal highway funds.

Several commenters recommended that § 777.11(b) not include a reference to net gain of wetlands, or that the net gain statement be further qualified. A net gain of wetlands nationally over the next decade has been made a goal of the National Clean Water Action Plan, and the FHWA has established a goal in the Plan of providing a compensatory mitigation ratio of 1.5 :1 or greater on a program-wide basis. In addition, the FHWA has established a goal of a net gain of wetlands in the FHWA Performance Plan. For the past three years the average ratio of mitigation provided to wetlands impacted has been two to one or greater. The FHWA is aware that many of the wetlands impacted by highway projects are small, isolated areas that have been degraded or are of relatively low value, and has worked with the U.S. Army Corps of Engineers to develop appropriate assessment methodology to reflect the relatively low value and benefits of these wetlands where such is the case. The FHWA also recognizes that in some parts of the country, such as the arid west, there are additional constraints on creating new wetlands acreage above what would naturally exist. Among these constraints is the availability of sufficient water and legal water rights issues. The FHWA emphasizes that the net gain of wetlands goal is a national objective in the federally funded highway program, and is not to be applied on a project-by-project basis, or even within a State Federal-aid highway program.

However, wetlands are nationally recognized in the Clean Water Act and other programs as important natural resources which need special management to ensure that their significant benefits are protected and preserved. Therefore, the FHWA believes that a net gain goal for the Federal highway program is a significant and worthwhile objective, and will provide important future ecological and societal benefits. Therefore, the net gain objective remains in the regulation as stated.

One commenter requested that § 777.11(c) be modified to allow the use of Federal highway funds to acquire mitigation credits in accordance with the terms of an approved mitigation banking instrument. The FHWA agrees that a mitigation banking instrument, approved by the appropriate regulatory authority, should provide sufficient assurances that the site will be maintained as a wetland as suggested in the Federal Guidance. However, this section deals with mitigation approaches other than banks. Therefore, the existing language will remain, with the following change: ''. . . legally recognized instrument, such as permanent easement, deed restriction, or legally approved mitigation banking instrument, which provides for the protection and permanent continuation of the wetland or natural habitat nature of the mitigation.''

A Federal agency pointed out the value of interdisciplinary, interagency, coordination highlighted in §§ 777.7 and 777.11, and encouraged State departments of transportation to take advantage of planning and design services provided by the State resource managers in evaluating resource values and project impacts and implementing effective mitigation. The FHWA concurs with these comments and encourages interdisciplinary approaches to wetlands assessment and mitigation.

Two commenters expressed additional concerns regarding mitigation banking and locating compensatory mitigation on public lands. One commenting agency, while aware of the potential advantages of mitigation banking, was concerned about the efficacy of wetland banks, which are unproven in its region. The recommendation was made that mitigation banks be fully coordinated and reviewed by State resource agencies before being implemented as mitigation. The importance of legally binding banking instruments was emphasized. The dynamic nature of natural wetlands was also emphasized by this commenter, which noted that the legal nature of wetland banks requires them to be stable in ecological character and functions over time, whereas natural wetlands are by nature dynamic and often subject to rapid and radical change by natural hydrologic change and biological succession. This comment points out the need for more knowledge about the dynamic processes which characterize the nature of wetlands and their successional changes in response to landscape and climatic processes.

It is incumbent on the banking proponent to be aware of potential stability problems associated with a particular bank, and be prepared to effectively establish and maintain the bank to provide the benefits and functions which are intended over the lifetime of the legal obligation. It is also important that regulators and resource managers consider the relative stability of the banked wetland resources, and make decisions about requirements for and certification of the use of banks within that context.

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above were considered and are available for examination in the docket at the above address. Comments received after the comment closing date were placed in the docket and were considered to the extent practicable. In addition to late comments, the FHWA will also

continue to file in the docket relevant information that became available after the comment closing date, and interested persons should continue to examine the docket for new material.

Executive Order 12866 (Regulatory Planning and Review and DOT Regulatory Policies and Procedures)

The FHWA has considered the impact of this document and has determined that it is neither a significant rulemaking action within the meaning of Executive Order 12866 nor a significant rulemaking under the regulatory policies and procedures of the Department of Transportation. This rulemaking amends the FHWA's regulations regarding mitigation of impacts to wetlands, which have become outdated because of provisions in sections 1006 and 1007 of the ISTEA and sections 1107 and 1109 of the TEA–21 authorizing greater flexibility for Federal participation in mitigating impacts to wetlands and natural habitats. These amendments have been codified at 23 U.S.C. 103 and 133. The recently enacted TEA–21 added the term ''natural habitat'' to the eligibility provisions of 23 U.S.C. 103 and 133, and added a preference for the use of established mitigation banks for wetland mitigation activities.

This rule does not cause any significant changes to the amount of funding available to the States under the STP or NHS programs or add to the process by which States receive funding. The provisions of this final rule do not require the additional expenditure of Federal-aid or State highway funds. Instead, this rule merely clarifies the scope of the FHWA's wetlands regulations by specifying that they apply to mitigation of all wetlands impacts due to projects funded pursuant to title 23, United States Code, not just privately owned wetlands, that mitigation of impacts to natural habitat due to projects funded pursuant to title 23 is eligible for Federal participation, and that mitigation banks are to receive preference in mitigating such impacts. Thus, it is concluded that the economic impact of this final rule is minimal. In addition, it does not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs; nor will amendment of this regulation raise any novel legal or policy issues. Therefore, a full regulatory evaluation was not performed and is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the FHWA has evaluated the effects of this final rule on small entities and has determined it would not have a significant economic impact on a substantial number of small entities. This final rule does not affect the amount of funding available to the States through the STP or NHS programs, or the procedures used to select the States eligible to receive these funds. Furthermore, States are not included in the definition of ''small entity'' set forth in 5 U.S.C. 601. For these reasons, and for those set forth in the analysis of Executive Order 12866, the FHWA hereby certifies that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, and it has been determined this action does not have a substantial direct effect or sufficient federalism implications on States that would limit the policymaking discretion of the States. Nothing in this document directly preempts any State law or regulation.

Executive Order 12372 (Intergovernmental Review)

Catalog of Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act of 1995

This action does not create a collection of information requirement for the purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

National Environmental Policy Act

The FHWA has analyzed this rulemaking for the purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347). This rule does not, in and of itself, constitute a major Federal action significantly affecting the quality of the human environment. Instead, it amends the scope of the existing FHWA regulation on wetland mitigation to conform with authorities in the ISTEA and the TEA–21, which increases the flexibility available to States when deciding how to mitigate impacts to wetlands and natural habitats resulting from projects funded pursuant to the provisions of title 23. In addition, the passage of the TEA–21, with its addition of the term ''natural habitat'' to the wetlands mitigation banking provisions of title 23, made this rule necessary. Such impacts to wetlands and natural habitat and appropriate mitigation measures would be evaluated pursuant to NEPA on a project-by-project basis by the States and the FHWA. Accordingly, promulgation of this rule does not require the preparation of an environmental impact statement.

Unfunded Mandates Reform Act of 1995

This rule does not impose a Federal mandate resulting in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. (2 U.S.C. 1531 *et seq.*).

Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

We have analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to healthy or safety that may disproportionately affect children.

Regulatory Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 777

Flood plains, Grant programs—Transportation, Highways and Roads, Wetlands.

Issued on: December 21, 2000.

Kenneth R. Wykle,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA revises 23 CFR Part 777 to read as follows:

PART 777—MITIGATION OF IMPACTS TO WETLANDS AND NATURAL HABITAT

Sec.
777.1 Purpose.
777.2 Definitions.
777.3 Background.
777.5 Federal participation.
777.7 Evaluation of impacts.
777.9 Mitigation of impacts.
777.11 Other considerations.

Authority: 42 U.S.C. 4321 *et seq.*; 49 U.S.C. 303; 23 U.S.C. 101(a), 103, 109(h), 133(b)(1), (b)(11), and (d)(2), 138, 315; E.O. 11990; DOT Order 5660.1A; 49 CFR 1.48(b).

§ 777.1 Purpose.

To provide policy and procedures for the evaluation and mitigation of adverse environmental impacts to wetlands and natural habitat resulting from Federal-aid projects funded pursuant to provisions of title 23, U.S. Code. These policies and procedures shall be applied by the Federal Highway Administration (FHWA) to projects under the Federal Lands Highway Program to the extent such application is deemed appropriate by the FHWA.

§ 777.2 Definitions.

In addition to those contained in 23 U.S.C. 101(a), the following definitions shall apply as used in this part:

Biogeochemical transformations means those changes in chemical compounds and substances which naturally occur in ecosystems. Examples are the carbon, nitrogen, and phosphorus cycles in nature, in which these elements are incorporated from inorganic substances into organic matter and recycled on a continuing basis.

Compensatory mitigation means restoration, enhancement, creation, and under exceptional circumstances, preservation, of wetlands, wetland buffer areas, and other natural habitats, carried out to replace or compensate for the loss of wetlands or natural habitat area or functional capacity resulting from Federal-aid projects funded pursuant to provisions of title 23, U.S. Code. Compensatory mitigation usually occurs in advance of or concurrent with the impacts to be mitigated, but may occur after such impacts in special circumstances.

Mitigation bank means a site where wetlands and/or other aquatic resources or natural habitats are restored, created, enhanced, or in exceptional circumstances, preserved, expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources. For purposes of the Clean Water Act, Section 404 (33 U.S.C. 1344), use of a mitigation bank can only be authorized when impacts are unavoidable.

Natural habitat means a complex of natural, primarily native or indigenous vegetation, not currently subject to cultivation or artificial landscaping, a primary purpose of which is to provide habitat for wildlife, either terrestrial or aquatic. For purposes of this part, habitat has the same meaning as natural habitat. This definition excludes rights-of-way that are acquired with Federal transportation funds specifically for highway purposes.

Net gain of wetlands means a wetland resource conservation and management principle under which, over the long term, unavoidable losses of wetlands area or functional capacity due to highway projects are offset by gains at a ratio greater than 1:1, through restoration, enhancement, preservation, or creation of wetlands or associated areas critical to the protection or conservation of wetland functions. This definition specifically excludes natural habitat, as defined in this section, other than wetlands.

On-site, in-kind mitigation means compensatory mitigation which replaces wetlands or natural habitat area or functions lost as a result of a highway project with the same or like wetland or habitat type and functions adjacent or contiguous to the site of the impact.

Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics, in light of overall project purposes.

Service area of a mitigation bank means that the service area of a wetland or natural habitat mitigation bank shall be consistent with that in the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 FR 58605, November 28, 1995), i.e., the designated area (e.g., watershed, county) wherein a bank can be expected to provide appropriate compensation for impacts to wetlands and/or other aquatic or natural habitat resources.

Wetland or habitat enhancement means activities conducted in existing wetlands or other natural habitat to achieve specific management objectives or provide conditions which previously did not exist, and which increase one or more ecosystem functions. Enhancement may involve tradeoffs between the resource structure, function, and values; a positive change in one may result in negative effects to other functions. Examples of activities which may be carried out to enhance wetlands or natural habitats include, but are not limited to, alteration of hydrologic regime, vegetation management, erosion control, fencing, integrated pest management and control, and fertilization.

Wetland or habitat establishment period means a period of time agreed to by the FHWA, State DOT, and U.S. Army Corps of Engineers, as necessary to establish wetland or natural habitat functional capacity in a compensatory mitigation project sufficient to compensate wetlands or habitat losses due to impacts of Federal-aid highway projects. The establishment period may vary depending on the specific wetland or habitat type being developed.

Wetland or habitat functional capacity means the ability of a wetland or natural habitat to perform natural functions, such as provide wildlife habitat, support biodiversity, store surface water, or perform biogeochemical transformations, as determined by scientific functional assessment. Natural functions of wetlands include, but are not limited to, those listed by the U.S. Army Corps of Engineers at 33 CFR 320.4(b)(2)(i) through (viii).

Wetland or habitat preservation means the protection of ecologically important wetlands, other aquatic resources, or other natural habitats in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation of wetlands for compensatory mitigation purposes may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the aquatic ecosystem.

Wetland or habitat restoration means the reestablishment of wetlands or natural habitats on a site where they formerly existed or exist in a substantially degraded state.

Wetland or wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

Wetlands or habitat mitigation credit means a unit of wetlands or habitat mitigation, defined either by area or a measure of functional capacity through application of scientific functional assessment. With respect to mitigation banks, this definition means the same as that in the Federal Guidance for the

Establishment, Use, and Operation of Mitigation Banks.

§ 777.3 Background.

(a) Executive Order 11990 (42 FR 26961, 3 CFR, 1977 Comp., p. 121) Protection of Wetlands, and DOT Order 5660.1A,[1] Preservation of the Nation's Wetlands, emphasize the important functions and values inherent in the Nation's wetlands. Federal agencies are directed to avoid new construction in wetlands unless the head of the agency determines that:

(1) There is no practicable alternative to such construction, and

(2) The proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.

(b) Sections 103 and 133 of title 23, U.S. Code, identify additional approaches for mitigation and management of impacts to wetlands and natural habitats which result from projects funded pursuant to title 23, U.S. Code, as eligible for participation with title 23, U.S. Code, funds.

(c) 33 CFR parts 320 through 330, Regulatory Program, U.S. Army Corps of Engineers; Section 404, Clean Water Act and 40 CFR part 230, Section 404(b)(1) Guidelines for the Specification of Disposal Sites for Dredged or Fill Material, establish requirements for the permitting of discharge of dredge or fill material in wetlands and other waters of the United States.

(d) Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks presents guidance for the use of ecological mitigation banks as compensatory mitigation in the Section 404 Regulatory Program for unavoidable impacts to wetlands and other aquatic resources.

(e) Interagency Cooperation—Endangered Species Act of 1973, as amended (50 CFR part 402), presents regulations establishing interagency consultation procedures relative to impacts to species listed under the authority of the Act and their habitats as required by Section 7, Interagency Coordination, of the Endangered Species Act of 1973 (16 U.S.C. 1536).

§ 777.5 Federal participation.

(a) Those measures which the FHWA and a State DOT find appropriate and necessary to mitigate adverse environmental impacts to wetlands and natural habitats are eligible for Federal participation where the impacts are the result of projects funded pursuant to title 23, U.S. Code. 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 title 23, U.S. Code, funds for activities required for the planning, design, construction, monitoring, and establishment of wetlands and natural habitat mitigation projects, and acquisition of land or interests therein.

§ 777.7 Evaluation of impacts.

(a) The reasonableness of the public expenditure and extent of Federal participation with title 23, U.S. Code, funds shall be directly related to:

(1) The importance of the impacted wetlands and natural habitats;

(2) The extent of highway impacts on the wetlands and natural habitats, as determined through an appropriate, interdisciplinary, impact assessment; and

(3) Actions necessary to comply with the Clean Water Act, Section 404, the Endangered Species Act of 1973, and other relevant Federal statutes.

(b) Evaluation of the importance of the impacted wetlands and natural habitats shall consider:

(1) Wetland and natural habitat functional capacity;

(2) Relative importance of these functions to the total wetland or natural habitat resource of the area;

(3) Other factors such as uniqueness, esthetics, or cultural values; and

(4) Input from the appropriate resource management agencies through interagency coordination.

(c) A determination of the highway impact should focus on both the short- and long-term affects of the project on wetland or natural habitat functional capacity, consistent with 40 CFR part 1500, 40 CFR 1502.16, 33 CFR 320.4, and the FHWA's environmental compliance regulations, found at 23 CFR part 771.

§ 777.9 Mitigation of impacts.

(a) Actions eligible for Federal funding. There are a number of actions that can be taken to minimize the impact of highway projects on wetlands or natural habitats. The following actions qualify for Federal-aid highway funding:

(1) Avoidance and minimization of impacts to wetlands or natural habitats through realignment and special design, construction features, or other measures.

(2) Compensatory mitigation alternatives, either inside or outside of the right-of-way. This includes, but is not limited to, such measures as on-site mitigation, when that alternative is determined to be the preferred approach by the appropriate regulatory agency; improvement of existing degraded or historic wetlands or natural habitats through restoration or enhancement on or off site; creation of new wetlands; and under exceptional circumstances, preservation of existing wetlands or natural habitats on or off site. Restoration of wetlands is generally preferable to enhancement or creation of new wetlands.

(3) Improvements to existing wetlands or natural habitats. Such activities may include, but are not limited to, construction or modification of water level control structures or ditches, establishment of natural vegetation, re-contouring of a site, installation or removal of irrigation, drainage, or other water distribution systems, integrated pest management, installation of fencing, monitoring, and other measures to protect, enhance, or restore the wetland or natural habitat character of a site.

(4) Mitigation banks. In accordance with all applicable Federal law (including regulations), with respect to participation in compensatory mitigation related to a project funded under title 23, U.S. Code, that has an impact on wetlands or natural habitat occurring 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, or other agreement between appropriate agencies.

(b) Mitigation banking alternatives eligible for participation with Federal-aid funds including such measures as the following:

(1) Mitigation banks in which mitigation credits are purchased by State DOTs to mitigate impacts to wetlands or natural habitats due to projects funded under title 23, U.S. Code, including privately owned banks or those established with private funds to mitigate wetland or natural habitat losses.

[1] DOT Order 5660.1A is available for inspection and copying from FHWA headquarters and field offices as prescribed at 49 CFR part 7.

(2) Single purpose banks established by and for the use of a State DOT with Federal-aid participation; or multipurpose publicly owned banks, established with public, non-title 23 Federal highway funds, in which credits may be purchased by highway agencies using title 23 highway funds on a per-credit basis.

(c) Contributions to statewide and regional efforts to conserve, restore, enhance and create wetlands or natural habitats. Federal-aid funds may participate in the development of statewide and regional wetlands conservation plans, including any efforts and plans authorized pursuant to the Water Resources Development Act of 1990 (Pub. L. 101–640, 104 Stat. 4604). Contributions to these efforts may occur in advance of project construction only if such efforts are consistent with all applicable requirements of Federal law and regulations and State transportation planning processes.

(d) Mitigation or restoration of historic impacts to wetlands and natural habitats caused by past highway projects funded pursuant to title 23, U.S. Code, even if there is no current federally funded highway project in the immediate vicinity. These impacts must be related to transportation projects funded under the authority of title 23, U.S. Code.

§ 777.11 Other considerations.

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

(b) Federal-aid funds shall not participate in the replacement of wetlands or natural habitats absent sufficient assurances, such as, but not limited to, deed restrictions, fee ownership, permanent easement, or performance bond, that the area will be maintained as a wetland or natural habitat.

(c) The acquisition of proprietary interests in replacement wetlands or natural habitats as a mitigation measure may be in fee simple, by easement, or by other appropriate legally recognized instrument, such as a banking instrument legally approved by the appropriate regulatory agency. The acquisition of mitigation credits in wetland or natural habitat mitigation banks shall be accomplished through a legally recognized instrument, such as permanent easement, deed restriction, or legally approved mitigation banking instrument, which provides for the protection and permanent continuation of the wetland or natural habitat nature of the mitigation.

(d) A State DOT may acquire privately owned lands in cooperation with another public agency or third party. Such an arrangement may accomplish greater benefits than would otherwise be accomplished by the individual agency acting alone.

(e) A State DOT may transfer the title to, or enter into an agreement with, an appropriate public natural resource management agency to manage lands acquired outside the right-of-way without requiring a credit to Federal funds. Any such transfer of title or agreement shall require the continued use of the lands for the purpose for which they were acquired. In the event the purpose is no longer served, the lands and interests therein shall immediately revert to the State DOT for proper disposition.

(f) The reasonable costs of acquiring lands or interests therein to provide replacement lands with equivalent wetlands or natural habitat area or functional capacity associated with these areas are eligible for Federal participation.

(g) The objective in mitigating impacts to wetlands in the Federal-aid highway program is to implement the policy of a net gain of wetlands on a program wide basis.

(h) Certain activities to ensure the viability of compensatory mitigation wetlands or natural habitats during the period of establishment are eligible for Federal-aid participation. These include, but are not limited to, such activities as repair or adjustment of water control structures, pest control, irrigation, fencing modifications, replacement of plantings, and mitigation site monitoring. The establishment period should be specifically determined by the mitigation agreement among the mitigation planners prior to beginning any compensatory mitigation activities.

[FR Doc. 00–33194 Filed 12–28–00; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8915]

RIN 1545–AX71

Tiered Structures—Electing Small Business Trusts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations amending the temporary regulations under section 444 of the Internal Revenue Code (Code) relating to the election of a taxable year other than the required taxable year. The temporary regulations provide that solely with respect to an S corporation shareholder, an electing small business trust (ESBT) and a trust that is described in section 401(a) or section 501(c)(3) and is exempt from taxation under section 501(a) is not a deferral entity for purposes of § 1.444–2T. The temporary regulations affect S corporations, ESBTs that own S corporation stock, and trusts that are described in section 401(a) or section 501(c)(3) and exempt from taxation under section 501(a) that own S corporation stock. The text of these temporary regulations serves as the text of the proposed regulations set forth in the notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective December 29, 2000.

Applicability Dates: For dates of applicability, see § 1.444–4T of these regulations.

FOR FURTHER INFORMATION CONTACT: Bradford Poston and James A. Quinn (202) 622–3060 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR Part 1) relating to the election of a taxable year other than the required taxable year under section 444. Section 444(d)(3) and § 1.444–2T generally prohibit an S corporation that is a member of a tiered structure from making an election under section 444 for taxable years beginning after December 31, 1986. An S corporation is considered to be a member of a tiered structure if the S corporation owns any portion of a deferral entity, or a deferral entity owns any portion of an S corporation. Section 1.444–2T(b)(2) defines deferral entity to include any entity that is a trust with the exception of certain grantor trusts (including qualified subchapter S trusts within the meaning of section 1361(d)(1)(A)).

Section 1302 of the Small Business Job Protection Act of 1996, Public Law 104–188 (110 Stat. 1755) (August 20, 1996), modified sections 641 and 1361 of the Internal Revenue Code (Code) to permit an electing small business trust (ESBT) to be an S corporation shareholder and also modified section 1361 to allow an organization (including a trust) that is described in section 401(a) or section 501(c)(3) and that is