

**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration****23 CFR Part 777****[Docket No. FHWA-97-2514]****RIN 2125-AD78****Mitigation of Impacts to Wetlands****AGENCY:** Federal Highway Administration (FHWA), DOT.**ACTION:** Supplemental notice of proposed rulemaking (SNPRM); request for comments.

**SUMMARY:** The FHWA is supplementing its June 17, 1996, notice of proposed rulemaking (NPRM) entitled, "Mitigation of Impacts to Wetlands." This SNPRM would clarify the scope of the FHWA's wetlands regulations by specifying that they apply to all projects funded pursuant to the provisions of title 23, United States Code (Title 23). This rulemaking would also make a technical amendment to the text of the NPRM.

**DATES:** Comments must be received on or before August 18, 1997.

**ADDRESSES:** Submit written, signed comments to the docket number that appears in the heading of this document to the Docket Clerk, U.S. DOT Dockets, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. Those persons or organizations who desire notification of receipt of comments must include a self-addressed, stamped envelope or postcard.

**FOR FURTHER INFORMATION CONTACT:** Mr. Paul Garrett, Office of Environment and Planning, HEP-42, (202) 366-9173, or Mr. Brett Gainer, Office of the Chief Counsel, HCC-31, (202) 366-1372, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC, 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** In an 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 current, out-moded regulations in light of changes brought about by the Intermodal Surface Transportation Efficiency Act of 1991 (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 would revise the current regulations to conform to the ISTEA's requirements, thereby providing more flexibility to State highway agencies in determining eligibility of mitigation alternatives for Federal participation. This proposal would also broaden the scope of the current regulation to encompass all wetlands mitigation projects eligible for Federal participation, not just those involving privately owned wetlands.

In the months since the NPRM was published, however, the FHWA has determined that certain language in the proposed regulation, carried over from the original rulemaking published in 1980, could be interpreted in an unnecessarily restrictive manner. Part 777, as now written, states that it applies 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 would retain this language, with the exception of the words "privately owned." The FHWA believes this provision is 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 sanction such "historic wetlands" restoration projects. First, both the National Highway System and Surface Transportation Programs, created by ISTEA, allow states to use Federal-aid funds for wetlands mitigation activities. 23 U.S.C. 103(i)(13) 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 "[c]ontributions 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(i)(13) or 133(e)(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 should be implied.

Two other provisions of Title 23, when read together, also provide a basis

for funding so-called historic wetlands restoration projects. The first is section 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 section 101 of Title 23, 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 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)(8). The definition of TEAs (23 U.S.C. 101) does limit them to those related to particular "projects" (as defined in section 101), but 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 or mitigation of water pollution due to highway runoff.

With all this in mind, the FHWA has decided to issue this SNPRM, which would further amend 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." The FHWA invites comments on this new proposal.

This SNPRM also makes a technical amendment to the text of the June 17, 1996, NPRM. Although the NPRM would expand the application of part 777 to the mitigation of environmental impacts to both private and publicly owned wetlands, the regulatory text of the NPRM inadvertently retained the heading, "Mitigation of Impacts to Privately Owned Wetlands." This SNPRM would correct that oversight by removing the words "Privately Owned" from the heading.

**Rulemaking Analyses and Notices**

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable, but the FHWA may issue a final rule at any time after the

close of the comment period. In addition to late comments, the FHWA will also continue to file in the docket relevant information that becomes 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 would supplement an NPRM proposing to amend FHWA regulations regarding mitigation of impacts to privately owned wetlands. These regulations have become outdated because of provisions in sections 1006 and 1007 of the ISTEA, which authorize greater flexibility for Federal participation in mitigating impacts to wetlands. These amendments have been codified at 23 U.S.C. 103 and 133.

This SNPRM would 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 proposed rulemaking would not require the additional expenditure of Federal-aid or State highway funds. Instead, this SNPRM would merely clarify the scope of the FHWA's wetlands regulations by specifying that they apply to all projects funded pursuant to title 23, United States Code (Title 23). Thus, it is anticipated that the economic impact of this rulemaking would be minimal. In addition, it would 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 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 SNPRM on small entities and has determined it would not have a significant economic impact on a substantial number of small entities. Supplementing the FHWA's June 17, 1996, NPRM in this manner would 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 E.O. 12866, the FHWA hereby certifies that this action will not have a significant economic impact on a substantial number of small entities.

#### **Executive Order 12612 (Federalism Assessment)**

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this action does not raise sufficient federalism implications to warrant the preparation of a federalism assessment. This SNPRM would not preempt any State law or State regulation. No additional costs or burdens would be imposed on the States as a result of this action, and the States' ability to discharge traditional State governmental functions would not be affected by this rulemaking.

#### **Executive Order 12372**

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**

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 SNPRM would not, in and of itself, constitute a major Federal action significantly affecting the quality of the human environment. Instead, it would clarify the scope of the June 17, 1996, NPRM, which is intended to increase the flexibility available to States when deciding how to mitigate impacts to wetlands resulting from projects funded pursuant to the provisions of title 23, United States Code. Such impacts 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 SNPRM would not require the preparation of an environmental impact statement.

#### **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: June 9, 1997.

**Jane Garvey,**

*Acting Administrator for the Federal Highway Administration.*

In consideration of the foregoing, the FHWA proposes to amend part 777 of title 23, Code of Federal Regulations, as follows:

#### **PART 777—MITIGATION OF IMPACTS TO WETLANDS**

1. The authority citation for part 777 is revised to read as follows:

**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), 133(b)(11), 133(d)(2), 138, 315; E.O. 11990; DOT Order 5660.1A; 49 CFR 1.48(b).

2. The heading of part 777 is revised to read as set forth above

3. Section 777.1 is revised to read as follows:

#### **§ 777.1 Purpose.**

To provide policy and procedures for the evaluation and mitigation of adverse environmental impacts to wetlands resulting from projects funded pursuant to the provisions of title 23, United States Code.

[FR Doc. 97-15929 Filed 6-17-97; 8:45 am]

BILLING CODE 4910-22-P

#### **FEDERAL EMERGENCY MANAGEMENT AGENCY**

#### **44 CFR Part 67**

[Docket No. FEMA-7214]

#### **Proposed Flood Elevation Determinations**

**AGENCY:** Federal Emergency Management Agency (FEMA).

**ACTION:** Proposed rule.

**SUMMARY:** Technical information or comments are requested on the proposed base (1% annual chance) flood elevations and proposed base flood elevation modifications for the