

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.

PART 778—PILOT PROGRAM FOR ELIMINATING DUPLICATION OF ENVIRONMENTAL REVIEWS

Sec.

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§ 778.101 Purpose.

The purpose of this part is to establish the requirements for a State to participate in the Pilot Program for eliminating duplication of environmental reviews (“Pilot Program”), authorized under 23 U.S.C. 330. The Pilot Program allows States to conduct environmental reviews and make approvals for projects under State environmental laws and regulations instead of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

§ 778.103 Eligibility and Certain Limitations.

(a) *Applicants.* To be eligible for the Pilot Program, a State must:

(1) Act by and through the Governor or top-ranking State transportation official who is charged with responsibility for highway construction;

(2) Consent to a waiver of its sovereign immunity for the compliance, discharge, and enforcement of any responsibility under this Pilot Program;

(3) Have previously assumed the responsibilities of the Secretary under 23 U.S.C. 327 related to environmental review, consultation, or other actions required under certain Federal environmental laws; and

(4) Identify laws authorizing the State to take the actions necessary to carry out the alternative environmental review and approval procedures under State laws and regulations.

(b) *Certain Limitations.* (1) State environmental laws and regulations may only be substituted as a means of complying with:

(i) NEPA;

(ii) Procedures governing the implementation of NEPA and related procedural laws under the authority of the Secretary, including 23 U.S.C. 109, 128, and 139; and regulations and executive orders. (2) Compliance with State environmental laws and regulations may not substitute for the Secretary's responsibilities regarding compliance with any other Federal environmental laws other than those set forth in (b)(1).

§ 778.105 Application requirements for participation in the Pilot Program.

(a) To apply to participate in the Pilot Program, a State must submit an application to the applicable Operating Administration(s) (*i.e.*, FHWA, FRA, or FTA).

(b) Each application submitted must contain the following information:

(1) A full and complete description of the alternative environmental review and approval procedures, including:

(i) The procedures the State uses to engage the public and consider alternatives to the proposed action; and

(ii) The extent to which the State considers environmental consequences or impacts on resources potentially impacted by the proposed actions (such as air, water, or species).

(2) Each Federal environmental requirement the State is seeking to substitute, within the limitations of § 778.103(b);

(3) Each State environmental law and regulation the State intends to substitute for a Federal environmental requirement, within the limitations of § 778.103(b);

(4) A detailed explanation (with supporting documentation, incorporated by reference where appropriate and reasonably available) of the basis for concluding the State environmental law or regulation intended to substitute for a Federal environmental requirement is at least as stringent as that requirement;

(5) A description of the projects or classes of projects (defined as either a defined group of projects or all projects to which NEPA, the procedures governing the implementation of NEPA and related procedural laws under the authority of the Secretary, including 23 U.S.C. 109 and 139, and related regulations and Executive orders would apply) for which the State would exercise the authority that may be granted under the Pilot Program;

(6) Verification that the State has the financial and personnel resources necessary to fulfill its obligations under the Pilot Program;

(7) Evidence that the State has sought public comments on its application prior to the submittal and the State's response to any comments it received;

(8) A point of contact for questions regarding the application and a point of contact regarding potential implementation of the Pilot Program (if different);

(9) Certification and explanation by the State's Attorney General or other State official empowered by State law to issue legal opinions that bind the State:

(i) That the State has legal authority to enter into the Pilot Program;

(ii) That the State waives its sovereign immunity to the extent necessary to consent to exclusive Federal court jurisdiction for the compliance, discharge, and enforcement of any responsibility under this Pilot Program;

(iii) That the State has laws that are comparable to the Freedom of Information Act, 5 U.S.C. 552 (FOIA), including laws that allow for any decision regarding the public availability of a document under those laws to be reviewed by a court of competent jurisdiction;

(iv) Identifying within the State's laws the jurisdictional requirements and standards of review applicable to

judicial review of decisions under the environmental laws proposed for substitution under the Pilot Program; and

(10) The State Governor's (or in the case of the District of Columbia, the Mayor's) or the State's top-ranking transportation official's signature approving the application.

§ 778.107 Application review and approval.

(a) The Operating Administration must solicit public comments on the application and must consider comments received before making a decision to approve or disapprove the application. Materials made available for this public review must include the State's application and supporting materials.

(b) After receiving an application the Operating Administration deems complete, the Operating Administration must make a decision on whether to approve or disapprove the application within 120 calendar days. The Operating Administration must transmit the decision in writing to the State with a statement explaining the decision.

(c) The Operating Administration will approve an application only if it determines the following conditions are satisfied:

(1) The State is party to an agreement with the Operating Administration under 23 U.S.C. 327;

(2) The Operating Administration has determined, after considering any public comments received, the State has the capacity, including financial and personnel, to undertake the alternative environmental review and approval procedures; and

(3) The Operating Administration, in consultation with the Office of the Secretary, with the concurrence of the Chair of CEQ, and after considering public comments received, has determined that the State environmental laws and regulations described in the State's application are at least as stringent as the Federal requirements for which they substitute.

(d) The State must enter into a written agreement with the Operating Administration.

(e) The written agreement must:

(1) Be executed by the Governor (or in the case of the District of Columbia, the Mayor) or top-ranking transportation official in the State charged with responsibility for highway construction;

(2) Provide that the State agrees to assume the responsibilities of the Pilot Program, as identified by the Operating Administration;

(3) Provide that the State, in accordance with the sovereign immunity waiver process required by State law, expressly consents to and accepts Federal court jurisdiction with respect to compliance, discharge, and enforcement of any responsibility undertaken as part of the Pilot Program;

(4) Certify that State laws and regulations exist that authorize the State to carry out the responsibilities of the Pilot Program;

(5) Certify that State laws and regulations exist that are comparable to FOIA (5 U.S.C. 552), including a provision that any decision regarding the public availability of a document under the State laws and regulations is reviewable by a court of competent jurisdiction;

(6) Contain a commitment that the State will maintain the personnel and financial resources necessary to carry out its responsibilities under the Pilot Program;

(7) Have a term of not more than 5 years, the term of a State's agreement with the Operating Administration in accordance with 23 U.S.C. 327, or a term ending on December 4, 2027, whichever is sooner; and

(8) Be renewable.

(f) The State must execute the agreement before the Operating Administration executes the agreement. The Operating Administration's execution of the agreement and transmittal to the State will constitute approval of the application.

(g) The agreement may be renewed at the end of its term, but may not extend beyond December 4, 2027.

(h) A State approved to participate in the Pilot Program may apply the approved alternative environmental review and approval procedures to locally administered projects, for up to 25 local governments at the request of those

local governments. For such locally administered projects, the State shall be responsible for ensuring that the requirements of the approved alternative State procedures are met.

§ 778.109 Criteria for determining stringency.

To be considered at least as stringent as a Federal requirement under this Pilot Program, the State laws and regulations, must, at a minimum:

(a) Define the types of actions that normally require an assessment of environmental impacts, including government-sponsored projects such as those receiving Federal financial assistance or permit approvals. (42 U.S.C. 4332(2)(C); 40 CFR 1501.1(a)(4), 1501.3, 1507.3(e)(2)(i), 1508.1(q);

(b) Ensure an early process for determining the scope of the action and issues that need to be addressed, identifying the significant issues, and for the classification of the appropriate assessment of environmental impacts in accordance with the significance of the likely impacts. For actions that may result in significant impacts on the environment, the scoping process must be an open and public process. (23 U.S.C. 139(e); 40 CFR 1501.5, 1501.9, 1506.6, 1507.3(c), 1507.3(e), 1508.1(y), and 1508.1(cc));

(c) Prohibit agencies and nongovernmental proponents from taking action concerning the proposal until the environmental impact evaluation is complete when such action would:

(1) Have adverse environmental impacts or

(2) Limit the choice of reasonable alternatives. (40 CFR 1506.1 and 1506.11(b)).

(d) Protect the integrity and objectivity of the analysis by requiring the agency to take responsibility for the scope and content of the analysis, and by preventing conflicts of interest among the parties developing the analysis and the parties with financial or other interest in the outcome of the project. (42 U.S.C. 4332(2)(D); 40 CFR 1506.5);

(e) Based on a proposed action's purpose and need, require objective evaluation of reasonable alternatives to the proposed action (including the alternative of not taking the action) if it

may result in significant impacts to the environment or, for those actions that may not result in significant impacts, consideration of alternatives if they will involve unresolved conflicts concerning alternative uses of available resources (42 U.S.C. 4332(2)(C)(iii); 42 U.S.C. 4332(2)(E); 23 U.S.C. 330(b)(1)(A); 40 CFR 1502.13, and 1502.14);

(f) Using procedures that ensure professional and scientific integrity of the discussions and analysis, require an assessment of the changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. (42 U.S.C. 4332(2)(C); 23 U.S.C. 330(b)(1)(B); 40 CFR 1501.5(c)(2), 1502.16, 1502.23, and 1508.1(g);

(g) Require the consideration of appropriate mitigation for the impacts associated with a proposal and reasonable alternatives (including avoiding, minimizing, rectifying, reducing or eliminating the impact over time, and compensating for the impact) (40 CFR 1502.14(e), 1502.16(a)(9), and 1508.1(s));

(h) Provide for adequate interagency participation, including appropriate coordination and consultation with State, Federal, Tribal, and local agencies with jurisdiction by law, special expertise, or an interest with respect to any environmental impact associated with the proposal, and for collaboration that would eliminate duplication of reviews. For actions that may result in significant impacts to the environment, the process should allow for the development of plans for interagency coordination and public involvement, and the setting of timetables for the review process (42 U.S.C. 4332(2)(C); 23 U.S.C. 139(d) and 139(g); 40 CFR 1500.5(g), 1501.8, 1501.9(b), 1502.174, and part 1503);

(i) Provide an opportunity for public participation and comment that is commensurate with the significance of the proposal's impacts on the environment, and require public access to the documentation developed during the environmental review and a process to respond to public comments (42 U.S.C. 4332(2)(C); 23 U.S.C. 330(b)(1)(A); FAST Act, Sec. 1309(c)(2)(B)(ii); 40 CFR 1502.20, part 1503, and 1506.6; and Executive Order 11514, Sec.1(b));

§ 778.111

(j) Provide for public access to the documentation necessary to review the potential impacts of projects;

(k) Include procedures for the elevation, resolution, and referral of interagency disputes prior to a final decision on the proposed project (23 U.S.C. 139(h); 40 CFR part 1504);

(l) For the conclusion of the environmental review process, require a concise documentation of findings (for actions that would not likely result in significant impacts to the environment) or, for actions that may result in significant impacts, a concise record that states the agency decision that:

(1) Identifies all alternatives considered (specifying which were environmentally preferable),

(2) Identifies and discusses all factors that were balanced by the agency in making its decision and states how those considerations entered into the decision,

(3) States whether all practicable means to avoid or minimize environmental harm have been adopted, and if not, why they were not; and

(4) Describes the monitoring and enforcement program that is adopted, where applicable, for any mitigation (40 CFR 1501.6(c), 1505.2, and 1505.3).

(m) Require the agency to supplement assessments of environmental impacts if there are substantial changes in the proposal that are relevant to environmental concerns or significant new circumstances or information relevant to environmental concerns and have a bearing on the proposed action or its impacts. (23 U.S.C. 330(e)(3); 40 CFR 1502.9(d)); and

(n) Allow for the use of procedures to facilitate process efficiency, such as tiering, programmatic approaches, adoption, incorporation by reference, approaches to eliminate duplication with other Federal requirements, and special procedures to address emergency situations. Where the procedures allow for the identification and establishment of categories of actions that normally do not have a significant impact on the environment and are therefore excluded from further review, ensure that the procedures require the consideration of extraordinary circumstances that would warrant a higher level of analysis in which a normally

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excluded action may have a significant environmental effect. (23 U.S.C. 139(b)(3); 40 CFR 1500.4, 1500.5, 1501.4, 1501.11, 1501.12, 1502.24, 1506.2, 1506.3, and 1506.4).

§ 778.111 Review and termination.

(a) *Review.* The Operating Administration must review each participating State's performance in implementing the requirements of the Pilot Program at least once every 5 years.

(1) The Operating Administration must provide notice and an opportunity for public comment during the review.

(2) At the conclusion of its last review prior to the expiration of the term, the Operating Administration may extend a State's participation in the Pilot Program for an additional term of not more than 5 years (as long as such term does not extend beyond the termination date of the Pilot Program) or terminate the State's participation in the Pilot Program.

(b) *Early Termination.* (1) If the Operating Administration, in consultation with the Office of the Secretary and the Chair of CEQ, determines that a State is not administering the Pilot Program consistent with the terms of its written agreement, or the requirements of this part or 23 U.S.C. 330, the Operating Administration must provide the State notification of that determination.

(2) After notifying the State of its determination under paragraph (c)(1), the Operating Administration must provide the State a maximum of 90 days to take the appropriate corrective action. If the State fails to take such corrective action, the Operating Administration may terminate the State's participation in the Pilot Program.

§ 778.113 Program termination and regulations sunset.

(a) *In General.* The Pilot Program shall terminate December 4, 2027, unless Congress extends the authority under 23 U.S.C. 330.

(b) *Sunset.* Unless Congress extends the authority for the Pilot Program that sunsets 12 years after the date of enactment, this rule shall expire on December 4, 2027.