

Originally Processed With FOIA(s):
1998-0004-F[1]; 2015-0141-F

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OA/ID Number: 29174
Folder ID Number: 29174-005

Folder Title:
Wetlands (1990) [2]

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*Ma. Wilber sent
382-5711*

[Brackets] are proposed revisions
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MEMORANDUM OF AGREEMENT
BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY
AND THE DEPARTMENT OF THE ARMY CONCERNING
THE DETERMINATION OF MITIGATION UNDER THE
CLEAN WATER ACT SECTION 404(b)(1) GUIDELINES

I. Purpose

The United States Environmental Protection Agency (EPA) and the United States Department of the Army (Army) hereby articulate the policy and procedures to be used in the determination of the type and level of mitigation necessary to demonstrate compliance with the Clean Water Act (CWA) Section 404(b)(1) Guidelines ("Guidelines"). This Memorandum of Agreement (MOA) expresses the explicit intent of the Army and EPA to implement the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, including wetlands. This MOA is specifically limited to the Section 404 Regulatory Program and is written to provide guidance for agency field personnel on the type and level of mitigation which demonstrates compliance with requirements in the Guidelines. The policies and procedures discussed herein are consistent with current Section 404 regulatory practices and are provided in response to questions that have been raised about how the Guidelines are implemented. The MOA does not change the substantive requirements of the Guidelines. It is intended to provide guidance regarding the exercise of discretion under the Guidelines.

Although the Guidelines are clearly applicable to all discharges of dredged or fill material, including general permits and Corps of Engineers (Corps) civil works projects, this MOA focuses on standard permits (33 CFR 325.5(b)(1))¹. This focus is intended solely to reflect the unique procedural aspects associated with the review of standard permits, and does not obviate the need for other regulated activities to comply fully with the Guidelines. EPA and Army will seek to develop supplemental guidance for other regulated activities consistent with the policies and principles established in this document.

The MOA provides guidance to Corps and EPA personnel for implementing the Guidelines and must be adhered to when considering mitigation requirements for standard permit applications. The Corps will use this MOA when making its determination of compliance with the Guidelines with respect to mitigation for standard permit applications.

¹ Standard permits are those individual permits which have been processed through application of the Corps public interest review procedures (33 CFR 325) and EPA's Section 404(b)(1) Guidelines, including public notice and receipt of comments. Standard permits do not include letters of permission, regional permits, nationwide permits, or programmatic permits.

others through the Administration's interagency task force and other avenues to help achieve this national goal.

C. In evaluating standard Section 404 permit applications, as a practical matter, information on all facets of a project, including potential mitigation, is typically gathered and reviewed at the same time. [The Corps views avoidance as the most effective mitigation measure, followed by minimization of impacts and compensation for wetland losses. Permit applications will be reviewed with avoidance as the primary goal; however, comprehensive approaches with appropriate mitigation to improve overall wetland values will be encouraged even though they may not avoid wetlands.] ~~The Corps except as indicated below, first makes a determination that potential impacts have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, finally, compensate for aquatic resource values. This sequence is considered satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of the Section 404(b)(1) Guidelines (examples of such comprehensive plans may include Special Area Management Plans, Advance Identification areas (Section 230.80), and State Coastal Zone Management Plans).⁴ It may be appropriate to deviate from the sequence [Avoidance of wetland may be inappropriate] when EPA and the Corps agree the proposed discharge is necessary to avoid environmental harm (e.g., to protect a natural aquatic community from saltwater intrusion, chemical contamination, or other deleterious physical or chemical impacts, or EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain. This environmental gain must be solely attributable to the project itself, exclusive of benefits which may accrue from proposed compensatory mitigation.~~

In determining "appropriate and practicable" measures to offset unavoidable impacts, such measures should be appropriate to the scope and degree of those impacts and practicable in terms of availability, cost, existing technology, and logistics in light of overall project purposes. The Corps will give full consideration to the views of the resource agencies when making this determination.

⁴By way of example, EPA and Army presently are discussing with representatives of the oil industry, the potential for a program of accelerated rehabilitation of abandoned oil facilities on the North Slope to serve as a vehicle for satisfying necessary compensation requirements.

1. Avoidance.⁵ Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative.⁶ The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a)(1) requires that, to be permissible, an alternative must have the least adverse impact on the aquatic ecosystem so long as the alternative does not have other significant adverse environmental consequence. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for nonwater dependent activities that do not involve special aquatic sites⁷ are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment. ~~Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).~~

2. Minimization [and Compensation]. Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit conditions. Subpart H of the Guidelines describes several (but not all) means for minimizing impacts of an activity.

Section 230.75(d) states that those means of minimization include compensation for destroyed habitat. Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all other appropriate and practicable minimization has been required. Compensatory actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site (on-site compensatory mitigation). If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area if practicable (i.e., in close physical proximity and, to the extent possible, the same watershed). In determining compensatory mitigation, the functional values lost by the resources to be impacted must be considered. Generally, in-kind compensatory mitigation is preferable to out-of-kind. [In some circumstances] there is ~~continued~~ uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success. Because the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration should be the first option considered.

* ⁵Avoidance as used in the Section 404(b)(1) Guidelines and this MOA does not include compensatory mitigation.

⁶It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed (40 CFR 230.10(c)).

⁷Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes.

In the situation where the Corps is evaluating a project where a permit issued by another agency requires compensatory mitigation, the Corps may consider that mitigation as part of the overall application for purposes of public notice, but avoidance and minimization shall still be sought.

Mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Where a mitigation bank has been approved by EPA and the Corps for purposes of providing compensatory mitigation ~~for specific identified projects~~, use of that mitigation bank [for specific projects] ~~for these particular projects~~ is considered as meeting the objectives of Section II.C.3[2] of this MOA, regardless of the practicability of other forms of compensatory mitigation. Additional guidance on mitigation banking will be provided. ~~Simple purchase or "preservation" of existing wetlands resources may in only exceptional circumstances be accepted as compensatory mitigation,~~ [especially where there is a realistic expertise that this will result in the preservation of wetlands through prevention of drainage, creation of protective buffer zones, and the like.] EPA and Army will develop specific guidance for preservation in the context of compensatory mitigation at a later date.

III. Other Procedures

A. Potential applicants for major projects should be encouraged to arrange preapplication meetings with the Corps and appropriate Federal, State, or Indian tribal, and local authorities to determine requirements and documentation required for proposed permit evaluations. As a result of such meetings, the applicant often revises a proposal to avoid or minimize adverse impacts for developing an understanding of the Guidelines requirements by which a future Section 404 permit decision will be made, in addition to gaining an understanding of other State or tribal, or local requirements.

B. In achieving the goals of the CWA, the Corps will strive to avoid and minimize adverse impacts and, as part of that effort, where appropriate and practicable, to offset unavoidable adverse impacts to existing aquatic resources. Measures which can accomplish this can be identified only through resource assessments tailored to the site performed by qualified professionals because ecological characteristics of each aquatic site are unique. Functional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field and/or the best professional judgment of Federal and State agency representatives, provided such assessments fully consider ecological functions included in the Guidelines. The objective of mitigation for unavoidable impacts is to offset environmental losses. Additional for wetlands, such mitigation should provide, at a minimum, one for one functional replacement (i.e., no net loss of values), with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan, recognizing that this minimum requirement may not be appropriate and practicable and thus may not be

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relevant in all cases, as discussed in Section II.B of this MOA.⁸ In the absence of more definitive information on the functions and values of specific wetlands sites, a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values. However, this ratio may be greater where the functional values of the area being impacted are demonstrably high and the replacement wetlands are of lower functional value or the likelihood of success of the mitigation project is low. Conversely, the ratio may be less than 1 to 1 for areas where the functional values associated with the area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.

C. The Guidelines are the environmental standard for Section 404 permit issuances under the CWA. Aspects of a proposed project may be affected through a determination of requirements needed to comply with the Guidelines to achieve these CWA environmental goals. ~~Other reviews, such as NEPA and the Corps public interest review, cannot be used to nullify and Guidelines requirements or to justify less rigorous Guidelines evaluations.~~ [Where another Federal agency is the lead agency under NEPA, the analysis of alternatives required for NEPA environmental documents will serve as the evaluation of practicable alternatives under the Guidelines. Through participation as a cooperating agency, the Corps will take steps to assure that information necessary for compliance with the Guidelines is addressed in the NEPA documents and that the need for supplemental information is minimized.]

D. Monitoring is an important aspect of mitigation, especially in areas of scientific uncertainty. Monitoring should be directed toward determining whether permit conditions are complied with and whether the purpose intended to be served by the condition is actually achieved. Any time it is determined that a permittee is in noncompliance with mitigation requirements of the permit, the Corps will take action in accordance with 33 CFR Part 326. Monitoring should not be required for purposes other than these, although information for other uses may accrue from the monitoring requirements. For projects to be permitted involving mitigation with higher levels of scientific uncertainty, such as some forms of compensatory mitigation, long-term monitoring, reporting and potential remedial action should be required. This can be required of the applicant through permit conditions.

E. Mitigation requirements shall be conditions of standard Section 404 permits. Army regulations authorize mitigation requirements to be added as special conditions to an Army permit to satisfy legal requirements (e.g., conditions necessary to satisfy the Guidelines) 33 CFR 325.4(a). This ensures legal enforceability of the mitigation conditions and enhances the

⁸For example, there are certain areas where, due to hydrological conditions the technology for restoration or creation of wetlands may not be available at present, or may otherwise be impracticable. In addition, avoidance, minimization, and compensatory mitigation may not be practicable

level of compliance. If the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.

F. Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of the agencies involved. Furthermore, formal policy guidance on or interpretation of this document shall be issued jointly.

G. This MOA shall take effect thirty (30) days after the date of the last signature below, and will apply to those completed standard permit applications which are received on or after the effective date. This MOA may be modified or revoked by agreement of both parties, or revoked by either party alone upon six (6) months written notice.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: EPA/Army Memorandum of Agreement on Mitigation

FROM: William K. Reilly 

TO: The Honorable John Sununu
White House Chief of Staff

I have prepared for your information an overview and general background of the Memorandum of Agreement (MOA) Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines that the Environmental Protection Agency and the Army signed on November 15, 1989.

This memorandum also sets out the process by which we developed the MOA, our understanding of major concerns regarding the MOA, and our recommendations.

Background

- Section 404 of the Clean Water Act regulates discharges of dredged and fill material into all waters of the United States, including wetlands. The Army Corps of Engineers issues permits authorizing the placement of such material in wetlands and other waters. EPA issues the Section 404(b)(1) Guidelines, which establish the substantive environmental criteria applied in the evaluation of the potential impacts of proposed projects. The Act also gives EPA the responsibility to ensure that permits are not issued which would result in "unacceptable adverse impacts" to fish and wildlife and other resources values.

- EPA promulgated the Section 404(b)(1) Guidelines in 1980 after notice and public comment. Among other things, the Guidelines provide that **no discharge shall be permitted:**

-- if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences (40 CFR 230.10(a));

-- unless the discharge complies with several other environmental laws, such as applicable water quality standards and the Endangered Species Act (40 CFR 230.10(b));

-- if the discharge will cause or contribute to significant degradation of the waters of the United States (40 CFR 230.10(c));

-- unless appropriate and practicable steps have been taken that will minimize potential adverse impacts of the discharge on the aquatic ecosystem, including compensatory mitigation (40 CFR 230.10(d)).

- EPA's ten Regions and the Corps' 37 Districts sometimes applied the Guidelines in differing fashions which generated confusion, uncertainty, and disagreements between EPA and the Corps, as well as with other parties. For example, an applicant relying on experience with the program in one part of the country, where compensatory mitigation of 1:1 has been required, could find, well into project planning in another area, that a different Region or Corps District expected a greater ratio for a particular type of wetland. As a result, some applicants were unclear as to what procedures should be followed to ensure compliance with the Guidelines. The public has repeatedly called for clarification of Guidelines requirements to aid them in their interpretation of mitigation and other requirements.

- Recognizing the need to clarify mitigation procedures, EPA and Army began independently, over five years ago, to develop separate mitigation policies. The agencies began to negotiate a joint MOA over four years ago.

The MOA

- An EPA/Army MOA on Mitigation was signed on November 15, 1989, and was originally to go into effect on December 15, 1989. The signed MOA sets forth the EPA's and Corps' interpretation of the mitigation requirements contained in the Section 404(b)(1) Guidelines. The MOA does not alter any regulatory requirements. The MOA applies only to application of the Section 404(b)(1) Guidelines to standard (individual) Section 404 permit applications, and not to general permits. There are 26 general permits which apply nationwide, and many more general permits which apply on a Statewide or Regional basis, which authorize many thousands of smaller discharges each year. For example, Nationwide general permit #26 authorizes certain discharges into non-tidal wetlands located above the headwaters and isolated wetlands; in the State of Alaska, there are currently 16 State and Regional general permits.

- The MOA clarifies that mitigation under the Guidelines occurs in a clear sequence of avoidance of adverse impacts through: (1) the evaluation of practicable alternatives; (2) minimization (e.g., project modification to reduce impacts); and (3) compensation of unavoidable impacts through restoration or creation. This is consistent with the

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From William Reilly to John Sununu Re: EPA/Corps MOA on Mitigation Concerns Section and Preferred Course of Action Sections redacted. (4 pp.)	n.d.	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Wetlands (1990) [2]

Open on Expiration of PRA
 (Document Follows)
 By *JF* (NLGB) on 5/12/05

Date Closed:	12/13/2004	OA/ID Number:	29174-005
FOIA/SYS Case #:	1998-0004-F[1]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

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P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
 P-3 Release would violate a Federal statute [(a)(3) of the PRA]
 P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
 P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
 P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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 (b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
 (b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
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 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information

sequence in the Section 404(b)(1) Guidelines; that is, Section 230.10(a) requires avoidance of impacts to the maximum extent practicable, while Section 230.10(d) requires minimization of unavoidable impacts and compensatory mitigation for all remaining impacts. The MOA provides for flexibility in the application of the mitigation sequence in certain defined circumstances. For example, the mitigation sequence can be satisfied by Federal/State development of a comprehensive plan, such as an Advance Identification under the Section 404(b)(1) Guidelines or a Special Area Management Plan, where EPA and the Corps agree that the plan incorporates the mitigation requirements of the Guidelines.

- Overall, the MOA provides significant flexibility. The alternatives analysis only requires the consideration of **practicable** alternatives to a proposed project, a factor which includes cost and feasibility. The steps of minimization and compensation only require actions which are both practicable (as described above) and appropriate to the impacts of the activity. The MOA clarifies that compensatory mitigation which is not feasible, not practicable, or would accomplish only inconsequential reductions in impacts is not required under the Guidelines.

- The MOA is not, and is not intended in itself, to achieve a national no net loss of wetlands goal. In clarifying the Guidelines, the MOA provides that the no net loss of wetlands goal should be considered on a permit by permit basis. However, the MOA clearly states that the level of compensatory mitigation determined to be appropriate and practicable (as required by the Guidelines) for each individual decision may not always fully meet the goal.

- We expect the MOA to:

- eliminate current inconsistencies in the implementation of the Guidelines that have resulted in varying interpretations by EPA Regional Offices and Corps Districts regarding the level of necessary mitigation.

- increase the effectiveness of the Section 404 regulatory program by reducing delays and uncertainty, and to improve our ability to protect wetlands.

- be responsive to questions and concerns raised by interested groups affected by the Section 404 program about the Guidelines' mitigation requirements.

Major Concerns Raised Regarding the MOA

- **Rulemaking**. The charge has been raised that the MOA will change the current requirements of the Section 404 program, and therefore can be put into effect only after the rulemaking provisions of the APA have been followed. This is the primary basis for the litigation in Alaska (5 suits have been filed). The MOA is merely guidance to EPA and Army field staff representing Headquarters' interpretation of the existing regulations. Issuance of such guidance is a routine practice in the Section 404

program, as it is with Federal programs in general. The MOA is consistent with the Guidelines and past regulatory practices. EPA and Army were advised by legal counsel that the MOA is an interpretive rule and that it is not subject to APA rulemaking requirements. DOJ has indicated that they can defend the agencies' position on this issue.

- Sequencing. The concern has been raised that the sequence set forth in the MOA is new, is too rigid, and will prevent needed development. However, it is important to note that EPA's position has long been that the Guidelines require this sequence, and in fact this sequence is normally followed by both agencies. There is flexibility built into application of the sequence in particular, and into the MOA in general, as described above.

- Compensation. The MOA includes a goal of no net loss of wetlands, and includes a provision for replacement of lost functional values, allowing the use of acreage as a surrogate for values. This is consistent with current practice in most cases, and implements the Guidelines requirement that all appropriate and practicable steps to compensate for unavoidable losses be taken. The goal of no net loss within the Section 404 program in no way alters the need to address implementation of this goal on a nationwide scale, across all programs and activities.

- Flexibility to Address Special Circumstances (e.g., Alaska). The concern has been raised that Alaska, and other areas, have special circumstances which affect the ability of permit applicants to avoid or compensate as anticipated by the MOA. The MOA was developed with the recognition that there are many different situations which must be considered in the field, and that discretion must be used on a case by case basis. The MOA sets forth the approach to be followed, but the actual determinations of what alternatives are "practicable" and what minimization and compensation are "appropriate and practicable" will continue to be made in the field, after consideration of all relevant factors.

- Relationship to Other Processes. The MOA states that other review processes, such as NEPA and the Corps' Public Interest Review, cannot be used to nullify the requirements of the Section 404(b)(1) Guidelines, or to justify less rigorous Guidelines evaluations. This is already codified in the Corps' Consolidated Permit Regulations, which govern the Section 404 program. Of course, information developed through other processes which is relevant to the determinations required by the Guidelines often is -- and, under the MOA, will continue to be -- used in the Guidelines evaluations.

Process To Date

- The MOA was developed over the course of many years, during which we spoke with and heard from many interested parties, including other Federal agencies, about our respective positions regarding mitigation under the Section 404(b)(1) Guidelines.

- Since the MOA was signed on November 15, the effective date has been delayed twice, once from December 15 to January 16, and again to January 31. In this time period we have met with and spoken to representatives of: the Alaska Congressional delegation; other Senators, Congressmen, and Congressional Committees; Federal Agencies, including DOE, DOT, and DOI; and a number of interest groups (both representing industry and the environment).
- We have also received numerous written comments, many requesting us to put the MOA into effect as soon as possible while many others asked that we initiate rulemaking prior to the effective date of the MOA.
- Many of the comments we received reflected confusion about or dissatisfaction with the Section 404 program itself, rather than the MOA. For example, there was concern about the impact of the MOA on small discharges. The MOA would not affect how those are currently regulated; where they would now be covered by general permits, for example, that will continue unchanged.
- As a result of comments from the Department of Justice, and after consideration of the many other comments we have received, EPA and Army developed revisions to the MOA in an effort to be responsive to some of the concerns raised, particularly by DOJ, without undermining the Guidelines or the Section 404 program.

Preferred Course of Action

- We believe that there are many advantages to proceeding with the signed MOA. These include:
 - Improving our ability to ensure that decisions regarding mitigation in the Section 404 program will be made in a consistent manner throughout the nation.
 - Providing "up front" information to guide applicants on what the permit process will expect in terms of mitigation requirements under the Guidelines.
 - Helping the Government to avoid questions of fairness and equity that have sometimes been raised where permittees believe that mitigation requirements have not been consistent across the country.
 - Reducing conflicts within the regulatory process that will improve the effectiveness of the permit program, reduce permit processing delays, and provide better service to the public.
 - Eliciting positive public reaction for the Administration's environmental goals.

EPA and Army clearly prefer this course of action. Implementation of this course of action requires only that the MOA be allowed to go into effect on January 31, as has already been published in the Federal Register.

- However, in an effort to be responsive to the many concerns that have been raised by the public and various governmental officials, EPA and Army have developed some potential modifications to the MOA that are intended to clarify that the MOA does not change the existing regulatory requirements; that eliminate unintended and unnecessary confusion; and that clarify that this is merely guidance, in accordance with suggestions from the Department of Justice.

Although we prefer to issue the original signed MOA, this modified course of action can provide most of the same benefits with relatively few disadvantages. Implementation of this course of action requires that EPA and Army finalize negotiation on modifications, sign a new MOA, and publish appropriate notice in the Federal Register.

- If we do not follow one of the two courses of action described above and issue and implement an MOA on January 31, 1990, we can expect that:

-- EPA and Army will continue business as usual in implementation of the Section 404(b)(1) Guidelines. Despite consistency with the provisions of the MOA in many parts of the country, confusion and disagreements and resultant delays and "poor government" will continue where this is not the case.

-- This will allow opponents of the MOA to press their case for variations from the established mitigation process resulting in conflicts, delays, and increased litigation.

-- The environmental community will likely decry rescission of the MOA as a major reversal in the Administration's pledge to protect the environment in general and to implement a goal of no net loss of wetlands.

EPA and Army recommend strongly against this course of action. Implementation of this course of action would require publication of a Federal Register notice rescinding the signed MOA.

cc: The Honorable Robert Page
The Honorable Michael Deland
Nancy Maloley

EPA will use this MOA in developing its positions on compliance with the Guidelines for proposed discharges and will reflect this MOA when commenting on standard permit applications.

II. Policy

A. The Council on Environmental Quality (CEQ) has defined mitigation in its regulations at 40 CFR 1508.20 to include: avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts. The Guidelines establish environmental criteria which must be met for activities to be permitted under Section 404.² The types of mitigation enumerated by CEQ are compatible with the requirements of the Guidelines; however, as a practical matter, they can be combined to form three general types: avoidance, minimization and compensatory mitigation. The remainder of this MOA will speak in terms of these more general types of mitigation.

B. The Clean Water Act and the Guidelines set forth a goal of restoring and maintaining existing aquatic resources. The Corps will strive to avoid and minimize adverse impacts and, as part of that effort, where appropriate and practicable, to offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions. In focusing the goal of no overall net loss to wetlands only, EPA and Army have explicitly recognized the special significance of the nation's wetlands resources. This special recognition of wetlands resources does not in any manner diminish the value of other waters of the United States, which are often of high value. All waters of the United States, such as streams, rivers, lakes, etc., will be accorded the full measure of protection under the Guidelines, including the requirements for appropriate and practicable mitigation. The determination of what level of mitigation constitutes "appropriate" mitigation is based solely on the values and functions of the aquatic resource that will be impacted. "Practicable" is defined at Section 230.3(g) of the Guidelines.³ However, the level of mitigation determined to be appropriate and practicable under Section 230.10(d) may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, [have significant adverse impacts on other areas of environmental concern] or would accomplish only inconsequential reductions in impacts. Consequently, it is recognized that no net loss of wetlands functions and values may not be achieved in each and every permit action. However, it remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base. EPA and Army are committed to working with

²(except where Section 404(b)(2) applies).

³Section 230.3(g) of the Guidelines reads as follows: "The term practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." (Emphasis supplied)

State of South Carolina

Fax to Mike Deland
395-7329

CARROLL A. CAMPBELL, JR.
GOVERNOR

Office of the Governor

1/30/90
POST OFFICE BOX 11300
COLUMBIA 29211

January 25, 1990

Mr. William Reilly
Administrator
U. S. Environmental Protection Agency
401 M Street, S. W.
Washington, D. C. 20460

Dear Bill:

I enjoyed our recent conversation regarding the E.P.A. and Army Memorandum of Agreement for wetlands mitigation under the Clean Water Act.

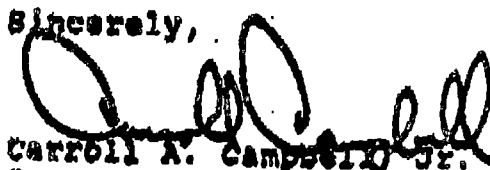
As you recall, during our deliberations on mitigation procedures at the National Wetlands Forum there was a continuous call for streamlining federal permitting procedures. After reviewing the MOA, it is my opinion it will increase the effectiveness of the Wetlands Regulatory Program by reducing delays and uncertainty. It should improve our ability to protect wetlands by eliminating current inconsistencies in the implementation of the programs jointly administered by the Corps and the E.P.A.

As we discussed, in South Carolina, the Governor's Freshwater Wetlands Forum has completed its report and endorsed the "no overall net loss" policy for the state. The Forum utilized much of the National Wetlands Forum's concepts in developing a comprehensive state wetlands program. I have enclosed a copy of the report for your information and hope it will serve as a national model for other states to follow.

I look forward to our continued work within the Administration in protecting our valuable natural resources and environment.

With best personal regards, I am

Sincerely,


Carroll A. Campbell, Jr.
Governor

CAC:jf/jdh

enclosures



State of South Carolina

Office of the Governor

CARROLL A. CAMPBELL, JR.
GOVERNOR

Post Office Box 11000
COLUMBIA 29211

January 25, 1990

The Honorable George Bush
President
The White House
Washington, D. C. 20500

Dear Mr. President:

Last year I created the Governor's Freshwater Wetlands Forum and charged it with adopting a comprehensive wetlands policy for the State of South Carolina. The Forum was a logical and necessary follow-up to my participation on the National Wetlands Policy Forum which I Co-chaired.

The Forum has completed its report and endorsed the "no overall net loss" policy for South Carolina. The Forum utilized much of the National Wetlands Forum's concepts in developing a comprehensive state wetlands program. I've enclosed a copy of the report for your information and hope it will serve as a national model for other states to follow.

I look forward to working with you and other members of your Administration in protecting our valuable and natural resources and environment.

With best personal regards, I am

Sincerely,

A handwritten signature in dark ink, appearing to read "Carroll Campbell".

Carroll A. Campbell, Jr.
Governor

CAC:jz/jdh

enclosure

Withdrawal/Redaction Sheet

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Memo	From Nancy Maloley to Andy Card Re: Wetlands MOA (1 pp.)	1/30/90	P 5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Wetlands (1990) [2]

Open on Expiration of PRA
 (Document Follows)
 By *Jf* (NLGB) on 5/12/05

Date Closed: 12/13/2004	OA/ID Number: 29174-005
FOIA/SYS Case #: 1998-0004-F[1]	Appeal Case #:
Re-review Case #: 2005-0426-S	Appeal Disposition:
P-2/P-5 Review Case #:	Disposition Date:
AR Case #:	MR Case #:
AR Disposition:	MR Disposition:
AR Disposition Date:	MR Disposition Date:

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
 P-3 Release would violate a Federal statute [(a)(3) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
 (b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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 (b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE
WASHINGTON

January 30, 1990

MEMORANDUM FOR ANDY CARD
ROGER PORTER
DAVID BATES

FROM: NANCY A. MALOLEY *nam*

SUBJECT: Wetlands MOA

The attached paper describes the main issue of contention with the MOA -- sequencing. I understand that Administrator Reilly is coming in at 1:00 p.m. to meet with Governor Sununu. At this juncture, DOT disagrees with the compromise struck on the 10th of January. At this point, the original MOA is scheduled to take effect on January 31. We need to reach an agreement on which approach to adopt. The different version of the MOA are described in the attached with options.

Senator Stevens is reviewing preamble language from EPA. My understanding in conversation with staffs of the Alaska delegation is that in any event their are expecting language agreed to with them on January 11 to be retained, in addition to the preamble.

Attachment

However, Senator Stevens has now agreed to preamble language which takes care of his substantive concerns and can live without the ~~other~~ 11 language which only addresses procedural concerns.

See comments

[Brackets] are proposed revisions
Crossouts are proposed deletions

MEMORANDUM OF AGREEMENT
BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY
AND THE DEPARTMENT OF THE ARMY CONCERNING
THE DETERMINATION OF MITIGATION UNDER THE
CLEAN WATER ACT SECTION 404(b)(1) GUIDELINES

I. Purpose

The United States Environmental Protection Agency (EPA) and the United States Department of the Army (Army) hereby articulate the policy and procedures to be used in the determination of the type and level of mitigation necessary to demonstrate compliance with the Clean Water Act (CWA) Section 404(b)(1) Guidelines ("Guidelines"). This Memorandum of Agreement (MOA) expresses the explicit intent of the Army and EPA to implement the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, including wetlands. This MOA is specifically limited to the Section 404 Regulatory Program and is written to provide guidance for agency field personnel on the type and level of mitigation which demonstrates compliance with requirements in the Guidelines. The policies and procedures discussed herein are consistent with current Section 404 regulatory practices and are provided in response to questions that have been raised about how the Guidelines are implemented. The MOA does not change the substantive requirements of the Guidelines. It is intended to provide guidance regarding the exercise of discretion under the Guidelines.

Although the Guidelines are clearly applicable to all discharges of dredged or fill material, including general permits and Corps of Engineers (Corps) civil works projects, this MOA focuses on standard permits (33 CFR 325.5(b)(1))¹. This focus is intended solely to reflect the unique procedural aspects associated with the review of standard permits, and does not obviate the need for other regulated activities to comply fully with the Guidelines. EPA and Army will seek to develop supplemental guidance for other regulated activities consistent with the policies and principles established in this document.

The MOA provides guidance to Corps and EPA personnel for implementing the Guidelines and must be adhered to when considering mitigation requirements for standard permit applications. The Corps will use this MOA when making its determination of compliance with the Guidelines with respect to mitigation for standard permit applications.

¹ Standard permits are those individual permits which have been processed through application of the Corps public interest review procedures (33 CFR 325) and EPA's Section 404(b)(1) Guidelines, including public notice and receipt of comments. Standard permits do not include letters of permission, regional permits, nationwide permits, or programmatic permits.

EPA will use this MOA in developing its positions on compliance with the Guidelines for proposed discharges and will reflect this MOA when commenting on standard permit applications.

II. Policy

A. The Council on Environmental Quality (CEQ) has defined mitigation in its regulations at 40 CFR 1508.20 to include: avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts. The Guidelines establish environmental criteria which must be met for activities to be permitted under Section 404.² The types of mitigation enumerated by CEQ are compatible with the requirements of the Guidelines; however, as a practical matter, they can be combined to form three general types: avoidance, minimization and compensatory mitigation. The remainder of this MOA will speak in terms of these more general types of mitigation.

B. The Clean Water Act and the Guidelines set forth a goal of restoring and maintaining existing aquatic resources. The Corps will strive to avoid and minimize adverse impacts and, as part of that effort, where appropriate and practicable, to offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions. In focusing the goal of no overall net loss to wetlands only, EPA and Army have explicitly recognized the special significance of the nation's wetlands resources. This special recognition of wetlands resources does not in any manner diminish the value of other waters of the United States, which are often of high value. All waters of the United States, such as streams, rivers, lakes, etc., will be accorded the full measure of protection under the Guidelines, including the requirements for appropriate and practicable mitigation. The determination of what level of mitigation constitutes "appropriate" mitigation is based solely on the values and functions of the aquatic resource that will be impacted. "Practicable" is defined at Section 230.3(g) of the Guidelines.³ However, the level of mitigation determined to be appropriate and practicable under Section 230.10(d) may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, [have significant adverse impacts on other areas of environmental concern] or would accomplish only inconsequential reductions in impacts. Consequently, it is recognized that no net loss of wetlands functions and values may not be achieved in each and every permit action. However, it remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base. EPA and Army are committed to working with

²(except where Section 404(b)(2) applies).

³Section 230.3(g) of the Guidelines reads as follows: "The term practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." (Emphasis supplied)

others through the Administration's interagency task force and other avenues to help achieve this national goal.

C. In evaluating standard Section 404 permit applications, as a practical matter, information on all facets of a project, including potential mitigation, is typically gathered and reviewed at the same time. [The Corps views avoidance as the most effective mitigation measure, followed by minimization of impacts and compensation for wetland losses. Permit applications will be reviewed with avoidance as the primary goal; however, comprehensive approaches with appropriate mitigation to improve overall wetland values will be encouraged even though they may not avoid wetlands.] ~~The Corps except as indicated below, first makes a determination that potential impacts have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, finally, compensate for aquatic resource values. This sequence is considered satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of the Section 404(b)(1) Guidelines (examples of such comprehensive plans may include Special Area Management Plans, Advance Identification areas (Section 230.80), and State Coastal Zone Management Plans).~~⁴ ~~It may be appropriate to deviate from the sequence [Avoidance of wetland may be inappropriate] when EPA and the Corps agree the proposed discharge is necessary to avoid environmental harm (e.g., to protect a natural aquatic community from saltwater intrusion, chemical contamination, or other deleterious physical or chemical impacts, or EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain. This environmental gain must be solely attributable to the project itself, exclusive of benefits which may accrue from proposed compensatory mitigation.~~

In determining "appropriate and practicable" measures to offset unavoidable impacts, such measures should be appropriate to the scope and degree of those impacts and practicable in terms of availability, cost, existing technology, and logistics in light of overall project purposes. The Corps will give full consideration to the views of the resource agencies when making this determination.

⁴By way of example, EPA and Army presently are discussing with representatives of the oil industry, the potential for a program of accelerated rehabilitation of abandoned oil facilities on the North Slope to serve as a vehicle for satisfying necessary compensation requirements.

1. Avoidance.⁵ Section 230.10(a) allows permit-issuance for only the least environmentally damaging practicable alternative.⁶ The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a)(1) requires that, to be permissible, an alternative must have the least adverse impact on the aquatic ecosystem so long as the alternative does not have other significant adverse environmental consequence. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for nonwater dependent activities that do not involve special aquatic sites⁷ are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment. ~~Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).~~

2. Minimization [and Compensation]. Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit conditions. Subpart H of the Guidelines describes several (but not all) means for minimizing impacts of an activity.

Section 230.75(d) states that those means of minimization include compensation for destroyed habitat. Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all other appropriate and practicable minimization has been required. Compensatory actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site (on-site compensatory mitigation). If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area if practicable (i.e., in close physical proximity and, to the extent possible, the same watershed). In determining compensatory mitigation, the functional values lost by the resources to be impacted must be considered. Generally, in-kind compensatory mitigation is preferable to out-of-kind. [In some circumstances] there is ~~continued~~ uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success. Because the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration should be the first option considered.

⁵Avoidance as used in the Section 404(b)(1) Guidelines and this MOA does not include compensatory mitigation.

⁶It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed (40 CFR 230.10(c)).

⁷Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes.

In the situation where the Corps is evaluating a project where a permit issued by another agency requires compensatory mitigation, the Corps may consider that mitigation as part of the overall application for purposes of public notice, but avoidance and minimization shall still be sought.

Mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Where a mitigation bank has been approved by EPA and the Corps for purposes of providing compensatory mitigation ~~for specific identified projects~~, use of that mitigation bank [for specific projects] ~~for those particular projects~~ is considered as meeting the objectives of Section II.C.3[2] of this MOA, regardless of the practicability of other forms of compensatory mitigation. Additional guidance on mitigation banking will be provided. ~~Simple purchase or "preservation" of existing wetlands resources may in only exceptional circumstances~~ be accepted as compensatory mitigation, [especially where there is a realistic expertise that this will result in the preservation of wetlands through prevention of drainage, creation of protective buffer zones, and the like.] EPA and Army will develop specific guidance for preservation in the context of compensatory mitigation at a later date.

III. Other Procedures

A. Potential applicants for major projects should be encouraged to arrange preapplication meetings with the Corps and appropriate Federal, State, or Indian tribal, and local authorities to determine requirements and documentation required for proposed permit evaluations. As a result of such meetings, the applicant often revises a proposal to avoid or minimize adverse impacts for developing an understanding of the Guidelines requirements by which a future Section 404 permit decision will be made, in addition to gaining an understanding of other State or tribal, or local requirements.

B. In achieving the goals of the CWA, the Corps will strive to avoid and minimize adverse impacts and, as part of that effort, where appropriate and practicable, to offset unavoidable adverse impacts to existing aquatic resources. Measures which can accomplish this can be identified only through resource assessments tailored to the site performed by qualified professionals because ecological characteristics of each aquatic site are unique. Functional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field and/or the best professional judgment of Federal and State agency representatives, provided such assessments fully consider ecological functions included in the Guidelines. The objective of mitigation for unavoidable impacts is to offset environmental losses. Additional for wetlands, such mitigation should provide, at a minimum, one for one functional replacement (i.e., no net loss of values), with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan, recognizing that this minimum requirement may not be appropriate and practicable and thus may not be

6

relevant in all cases, as discussed in Section II.B of this MOA.⁸ In the absence of more definitive information on the functions and values of specific wetlands sites, a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values. However, this ratio may be greater where the functional values of the area being impacted are demonstrably high and the replacement wetlands are of lower functional value or the likelihood of success of the mitigation project is low. Conversely, the ratio may be less than 1 to 1 for areas where the functional values associated with the area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.

C. The Guidelines are the environmental standard for Section 404 permit issuances under the CWA. Aspects of a proposed project may be affected through a determination of requirements needed to comply with the Guidelines to achieve these CWA environmental goals. ~~Other reviews, such as NEPA and the Corps public interest review, cannot be used to nullify and Guidelines requirements or to justify less rigorous Guidelines evaluations.~~ [Where another Federal agency is the lead agency under NEPA, the analysis of alternatives required for NEPA environmental documents will ~~serve as~~ the evaluation of practicable alternatives under the Guidelines. Through participation as a cooperating agency, the Corps will take steps to assure that information necessary for compliance with the Guidelines is addressed in the NEPA documents and that the need for supplemental information is minimized.]

in most cases provide the information for

D. Monitoring is an important aspect of mitigation, especially in areas of scientific uncertainty. Monitoring should be directed toward determining whether permit conditions are complied with and whether the purpose intended to be served by the condition is actually achieved. Any time it is determined that a permittee is in noncompliance with mitigation requirements of the permit, the Corps will take action in accordance with 33 CFR Part 326. Monitoring should not be required for purposes other than these, although information for other uses may accrue from the monitoring requirements. For projects to be permitted involving mitigation with higher levels of scientific uncertainty, such as some forms of compensatory mitigation, long-term monitoring, reporting and potential remedial action should be required. This can be required of the applicant through permit conditions.

270.10
9(9)

E. Mitigation requirements shall be conditions of standard Section 404 permits. Army regulations authorize mitigation requirements to be added as special conditions to an Army permit to satisfy legal requirements (e.g., conditions necessary to satisfy the Guidelines) 33 CFR 325.4(a). This ensures legal enforceability of the mitigation conditions and enhances the

⁸For example, there are certain areas where, due to hydrological conditions the technology for restoration or creation of wetlands may not be available at present, or may otherwise be impracticable. In addition, avoidance, minimization, and compensatory mitigation may not be practicable

level of compliance. If the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.

F. Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of the agencies involved. Furthermore, formal policy guidance on or interpretation of this document shall be issued jointly.

G. This MOA shall take effect thirty (30) days after the date of the last signature below, and will apply to those completed standard permit applications which are received on or after the effective date. This MOA may be modified or revoked by agreement of both parties, or revoked by either party alone upon six (6) months written notice.

1/30/90

To: Linda Casey

From: Susan Slye

Here is the attachment that was not included in the Wetlands
memo we sent earlier.

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Paper	Issue: Should the MOA between the EPA and the Corps of Engineers on Wetlands Permitting be Implemented (4 pp.)	n.d.	P-8	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
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AR Disposition Date:		MR Disposition Date:	

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ISSUE: Should the Memorandum of Agreement between EPA and the Corps of Engineers on wetlands permitting be implemented.

Action Forcing Event: On November 15, the Corps and EPA signed a Memorandum of Agreement, subsequently published in the Federal Register, to have taken effect December 15. It was extended for 30 days to address inter-agency concerns. It was due to take effect January 16, 1990, and was extended for another 15 days. It is now due to take effect January 31, 1990. (Midnight tonight.)

Discussion:

Over the last four years EPA and the Corps have negotiated a Memorandum of Agreement (MOA) to establish a consistent nationwide approach to the Section 404 permitting program. Its purpose is to address inconsistencies by the Corps and EPA from region to region in determining type and level of mitigation. Its implementation has twice been postponed to address concerns of federal agencies, primarily the Departments of Energy and Transportation, and the State of Alaska, over the impacts of this MOA on energy development and highway construction.

The principal issue on which disagreement over the MOA hinges is on the concept of mitigation sequencing. The issue is do the benefits of consistency outweigh the benefits of flexibility. Under sequencing, permit applicants must first avoid filling the wetland. Next, if avoidance measures are not practicable, measures to minimize the degradation of the wetland would be undertaken, and finally, any remaining unavoidable losses of wetland would be compensated. Under the Section 404(b)(1) Guidelines, in order for EPA or the Corps to require an applicant to avoid, minimize or compensate, such requirements must be practicable. The test of practicability includes availability, cost, existing technology and logistics. The guidelines are clear that avoidance is required when practicable and thus preferable to any mitigation, including both minimization and compensation. The guidelines, however, do not rank these mitigation measures or necessarily require one over the other.

EPA and the Corps argue that applicants must consider practicable alternatives before addressing minimization, and must minimize to the maximum extent practicable before considering compensation. The agencies point to the practicability test as providing broad flexibility for field staff to consider the individual circumstances of particular permittees. They also point to the 404(b)(1) guidelines, which contain explicit requirements against permit issuance where there is a practicable alternative with less adverse impact, as a basis for requesting that

applicants at least address the possibility of alternative sites. According to the Corps, sequencing is currently used in practice in most Corps districts.

DOT argues that, while sequencing is a valid goal, applicants should be able to consider various combinations of the three major elements (avoidance, minimization and compensation). They want an approach that does not imply that practicable options in one step of the sequence need to be eliminated before moving to the next step. They believe the MOA, by specifying the order in which decision analysis must proceed, forecloses discretion available to them. They prefer a more flexible iterative approach which allows the appropriate level of mitigation through the most favorable overall combination of avoidance, minimization and compensation. Some districts interpret the guidelines to allow this approach.

As a practical matter, Corps permitting is currently based on both approaches, the one favored by the Corps and EPA, and the other more flexible approach, although most districts follow the Corps/EPA approach.

These differing views are expressed in three different version of the MOA:

1. The original version signed by EPA and the Corps in November. This version requires strict consideration of avoidance, minimization and compensation in a sequential fashion. As required by current regulations, any permit requirements would have to meet the test of practicability.
2. A compromise version, agreed to at an interagency meeting on January 10 and subsequently revised at a meeting with staff of the Alaska delegation on January 11. This version incorporates several suggestions made by the Department of Justice and the state of Alaska, clarifies language which many interpreted as a strict one-for-one acreage replacement requirement, and increases the flexibility attached to the sequencing process.
3. A version prepared by DOT allows even greater flexibility by deleting sequencing requirements. While avoidance remains a goal, project sponsors would be able to propose filling of wetlands, in return for proposals for minimization and compensation to improve wetland values.

A second issue of concern to DOT is the relationship of the National Environmental Policy Act's (NEPA) EIS requirements to Section 404. DOT has proposed using the selection of alternatives in an EIS under NEPA to satisfy the requirements for evaluation of alternatives under Section 404. It is possible, and indeed recommended by CEQ, for applicants to use a single alternatives analysis procedure to meet the different tests under the two laws. However, the Department of Justice stated strongly

that 1) the authority to decide Section 404 permits could not be delegated to EIS-preparing agencies under NEPA, and 2) a NEPA EIS could not be used to justify selection of an alternative that violates the Section 404 Guidelines.

Options:

1. Go forward with the original MOA of November 15.

Pros

- It is consistent with the President's commitment to achieving the goal of no net loss of wetlands.
- It will provide for more consistent guidance in permit decision-making between EPA and the Corps and, therefore, more predictability for the applicant.
- It is consistent with operating procedures in the majority of Corps districts.

Cons

- It will be viewed by some as inconsistent with existing regulations and therefore subject to notice and comment because it violates the Administrative Procedure Act. Loss of the lawsuits could adversely affect agencies use of MOA's in the future.
- If rigidly implemented, it could result in permit denial for a variety of proposed projects ranging from oil and gas development and highway construction to smaller projects.

- II. Go forward with the compromise MOA to include changes suggested by the Justice Department to reduce litigation risk, highlight the importance of discretion in permitting, and recognize special circumstances under which avoidance, minimization and compensatory mitigation may not be feasible.

Pros

- Allow Administration to proceed with the MOA, thereby avoiding the embarrassment of retracting it in the face of the President's "no net loss" goal.
- Reduces most federal agency concerns about sequencing and one for one replacement.

Cons

- Since the MOA will be clearly weaker than the version published earlier, the President could be accused of weakening his position on the environment.
 - Does not satisfy DOT's and to a lesser extent DOE's concerns that sequencing would foreclose permitting options currently available to them.
3. Proceed with a further compromise, based on DOT's concerns to provide for avoidance as a goal and to eliminate any rigid sequencing.

Pros

- Allows more flexibility for Corps field personnel in making permit decisions that might be otherwise unacceptable under strict sequencing.
- Allays DOT concerns that sequencing could interfere with transportation project planning.
- Could result in net increase in wetland values.

Cons

- Would be viewed as significant retreat from President's stated goal of "no net loss" of wetlands.
- Inconsistencies in the current permitting process would continue unresolved to the detriment of the Corps, EPA and permit applicants.
- The science of creating wetlands is not very advanced. Therefore, in the near term, avoidance needs to be an important method of preserving existing wetland values.

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, NW.
WASHINGTON, DC 20503

DATE:

1/16

TO:

Nancy Mabley

TELEPHONE NUMBER:

6554

FAX NUMBER:

x 7739

SUBJECT OF MATERIAL:

Revised Wetlands MDA

NUMBER OF PAGES:

70 + Cover

MESSAGE:

(1) As received from EPA(2) Redrafted, Press Release, as we discussed; Mike suggested circulating to Agencies (DOZ, DOE, etc) as well as in-house.

FROM:

Robin O'Malley

TELEPHONE NUMBER:

395-5750

FAX NUMBER: FTS: 395-3744

Underline shows 1/10 proposed revisions
[Brackets] show Alaska's 1/11 proposed revisions

**MEMORANDUM OF AGREEMENT
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AND THE DEPARTMENT OF THE ARMY CONCERNING
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I. Purpose

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B. The Clean Water Act and the Guidelines set forth a goal of restoring and maintaining existing aquatic resources. The Corps will strive to avoid [and minimize] adverse impacts and[, as part of that effort, where appropriate and practicable, to] offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions. In focusing the goal of no overall net loss to wetlands only, EPA and Army have explicitly recognized the special significance of the nation's wetlands resources. This special recognition of wetlands resources does not in any manner diminish the value of other waters of the United States, which are often of high value. All waters of the United States, such as streams, rivers, lakes, etc., will be accorded the full measure of protection under the Guidelines, including the requirements for appropriate and practicable mitigation. The determination of what level of mitigation constitutes "appropriate" mitigation is based solely on the values and functions of the aquatic resource that will be impacted. "Practicable" is defined at Section 230.3(g) of the Guidelines.³ However, the level of mitigation determined to be appropriate and practicable under Section 230.10(d) may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, or would accomplish only inconsequential reductions in impacts. Consequently, it is recognized that no net loss of wetlands functions and values may not be achieved in each and every permit action. However, it remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base. EPA and Army are committed to working with

²(except where Section 404(b)(2) applies).

³Section 230.3(g) of the Guidelines reads as follows: "The term practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." (Emphasis supplied)

EPA/Army MOA Concerning the Determination of Mitigation under the Section 404(b)(1) Guidelines

Page 3

others through the Administration's interagency task force and other avenues to help achieve this national goal.

C. In evaluating standard Section 404 permit applications, as a practical matter, information on all facets of a project, including potential mitigation, is typically gathered and reviewed at the same time. The Corps, except as indicated below, first makes a determination that potential impacts have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, finally, compensate for aquatic resource values. This sequence is considered satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of the Section 404(b)(1) Guidelines (examples of such comprehensive plans may include Special Area Management Plans, Advance Identification areas (Section 230.80), and State Coastal Zone Management Plans).⁴ It may be appropriate to deviate from the sequence when EPA and the Corps agree the proposed discharge is necessary to avoid environmental harm (e.g., to protect a natural aquatic community from saltwater intrusion, chemical contamination, or other deleterious physical or chemical impacts), or EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain. This environmental gain must be solely attributable to the project itself, exclusive of benefits which may accrue from proposed compensatory mitigation.

In determining "appropriate and practicable" measures to offset unavoidable impacts, such measures should be appropriate to the scope and degree of those impacts and practicable in terms of [availability,] cost, existing technology, and logistics in light of overall project purposes. The Corps will give full consideration to the views of the resource agencies when making this determination.

1. Avoidance.⁵ Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative.⁶ The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a)(1) requires that, to be permittable,

⁴By way of example, EPA and Army presently are discussing, with representatives of the oil industry, the potential for a program of accelerated rehabilitation of abandoned oil facilities on the North Slope to serve as a vehicle for satisfying necessary compensation requirements.

⁵Avoidance as used in the Section 404(b)(1) Guidelines and this MOA does not include compensatory mitigation.

⁶It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed (40 CFR 230.10(c)).

an alternative must have the least adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites⁷ are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment. Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).

2. Minimization. Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit conditions. Subpart H of the Guidelines describes several (but not all) means for minimizing impacts of an activity.

[Section 230.75(d) states that those means of minimization include compensation for destroyed habitat.] Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all [other] appropriate and practicable minimization has been required. Compensatory actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site (on-site compensatory mitigation). If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area if practicable (i.e., in close physical proximity and, to the extent possible, the same watershed). In determining compensatory mitigation, the functional values lost by the resource to be impacted must be considered. Generally, in-kind compensatory mitigation is preferable to out-of-kind. There is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success. Because the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration should be the first option considered.

In the situation where the Corps is evaluating a project where a permit issued by another agency requires compensatory mitigation, the Corps may consider that mitigation as part of the overall application for purposes of public notice, but avoidance and minimization shall still be sought.

Mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Where a mitigation bank has been approved by EPA and the Corps for purposes of providing compensatory mitigation for specific identified projects, use of that mitigation bank for those particular

⁷Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes.

projects is considered as meeting the objectives of Section II.C.3 of this MOA, regardless of the practicability of other forms of compensatory mitigation. Additional guidance on mitigation banking will be provided. Simple purchase or "preservation" of existing wetlands resources may in only exceptional circumstances be accepted as compensatory mitigation. EPA and Army will develop specific guidance for preservation in the context of compensatory mitigation at a later date.

III. Other Procedures

A. Potential applicants for major projects should be encouraged to arrange preapplication meetings with the Corps and appropriate federal, state or Indian tribal, and local authorities to determine requirements and documentation required for proposed permit evaluations. As a result of such meetings, the applicant often revises a proposal to avoid or minimize adverse impacts after developing an understanding of the Guidelines requirements by which a future Section 404 permit decision will be made, in addition to gaining an understanding of other state or tribal, or local requirements.

B. In achieving the goals of the CWA, the Corps will strive to avoid [and minimize] adverse impacts and[, as part of that effort, where appropriate and practicable, to] offset unavoidable adverse impacts to existing aquatic resources. Measures which can accomplish this can be identified only through resource assessments tailored to the site performed by qualified professionals because ecological characteristics of each aquatic site are unique. Functional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field and/or the best professional judgment of federal and state agency representatives, provided such assessments fully consider ecological functions included in the Guidelines. The objective of mitigation for unavoidable impacts is to offset environmental losses. Additionally for wetlands, such mitigation should provide, at a minimum, one for one functional replacement (i.e., no net loss of values), with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan, recognizing that this minimum requirement may not be appropriate and practicable, and thus may not be relevant in all cases, as discussed in Section II.B of this MOA.⁸ In the absence of more definitive information on the functions and values of specific wetlands sites, a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values. However, this ratio may be greater where the functional values of the area being impacted are demonstrably high and the replacement wetlands are of lower functional value or the likelihood of success of the mitigation project is low. Conversely, the ratio may be less than 1 to 1 for areas where

⁸For example, there are certain areas where, due to hydrological conditions, the technology for restoration or creation of wetlands may not be available at present, or may otherwise be impracticable. In addition, avoidance, minimization, and compensatory mitigation may not be practicable where there is a high proportion of land which is wetlands.

EPAArmy MOA Concerning the Determination of Mitigation under the Section 404(b)(1) Guidelines

Page 6

the functional values associated with the area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.

C. The Guidelines are the environmental standard for Section 404 permit issuance under the CWA. Aspects of a proposed project may be affected through a determination of requirements needed to comply with the Guidelines to achieve these CWA environmental goals. Other reviews, such as NEPA and the Corps public interest review, cannot be used to nullify any Guidelines requirements or to justify less rigorous Guidelines evaluations.

D. Monitoring is an important aspect of mitigation, especially in areas of scientific uncertainty. Monitoring should be directed toward determining whether permit conditions are complied with and whether the purpose intended to be served by the condition is actually achieved. Any time it is determined that a permittee is in non-compliance with mitigation requirements of the permit, the Corps will take action in accordance with 33 CFR Part 326. Monitoring should not be required for purposes other than these, although information for other uses may accrue from the monitoring requirements. For projects to be permitted involving mitigation with higher levels of scientific uncertainty, such as some forms of compensatory mitigation, long term monitoring, reporting and potential remedial action should be required. This can be required of the applicant through permit conditions.

E. Mitigation requirements shall be conditions of standard Section 404 permits. Army regulations authorize mitigation requirements to be added as special conditions to an Army permit to satisfy legal requirements (e.g., conditions necessary to satisfy the Guidelines) [33 CFR 325.4(a)]. This ensures legal enforceability of the mitigation conditions and enhances the level of compliance. If the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.

F. Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of the agencies involved. Furthermore, formal policy guidance on or interpretation of this document shall be issued jointly.

G. This MOA shall take effect thirty (30) days after the date of the last signature below, and will apply to those completed standard permit applications which are received on or after the effective date. This MOA may be modified or revoked by agreement of both parties, or revoked by either party alone upon six (6) months written notice.

THE WHITE HOUSE

WASHINGTON

January 16, 1090

MEMORANDUM FOR BILL REILLY, EPA
MIKE DELAND, CEQ
DAVID BATES, CABINET AFFAIRS
ROBERT PAGE, CORPS
LAJUANA WILCHER, EPA
BOB GRADY, OMB
LINDY STUNTZ, DOE
TOM WEIMER, DOI
ELAINE CHAO, DOT

FROM: NANCY A. MALOLEY *NAM*

Attached is a draft press release on the Wetlands Task Force and its efforts to achieve a "no net loss" goal. Please provide comments by 5:00 p.m. today. My fax number is 456-7739.

Also attached is a clean copy of the MOA revised as of January 11. Please provide this to whomever you deem appropriate to get comments you feel are necessary on this MOA. Since the effective date is January 31, I am now looking to a meeting sometime Wednesday or Thursday of next week to go over any additional comments.

Attachments

DRAFT PRESS RELEASE

The Domestic Policy Council's Task Force on Wetlands has been directed to develop a comprehensive program to realize President Bush's goal of no net loss of wetlands.

The Task Force will consider a broad range of issues, including both regulatory and non-regulatory approaches to wetlands protection. The major vehicle for implementing the findings and conclusions of the Task Force will be a recommendation to the President regarding strengthening Executive Order 11990, which concerns wetlands protection.

The Task Force is chaired by Nancy Maloley, of the Office of Policy Development, and includes representatives from EPA, Army, DOT, DOE, DOA, DOJ, HUD, DOI, CEQ, and OMB.

The Task Force will accomplish its work through the use of small interagency groups, each of which will develop options on a particular issue, for consideration by the full Task Force. These groups will address such issues as the scope and meaning of the no net loss goal, specific Executive Order language required to ensure that federal policies assist in achieving the goal, the means for implementing the broad directives of an Executive Order, the role of market based incentives in wetlands protection, agricultural issues, and additional steps that may be necessary to implement the no net loss goal, including whether legislative changes are required.

In addition, the Task Force will pay particular attention to the unique geographic and hydrologic circumstances found in certain areas of both the Lower 48 and Alaska.

107907

State of South Carolina

Office of the Governor

CARROLL A. CAMPBELL, JR.
GOVERNOR

POST OFFICE BOX 11369
COLUMBIA 29211

January 25, 1990

The Honorable George Bush
President
The White House
Washington, D. C. 20500

Dear Mr. President:

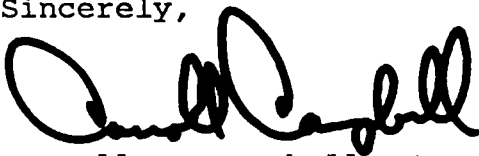
Last year I created the Governor's Freshwater Wetlands Forum and charged it with adopting a comprehensive wetlands policy for the State of South Carolina. The Forum was a logical and necessary follow-up to my participation on the National Wetlands Policy Forum which I Co-chaired.

The Forum has completed its report and endorsed the "no overall net loss" policy for South Carolina. The Forum utilized much of the National Wetlands Forum's concepts in developing a comprehensive state wetlands program. I've enclosed a copy of the report for your information and hope it will serve as a national model for other states to follow.

I look forward to working with you and other members of your Administration in protecting our valuable and natural resources and environment.

With best personal regards, I am

Sincerely,



Carroll A. Campbell, Jr.
Governor

CAC;jr/jdh

enclosure

THE WHITE HOUSE

WASHINGTON

February 2, 1990

MEMORANDUM FOR ANDY CARD

Assistant to the President and
Deputy to the Chief of Staff

FROM:

LANNY GRIFFITH
Special Assistant to the President for
Intergovernmental Affairs

SUBJECT:

Governor Campbell and MOA

At your request, I spoke with Governor Campbell this afternoon. He is quite familiar with the controversy surrounding the Memorandum of Agreement between EPA and the Corps of Engineers because he has been called and lobbied by EPA, the Corps, and DOT.

The Governor has read a cover memo concerning the MOA and has had it reviewed by his environmental advisors. He has not read the MOA itself or the supporting documents.

Governor Campbell has told Administrator Reilly that based on what he has seen, he has no objection if it does not change policy and in fact expedites procedure rather than make it more onerous. Based on what he has seen, he cannot make either determination with certainty.

Based on later conversations with DOT, he has concerns about the impact that this will have on building highways. He feels that our policy must allow for mitigation of free-standing wetlands and provide "reasonableness" and "least destructive" standards in locating highways. He is not aware that the MOA would disallow these standards; however, he would have serious problems with it if it does.

After a lengthy discussion, he characterized his position as follows: He has no basis to object to the MOA but also not enough information to recommend it.

PAGE TWO

He has left for a trip to Europe but said to get in touch with his office in Columbia if we need to track him down over there.

I have left with you copies of Governor Campbell's own report on wetlands as well as all the letters we have received on this issue. As you can see, the letters strongly favor reinstating the Memorandum of Agreement.

Please let me know if I can be of further assistance to you in any way.



STATE OF NEBRASKA

KAY A. ORR, GOVERNOR

January 23, 1990

President George Bush
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear President Bush:

It has come to my attention that the Memorandum of Agreement concerning the Section 404(b)(1) guidelines for the Clean Water Act was suspended. One of the things we treasure most in Nebraska is our clean water. That water serves as the source of life for our agricultural community and the habitat for our wildlife. In my view the Memorandum of Agreement serves well the interests of the environment, agriculture and industrial purpose.

Upon review of the Memorandum of Agreement, reinstatement of the memorandum is necessary in order to clarify federal wetlands policy. It will do that by mandating a single standard for the Corps of Engineers and the Environmental Protection Agency.

The wetlands of our state are an important resource for maintenance of water quality, and preservation of wildlife habitat. On behalf of the State of Nebraska reinstatement of the Memorandum is recommended.

Your strongest consideration of this matter is greatly appreciated.

Sincerely,



KAY A. ORR
Governor

KAO:mj:db

SE Griffith
LARRY

109419

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27603-8001

JAMES G. MARTIN
GOVERNOR

January 29, 1990

President George Bush
The White House
1600 Pennsylvania Avenue
Washington, D. C. 20006

Dear President Bush:

It has been brought to my attention that the proposed Memorandum of Agreement developed by the Department of the Army and the Environmental Protection Agency concerning the determination of mitigation under the Clean Water Act needs additional clarification before it is implemented. The proposed MOA would have an extremely disruptive effect on our state's highway improvement program. We are into our first year of a thirteen-year 9.2 billion dollar highway improvement program for North Carolina. Any action that would delay or alter these plans could result in severe economic consequences for the State.

The primary effect of the MOA would be to our highway expansion program, but we also fear it could have an adverse effect on our economic development plans, in which highways play an important part.

I am attaching a separate document that lists our five major areas of concern with the proposed MOA.

North Carolina has long recognized the need to address the protection and management of our wetland resources and the North Carolina Department of Transportation developed one of the first major wetland mitigation banks in the United States in 1985. Our bank now consists of approximately 1,200 acres of prime bottom-land hardwood forests and we have found the bank to be a very effective means of mitigation. Personally, I am a strong advocate of protecting our wetlands in a reasonable manner. I made the motion at the National Governors' Association meeting in February of 1989 to adopt a policy of a goal of no net loss of wetlands, with the States' responsibility to develop a plan to achieve that goal. I believe this is consistent with your policy, Mr. President, and

President George Bush
January 29, 1990
Page two

North Carolina is in the process of developing its plan on the protection of our wetlands through a legislative study commission and an inter-agency working group. Our State plan, I am confident, will not only protect our wetlands, but will also enable us to continue our economic development and improvement of our highway system.

I respectfully request that the implementation of the proposed Memorandum of Agreement be delayed until our concerns can be addressed.

Sincerely,


James G. Martin

JGM/cs

cc: Department of the Army
William Reilly, EPA
N. C. Congressional Delegation
N. C. Washington Office
Secretary Tommy Harrelson
Secretary William Cobey
Secretary James T. Broyhill

Attachment

ISSUES OF CONCERN
Proposed Memorandum of Agreement Between the
Department of the Army and the Environmental Protection Agency

1. The MOA states that mitigation decisions should not be based on characteristics of the proposed project such as need, social value, or the nature or investment objectives of the project sponsor. We disagree.
2. The MOA does not make allowances for "pipeline" projects which have already gone through considerable planning and coordination requirements thus creating uncertainty and posing undue hardships for all public and private parties concerned with such projects.
3. The MOA states that mitigation shall be based on the values and functions of the aquatic resources that will be affected without specifying how such values and functions are to be determined. We believe a great deal of delays would result, and time and money would be wasted waiting for answers to these basic questions.
4. The sequential mitigation process, required by the MOA, will be very time consuming and could delay many projects that are in the pipeline.
5. The proposed MOA was developed without the benefit of input from the public or from affected agencies and parties.



THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

February 2, 1990

MEMORANDUM FOR GOVERNOR JOHN SUNUNU
CHIEF OF STAFF
THE WHITE HOUSE

FROM: SAMUEL K. SKINNER

A handwritten signature, likely of Samuel K. Skinner, is written in dark ink to the right of the 'FROM:' line.

Enclosed is an updated list of projects that would be affected by the proposed MOA on highway projects. This list was prepared after consultation with Highway Directors all across the country.

I understand that you have received a number of letters from State Highway Directors and governors from all over the country. A representative sample is enclosed for your use. I believe this is a good sample of how people feel about MOA and why it can not be approved in its current form.

EFFECTS OF THE PROPOSED
EPA/ARMY MOA ON HIGHWAY PROJECTS

If the proposed MOA had been in effect it would have been impossible to develop projects that resulted in a net gain in wetland values because the mitigation would not have been possible before avoidance. Following are some examples:

1. Madison South Beltway in Wisconsin where 22 acres of wetlands were compensated by 20 acres of replacement wetlands, and 102 acres of wetlands placed in public ownership preventing from drainage not regulated by Section 404.
2. Pine Bluff bypass in Arkansas which is in development. Twenty-six acres of wetlands are compensated by creation of 100 acres and purchase of 160 acres of existing wetlands, protecting them from drainage not regulated by Section 404.
3. Rancocas Creek Bridge in New Jersey where 2.3 acres of wetlands were compensated by creating 4.5 acres that have successfully duplicated the original value acre for acre resulting in a net gain of 2.2 acres.

Following projects are examples of projects that could not have been built under the MOA:

Route 25	Bourne, MA
I-495	Marsh Field, MA
I-90	Sterling, MA
Bobby Jones Expressway	Augusta, GA
Torras Causeway	Brunswick to Simons Island, GA
I-95	South Carolina to Florida
I-16	Macon to Savannah, GA
Bridge over Anasco River	Mayaguez, PR
Bridge over Herrera River	Rio Grande, PR
PR-2/Bridge over Camuy River	Camuy, PR
Bridge over Boca Prieta Channel	Humacao, PR
I-15	Bernice-Basin, MT
US 12	Avon-Elliston, MT

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US 12	Helena West, MT
US 12	Ryegate East, MT
I-691	From I-91 westerly to I-84, CT
Central CT Expressway Route 9	I-91 - west-north to I-84, CT
I-91	Hartford north to MA State line, CT
Route 7	At northern terminus at I-84 Danbury - at southern terminus at I-95 Norwalk, CT
I-95 Baldwin Bridge & Approaches	I-95, CT Saybrook to Old Lyme
I-164, Evansville Bypass	Evansville, IN
US 50, Washington Bypass	Washington, IN
US 12/20 Spur	Gary, IN
US 24, South Bend Bypass	South Bend, IN
US 54	Kingman Co., KS
US 78	Itawamba Co., MS
US 98	Forrest & Perry Counties, MS
US 82	Lowndes Co., MS
US 49W	Sunflower Co., MS
US 98	George Co., MS
US 78	Marshall Co., MS
US 78	Benton Co., MS
US 45	Lauderdale Co., MS
US 98	Forrest & Perry Counties, MS
US 84	Wayne Co., MS
SR 25	Leake Co., MS

3

US 45	Alcorn Co., MS
US 78	Itawamba Co., MS
US 84	Jones Co., MS
US 49W	Sunflower Co., MS
US 61	Coahoma Co., MS
K & L Street Connector (Capital Parkway West)	Lincoln, NE
I-287	northern NJ
Trenton Complex (I-295)	Trenton, NJ
State Route 18	Monmouth Co., NJ
State Route 92	Central, NJ
State Route 24	Morris Co., NJ
State Route 55	Gloucester Co., NJ
State Route 152	near Atlantic City, NJ

Following proposed projects will be in jeopardy under the MOA:

Central Artery/ Third Harbor Tunnel	Boston, MA
Beverly Salem Bridge	Salem, MA
Route 57	Agawam, MA
US 17	Richmond Hill, GA
Harry S. Truman Pkwy.	Savannah, GA
Fall Line Freeway	Macon, GA
US 1	Folkston to Waycross, GA
US 82	Jesup to Ludowicki, GA
PR-26 Baldorioty Ave.	San Juan, PR
PR-53 Relocation of PR-3	Humacao, Yabucoa, PR

PR-3 65th Infantry Ave.	Carolina, PR
PR-167 Bayamon-Naranjito	Bayamon, PR
PR-109 Anasco Bypass	Anasco, PR
PR-2	Mayaguez, Aguadilla, PR
PR-406	Anasco, PR
PR-119	Camuy, PR
US 93	Darby N. & S., MT
Route 78	Absarokee-Columbus, MT
Relocated Route 6	Bolton to Willamantic, CT
Route 6	Bolton to Rhode Island State line, CT
Route 11 Extension	Route 82, CT (Salem-4 corners) to I-95
Route 7	Completion of construction between Norwalk and Danbury, CT
I-291	From I-91 - east and South to I-84, CT
Route 72	Plainville westerly to I-84, CT
US 231, West Lafayette Bypass	West Lafayette, IN
US 20	Steuben Co, IN
US 24	Wabash to Huntington, IN
I-265 extension	From I-65 east to SR 62 in Clark Co., IN
National Lakeshore Access Road	Michigan, IN
96th Street extension	US 31 to I-69 in Hamilton and Marion Counties, IN
US 50	Knox Co., IN
South Lawrence Trafficway	Lawrence, KS

US 50	Lyon Co., KS
SE Corridor Improvement	Pittsburg to Wichita, KS
US 61	Claiborne Co., MS
US 72	Alcorn Co., MS
US 72	Tippah-Alcorn Co., MS (State Route 15 to Theo)
US 82	Webster Co., MS (Eupora to Mathison)
US 82	Montgomery Co., MS
NJ Turnpike	northern NJ
US Route 206	central NJ
State Route 147	Cape May Co., NJ
County Route 522	Middlesex Co., NJ
Eisenhower Parkway	Essex Co., NJ

These are representative of all the other States which see unjustified rigidity in the MOA that would create enormous obstacles for highway projects with the real possibility that the end result would be a net loss of wetlands because mitigation options especially those that would take wetlands into the public domain thereby protecting them in perpetuity from draining by private interests would be severely diminished.



The State of New Hampshire Department of Transportation

John W. Morton Building

Hazen Drive

P.O. Box 483

Concord, N.H. 03302-0483

Wallace E. Stickney, P.E.
Commissioner

Tel: 603-271-3734

Fax: 603-271-3814

January 19, 1990

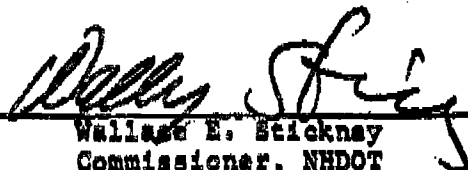
Eugene W. Ciolekley
Federal Highway Administration
(Telecopy)

Re: Your request to review proposed revision to the EPA and the Department of Army's MOA regarding wetlands.

I have attached a copy of a statement which was made for me before Congressman Laughlin in a session here in New Hampshire today. It sets forth my over-riding concern about the MOA which your proposed amendments do not reflect as yet and that is the MOA would have people who are narrowly focused on wetlands issues make decisions for other expert federal agencies and in contravention of the balancing requirements of the National Environmental Policy Act.

In fact, it repeals NEPA, it is legislative and regulatory change by interagency agreement and is illegal as hell. I wish that the Federal Highway Administration would stand up and say so. Do you really want to delegate your (FHWA's) responsibility for safety to EPA and the Corps?

Beyond that very important basic issue, I am faxing back your draft with hand written comments. This is the best we are going to be able to do as of the close of business today but we will have more on Monday.


Wallace E. Stickney
Commissioner, NHDOT

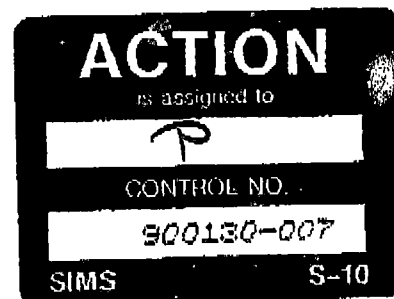


ROBERT A. INNOCENZI
ACTING COMMISSIONER

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

1035 PARKWAY AVENUE
CN 600
TRENTON, N.J. 08625
609-530-3535

January 26, 1990



Honorable John Sununu
Chief of Staff to the President
The White House
1600 Pennsylvania Avenue
Washington, DC 20503

Dear Governor Sununu:

We have been advised that you recently met with Secretary Skinner, regarding the recently drafted memorandum of agreement (MOA) between the Environmental Protection Agency (EPA) and the Army Corps of Engineers on wetland mitigation. We would like to take this opportunity to present the concerns of the New Jersey Department of Transportation (NJDOT) on this issue.

The November 15, 1989 "Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(B) (1) Guidelines," in its current revised form, will perpetuate and exacerbate a duplicative and grossly inefficient decision making process regarding wetland impacts on federally funded transportation projects. The 404 program, for years, has plagued state transportation agencies with costly delays. In general, we believe that the MOA should acknowledge the unique position of state DOT's, avoid the continued waste of precious transportation dollars, and recognize the input of the United States Department of Transportation (USDOT).

First, we should point out that the NJDOT has, over the years, taken great care in avoiding and mitigating wetland impacts on all projects. With the recent enactment of a state freshwater wetland protection act, NJDOT has been working in close partnership with our state wetland protection agency (The New Jersey Department of Environmental Protection), to continue developing environmentally acceptable projects. We do not question the value of wetland protection -- in fact we strongly support preservation and mitigation (and in New Jersey, we generally replace wetlands at a ratio of two

for every one acre lost) -- but we believe the federal review process is duplicative, flawed, and unfortunately, left unresolved in the current MOA.

Before elaborating on specific problems, we would emphasize that in contrast to the "private sector," state transportation agencies are in a unique position, resulting from the application of the National Environmental Policy Act (NEPA) and Section 404 of the Clean Water Act to their programs. The situation can be described as a "crossfire" between two different federally imposed standards by three federal agencies at two separate phases of project development.

First, to get funding approval from the Federal Highway Administration (FHWA), state DOT's must conduct an exhaustive and lengthy analysis of project alternatives, and select a project design to satisfy the NEPA standard; one that balances all social, economic and environmental considerations. Later, to obtain a section 404 permit from the Army Corps, the DOT's must conduct yet another exhaustive and lengthy analysis of project alternatives, but this time, to satisfy a different standard known as the "Section 404(B)(1)" standard. Unlike the NEPA standard, this standard, jointly administered by EPA and the Corps, is solely concerned with selecting a design that avoids and minimizes impacts to wetlands.

The result is that the transportation improvement initiated by the state DOT culminates in one project design approved by the FHWA, followed later by a different project design approved by the Corps. This "crossfire" has a tremendous cost in terms of time, money and governmental credibility. (In contrast, projects which do not use federal funds and require federal approval only from the Army Corps are subject to only one alternatives analysis, administered by the Corps.)

Another area where state DOT's are in a unique position in contrast to the "private sector," is that their projects are designed with the overall public interest in mind. Unfortunately, the way the 404 program is being administered, these two very important distinctions are unrecognized, and are not addressed in the MOA. The end result is that the public is getting less for its transportation dollars.

Because state DOT's are major participants in the Section 404 program, with billions of dollars worth of transportation projects subject to approval, we firmly believe that important opportunities exist for EPA, the Corps and USDOT to improve program delivery for each agency through creative administration of the Clean Water Act and NEPA. The subject MOA is just such an opportunity.

Four specific points should be addressed in the development of an acceptable MOA:

1. USDOT SHOULD BE MADE A PARTY TO THE PROPOSED AGREEMENT. Because transportation programs and projects are significant "users" of the 404 program, USDOT should participate in the development and execution of the document. USDOT is in the best position, at the federal level, to articulate the concerns of the state DOT's.

2. CLEAR PROVISIONS SHOULD BE INCLUDED IN THE AGREEMENT TO ACCEPT THE OUTCOME OF ONE ALTERNATIVES ANALYSIS ACCEPTABLE TO EPA, THE CORPS AND USDOT. Section III. C. of the current agreement indicates that this is not the intent of the federal government.

3. DECISION MAKING ON APPROPRIATE MITIGATION OF WETLAND IMPACTS SHOULD BE SIMPLIFIED. Since many transportation projects, big and small, involve minor wetland impacts, complicated and lengthy procedures cited in the current MOA (none of which are universally accepted by the federal government) which lead to inevitable conflicts in judgment, should be replaced with a programmatic approach. A size threshold should be established (such as up to two or three acres) for which there would be an automatic one to one -- or even two to one -- compensation ratio. In addition, wetland banking for such small impacts should be the first option, not the last, as currently proposed. As public agencies with well planned yearly construction programs, state DOT's are in a prime position to implement wetland banking. The result would be speedier decisions with no overall loss to wetlands. Additionally, innovative mitigation should be provided for and encouraged where feasible.

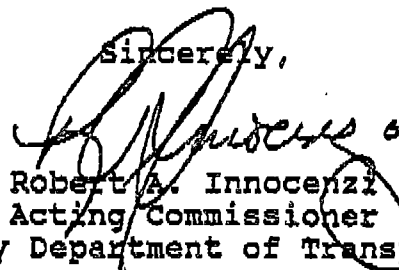
4. THERE SHOULD BE A CATEGORICAL FINDING FOR ALL TRANSPORTATION PROJECTS IN THE AGREEMENT THAT, ALTHOUGH NOT WATER DEPENDENT (with the exception of certain Coast Guard and port projects), SUCH PROJECTS SERVE THE OVERALL PUBLIC BENEFIT AND BY DEFINITION, AUTOMATICALLY COMPLY WITH THE WATER DEPENDENCY PROVISION OF SECTION 404(B)(1). Currently, project need is established during the NEPA stage of project development, and is subject to FHWA approval. It serves no useful public purpose to spend years repeating this exercise for the Corps of Engineers and EPA, with possibly a different project as a result. The federal agencies should provide guidance to the states on how to comply with a unified federal wetland mitigation policy, and such compliance should be mandated only once, not several times.

Although not directly relevant to the MOA, we ask that the Federal Government recognize that the outcome of approvals under Section 404 of the Clean Water Act generates substantial costs to avoid, minimize and replace wetlands lost to projects. Full federal funding should therefore be made available to cover these costs as legitimate project expenses.

In closing, we wish to stress that the problems presented herein are long-standing. The proposed MOA unfortunately will not result in increasing the Federal Government's efficiency in the wetland mitigation process.

Your assistance is therefore respectfully requested. Please feel free to contact me should any additional information be required. We thank you for your concern.

Sincerely,


Robert A. Innocenzi
Acting Commissioner

New Jersey Department of Transportation

cc: ¹ Honorable Samuel K. Skinner, Secretary of Transportation



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION
HARRISBURG, PENNSYLVANIA 17120

OFFICE OF
SECRETARY OF TRANSPORTATION

January 25, 1990

EPA/Army Memorandum of Agreement

Mr. John H. Sununu
Chief of Staff To The President
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. Sununu:

I am writing to you to express our views on the Memorandum of Agreement (MOA) Between the Environmental Protection Agency (EPA) and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines. Since my agency is routinely involved with complying with the mitigation requirements of the Section 404 Regulatory Program, and often experiences difficulty in working with the many state and federal agencies involved in the permit application review process, I feel it is important to submit our comments and suggestions on this MOA and the Section 404 Program to you.

Background

The State and Federal resource agencies in Pennsylvania began to use the Section 404(b)(1) Guidelines in reviewing our State and Federal waterway permit applications several years ago. This occurred when we were in the midst of designing and constructing several major Interstate Highway completion projects and several hundred critical bridge replacement projects involving waterway and wetland encroachments. Due to the importance of not having project delays caused by inadequate alternatives analysis and mitigation proposals, we learned early how to integrate the required Section 404(b)(1) alternatives analyses and mitigation into our project development process.

Although we have been successful in progressing with our transportation improvement programs while complying with the Section 404(b)(1) Guidelines, we have expended an extraordinary amount of time, manpower and financial resources closely coordinating with the resource agencies involved in the waterway permit process.

Our public involvement and coordination efforts with agencies outside the waterway permit process are routine as compared to the coordination effort required to effectively

EPA/Army Memorandum of Agreement
Page 2
January 25, 1990

deal with the multiple State and Federal agencies involved in the waterway permit process. In Pennsylvania, waterway permit applications are reviewed by the PA Department of Environmental Resources, the PA Game Commission, The PA Fish Commission, the U.S. EPA, the U.S. Fish and Wildlife Service and four (4) Army Corps of Engineers Districts.

In examining our project development process as it has evolved to respond to the Section 404(b)(1) requirements for streamlining opportunities, we find that it is not the substantive requirements (avoidance, minimization and mitigation) of the (b)(1) Guidelines that cause the most difficulties, it is the coordination and permit application review process. Among the problems we experience in coordinating with the resource agencies are:

- o Inadequate levels of resource agency review staff resources to participate in the project development process as critical location and design decisions are made.
- o Lack of consistent and continuous agency representation.
- o Disagreement among the resource agency staff as to appropriate technical analysis methodologies, particularly in the assessment of wetland values and functions.
- o Absence of a single point of contact or resource agency review coordinator to pull the agency position(s)/comments together.
- o A high level of frustration from their inability to totally prevent the loss of aquatic resources through the existing laws and regulations.

We also find the lack of effective and widely accepted environmental analysis tools based on sound research and training in their use to be serious problems. Analysis techniques and methodologies for wetland delineation, wetland value and functional assessment, wetland impact assessment and mitigation design have been slow to evolve and are not widely accepted. Availability of training for the users has been limited, at best.

Comments on the MOA

Based on our experience in complying with the Section 404 (b)(1) Guidelines and our review of the content of the MOA, we do not see the MOA affecting much change in how the Guidelines are applied to the waterway permit application process for transportation improvement projects in Pennsylvania. We would hope that the MOA will result in a more consistent application of the Guidelines by the resource agencies.

EPA/Army Memorandum of Agreement
Page 3
January 25, 1990

Although we support implementation of the MOA, we feel that it will take more than this MOA to improve the effectiveness of the Section 404 (b) (1) Guidelines. Our suggestions for actions the Administration could take to improve the Section 404 Program as well as the parallel state waterway permit programs are briefly outlined below.

Suggestions

We suggest that the following actions be taken to improve the Section 404 Program and the state waterway permit programs:

1) The Federal agencies involved in the Section 404 Program should be parties to this MOA, such as the Federal Highway Administration and the U.S. Fish and Wildlife Service.

2) The MOA should include provisions for the EPA and the Corps to develop a plan to implement the effective use and application of the Section 404(b) (1) Guidelines. We would hope that the agencies in developing this plan would consider the adequacy of review staffing levels and budgets; the development and use of widely accepted analysis techniques and methodologies; training for permit review staff and applicants; coordinated research on the design of wetland mitigation measures; and the development of guidance for applicants to use in integrating the Section 404 (b) (1) Guideline requirements into their program and project development processes.

I appreciate the opportunity to take part in the review of this important document and to offer our comments and suggestions.

Sincerely,



Howard Yerusalim, P.E.
Secretary, Department of Transportation

**WEST VIRGINIA DEPARTMENT OF HIGHWAYS**

State Capitol Complex
Building Five

Charleston, West Virginia 25305

January 18, 1990

GASTON CAPERTON
GOVERNOR

FRED VANKIRK
ACTING COMMISSIONER
STATE HIGHWAY ENGINEER

Mr. John Sununu
Chief of Staff
White House
Washington, D.C. 20500

Dear Mr. Sununu:

Recently the US Army Corps of Engineers and the US Environmental Protection Agency executed the enclosed Memorandum of Agreement (MOA) which addresses the procedures for wetland mitigation. These procedures were drafted to comply with Section 404 (b)(1) Guidelines of the Clean Water Act.

The Department of Transportation is very concerned with certain portions of the MOA. This MOA was to go into effect on December 15, 1989 but it has been delayed until the end of January 1990.

The proposed MOA has far reaching consequences and as such could have major effects on the social, economic and environmental aspects of our society. Being of such magnitude, it would seem that at least the requirements of the Administrative Procedures Act should be applied.

The MOA does not allow other concerns to be properly involved in the decision making process since Paragraph B, Page 2 of the MOA, indicates the determination of mitigation decisions "...shall not be based upon characteristics of the proposed project such as need, societal value, or the nature or investment objectives of the project's sponsor." On Page 5 in Section C, the MOA stipulates that "Other reviews, such as NEPA and the Corps public interest review, cannot be used to nullify any Guidelines requirements or to justify less rigorous Guidelines evaluations."

It appears that the total benefit to the public or the economics of an area is to be ignored and not allowed in any consideration of mitigation strategies. NEPA has required a balance of effects to be considered prior to decision-making in the past, now this MOA appears to place wetlands to the top of all considerations. Originally, the NEPA process required all aspects, social - economical - environmental, to be considered and evaluated. It appears that the social and economic aspects must take a back seat to historical preservation, hazardous waste, endangered species, recreational lands and now wetlands.

We have found that in the consideration of wetlands, the regulatory agencies have no real fiscal or social limits. It is apparent that the total outlay of public funds is not a major concern.

Mr. John Sununu

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January 18, 1990

In the case of the New River Parkway, as one example, the intersection of the water surface with the bank has been determined to be a strip riverine wetland. Much of this riverbank was constructed of rock fill approximately twenty years ago when the existing road was widened. Due to the terrain of the area, it will be necessary to fill into the New River or to build massive retaining walls to keep from encroaching upon this area. While the details of this project have not been finalized, we have been informed in discussions that we will not be able to touch this area regardless of the cost. In some areas where the terrain is less harsh, the alternate is to take homes instead of encroaching on the riverine wetland. We feel that the intersection of the riverbank and the water is certainly a wetland but if we can not touch the area, the social and economic costs will soar.

We are working with the resource agencies and are considering these effects in the environmental impact statement but are very concerned with the final details.

We understand that the OMB has requested that no agency set policies on the "No Net Loss" issue prior to completion of the President's Domestic Council Policy Task Force deliberations. This MOA seems to be in conflict with that request.

We request that consideration be given to our comments and the untimeliness of the MOA.

Very truly yours,

ORIGINAL SIGNED BY
FRED VanKIRK

Fred VanKirk
Acting Commissioner -
State Highway Engineer

FV:Rh

Enclosure

cc: Governor Gaston Caperton

Mr. Samuel Skinner, IV
Secretary, US Department of
Transportation

/Mr. Thomas Larson, Administrator
Federal Highway Administration

Mr. Billy Higginbotham
Division Administrator
Federal Highway Administration

ARKANSAS STATE HIGHWAY COMMISSION**RAYMOND PRITCHETT, CHAIRMAN**
MARSHALL**RON HARROD, VICE CHAIRMAN**
PRESCOTT**ROONEY E. SLATER**
JONESBORO**L.W. "BILL" CLARK**
HOT SPRINGS**BOBBY HOPPER**
SPRINGDALE

P.O. BOX 2261

LITTLE ROCK, ARKANSAS 72203

TELEPHONE No. (501) 569-2000

FAX No. (501) 569-2400

MAURICE SMITH
DIRECTOR OF
HIGHWAYS AND TRANSPORTATION**DAN FLOWERS**
ASSISTANT DIRECTOR OF
HIGHWAYS AND TRANSPORTATION**CHARLES VENABLE**
CITY ENGINEER

January 19, 1990

The Honorable John H. Sununu
Chief of Staff to the President
The White House
1600 Pennsylvania Avenue N.W.
Washington, D.C. 20500

Dear Mr. Sununu,

I am writing to express my concern regarding the direction in which the Federal Regulatory Agencies are proceeding in wetland protection. The Arkansas Highway and Transportation Department is acknowledged nationally as a leader in the protection of the environment. The Department has received this reputation while achieving its primary goal of providing an excellent transportation system for the citizens of Arkansas.

Strict adherence to the Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency concerning mitigation could have a negative effect on protection of the environment, including wetlands. Had this Memorandum been in effect in 1979, the Department would not have acquired 175 acres of bottomland hardwood wetlands in conjunction with the construction of U.S. 67 and would not have conducted a ten year study of the effects of highway fill on bottomland hardwoods. This monitoring program, a condition of the 404 permit, will provide ten years of data and is expected to be the major baseline research investigation on bottomland hardwoods wetlands in the nation. Another project of significant environmental consequence and benefit which would have been affected by the proposed MDA is the Bayou Bartholomew Expressway in Jefferson County. This project resulted in the destruction of 26 acres of natural wetlands but through consultation and cooperation with the resources and regulating agencies, approximately 100 acres of wetlands will be created and enhanced and 158 acres of existing bottomlands hardwood/wetlands will be purchased. The mitigation plan to lessen the wetland and flooding impacts made the selected alternative acceptable.

ARKANSAS STATE HIGHWAY COMMISSION
LITTLE ROCK, ARKANSAS

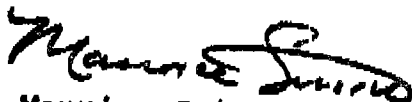
The Honorable John H. Sununu
Page 2
January 19, 1990

The primary concern with the Memorandum is two-fold:

- (1) That wetlands preservation has become a single issue determinant for alternative selection, to the detriment of other legitimate environmental, cultural, social and design factors and irrespective of transportation needs.
- (2) That alternative selection is viewed in a vacuum with no minimizing or mitigation features. In many instances, with appropriate mitigation, the environmental benefits can actually outweigh the negative aspects of an alternative.

The Department will continue to seek ways to lessen environmental impacts while carrying out its primary mission. However, we fully support the Federal Highway Administration and the Department of Transportation in their efforts to promote utilization of the NEPA process to provide a balanced analysis for all environmental, economic, and transportation needs concerns. We further request that implementation of this Memorandum be postponed until a comprehensive national wetlands and no-net-loss policy is fully developed and adopted through full involvement of the affected agencies.

Sincerely yours,



Maurice Smith
Director

MS:ds

Northern District Commissioner

Wayne O. Burkes
Central District CommissionerRonnie Shows
Southern District CommissionerJULIE A. LADD
DirectorJames D. Quin
Chief Engineer

Mississippi State Highway Department / P.O. Box 1850 / Jackson, Mississippi 39215-1850 / FAX (601) 359-2233

January 22, 1990

The Honorable John H. Sununu
Chief of Staff to the President
Executive Office of the President
The White House
1600 Pennsylvania Avenue
Washington, D. C. 20500

Dear Mr. Sununu:

RE: Army Corps of Engineers and U. S.
Environmental Protection Agency
Memorandum of Agreement on Wetland
Mitigation

We have reviewed the recently executed Memorandum of Agreement between the Army Corps of Engineers and the U. S. Environmental Protection Agency on Wetland Mitigation and are greatly concerned with the content and the procedures of its execution.

The procedures for the issuance of permits by the Secretary of Army through the Corps of Engineers for the discharge of dredged or fill material into waters of the United States as provided in Section 404(a) of the Clean Water Act were promulgated through the rulemaking procedures of the U. S. Government and appear at 33 CFR Part 323 and related Parts 320 through 330.

The guidelines required in Section 404(b)(1) of the Clean Water Act for use by the Secretary of Army (Corps of Engineers) in specifying disposal sites were developed by the Administrator of the Environmental Protection Agency and the Secretary of Army as required through the rulemaking procedures of the U. S. Government.

Should the Administrator of the Environmental Protection Agency determine that an activity proposed for permitting would have an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fishery area (including spawning and breeding areas), wildlife, or recreational areas, he or she is authorized to prohibit the specification of the site as provided in Section 404(c) of the Clean Water Act and procedures promulgated through the rulemaking procedures of the U. S. Government at 40 CFR Part 231.

Mr. John H. Sununu
Page 2
January 22, 1990

The existing procedures and guidelines establish a sensible and workable process for carrying out the provisions of the law.

The process has worked very well in many cases in the administration of the Federal Aid Highway Program, resulting in the issuance of thousands of permits on a timely basis over the years. Likewise, many problems and delays have been encountered regarding what are wetlands - where do they begin and end?, practicable alternatives to avoid or minimize impacts to wetlands and practical mitigation of unavoidable wetland losses. The degree varies depending on the agency personnel administering the permitting process and those of commenting agencies, principally U. S. Fish and Wildlife and EPA.

Our problems with the EPA involvement in most recent years have been their contention that the 404(b)(1) Guidelines embodied the concept of "No Net Loss of Wetlands", both value and area.

It would appear that EPA has worn the Corps of Engineers thin and is trying by the MOA to inject the guidelines with irony.

We believe the MOA is not needed and is not the vehicle for amending policies and guidelines prologmated through the rulemaking process.

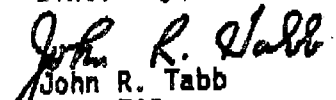
We believe that the "No Overall Net Loss" concept should not be advanced until the President's Domestic Policy Council's Task Group completes deliberation on the issue.

We, also, think the Task Group should look into the New Federal Policy for Delineating Wetlands with particular reference to disturbed areas in conjunction with any policy established for "No Overall Net Loss".

We are attaching copies of two letters with attachments written on the subjects of "No Net Loss" and the "Delineation Manual" which expresses some of our feelings about the subjects.

Thank you for the opportunity of expressing our concerns on a matter vital to the continuance of our highway program.

Sincerely,


John R. Tabb
DIRECTOR

JRT:je

Attachments

Mr. J. M. Tumlin

State
of
1/126IN1A

Sumlin M
Turner / 2/1/90
Kirk
Wooten

January 22, 1990

Mr. John Sununu
Chief of Staff
White House
Washington, D.C. 20500

Dear Mr. Sununu:

The Virginia Department of Transportation (VDOT) completely supports the Federal Highway Administration's (FHWA) call for a comprehensive national wetlands policy to be developed and implemented by a new Executive Order to replace the existing Executive Order 11990 dated May 24, 1977. Until such a policy is developed with adequate opportunity for all affected agencies to participate, new policies, regulations and Memoranda of Agreement (MOA) such as the Environmental Protection Agency (EPA)/Department of Army (Army) MOA on wetlands mitigation should be placed on hold.

The new Executive Order should define "No Net Loss" as it relates to wetlands and articulate its implementation by the federal agencies. Further, the Executive Order should integrate the EPA/Army 404 process with the National Environmental Policy Act (NEPA) which could reduce paperwork and enhance overall environmental protection of our natural resources.

Our major concern with the EPA/Army MOA is its potential to disrupt, cause major delays, if not complete cancellation, of many public work projects by its automatic presumption that alternatives exist for non-water dependent projects (highways) which impact wetlands. This provision discounts all other environmental concerns and elevates wetlands to a sacred status. In Section III C, the EPA/Army MOA specifically states that NEPA cannot be used to nullify any guideline requirements. NEPA was designed to provide a fair and adequate balancing of all environmental concerns with full public participation.

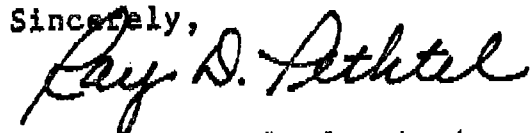
Mr. John Sununu

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January 22, 1990

While we fully support the protection and conservation of the nation's wetlands, we believe that the EPA/Army MOA has enormous potential to disrupt the nation's highway program. Our only request is that the FHWA be given full opportunity to identify and articulate the highway program needs prior to the adoption of any further wetland regulations or MOA.

Sincerely,



Ray D. Pethtel, Commissioner

MHT/jm

cc: Mr. O. K. Mabry
Mr. J. S. Hodge
Mr. R. L. Hundley
Mr. M. H. Thomas
Mr. J. M. Tumlin



THE SECRETARY OF TRANSPORTATION

OF THE PROPOSED
ON HIGHWAY PROJECTS

WASHINGTON, D.C. 20590

EFFECTS
EPA/ARMY MOA

February 2, 1990

MEMORANDUM FOR GOVERNOR JOHN SUNUNU

CHIEF OF STAFF

THE WHITE HOUSE

FROM:

SAMUEL K. SKINNER

Enclosed is an updated list of projects that would be affected by the proposed MOA on highway projects. This list was prepared after consultation with Highway Directors all across the country.

I understand that you have received a number of letters from State Highway Directors and governors from all over the country. A representative sample is enclosed for your use. I believe this is a good sample of how people feel about MOA and why it can not be approved in its current form.

If the proposed MOA had been in effect it would have been impossible to develop projects that resulted in mitigation would not have been possible before avoidance. Following are some examples:

1. Madison South Beltway in Wisconsin compensated by 20 acres of wetlands placed in public ownership preventing from drainage regulated by Section 404.

Following projects are examples of under the MOA:

Bourne, MA	US 12/20 Spur	Route 25, Gary, IN
Marsh Field, MA	US 24, South Bend Bypass	South Bend, IN
Sterling, MA	US 54	Kingman Co., KS
Augusta, GA	US 78	Itawamba Co., MS
Brunswick to Simons Island, GA	US 98	Forrest & Perry County
South Carolina to Florida	US 82	Torras Causeway
Macon to Savannah, GA	US 49	Lowndes Co., MS
Mayaguez, PR	US 98	Sunflower Co., MS
Rio Grande, PR	US 78	George Co., MS
Camuy, PR	US 78	Marshall Co., MS
Humacao, PR	US 98	Benton Co., MS
Bernice-Basin, MT	US 84	PR-2/Bridge over Camuy River
Avon-Elleston, MT	SR 25	Lauderdale Co., MS
		Bridge over Boca Prieta Channel
		Wayne Co., MS
		US 12
		Leake Co., MS

EFFECTS OF THE PROPOSED EPA/ARMY MOA ON HIGHWAY PROJECTS

If the proposed MOA had been in effect it would have been impossible to develop projects that resulted in a net gain in wetland values because the mitigation would not have been possible before avoidance. Following are some examples:

1. Madison South Beltway in Wisconsin where 22 acres of wetlands were compensated by 20 acres of replacement wetlands, and 102 acres of wetlands placed in public ownership preventing from drainage not regulated by Section 404.
2. Pine Bluff bypass in Arkansas which is in development. Twenty-six acres of wetlands are compensated by creation of 100 acres and purchase of 160 acres of existing wetlands, protecting them from drainage not regulated by Section 404.
3. Rancocas Creek Bridge in New Jersey where 2.3 acres of wetlands were compensated by creating 4.5 acres that have successfully duplicated the original value acre for acre resulting in a net gain of 2.2 acres.

Following projects are examples of projects that could not have been built under the MOA:

Route 25	Bourne, MA
I-495	Marsh Field, MA
I-90	Sterling, MA
Bobby Jones Expressway	Augusta, GA
Torras Causeway	Brunswick to Simons Island, GA
I-95	South Carolina to Florida
I-16	Macon to Savannah, GA
Bridge over Anasco River	Mayaguez, PR
Bridge over Herrera River	Rio Grande, PR
PR-2/Bridge over Camuy River	Camuy, PR
Bridge over Boca Prieta Channel	Humacao, PR
I-15	Bernice-Basin, MT
US 12	Avon-Elliston, MT

US 12	Alcorn Co., MS	US 45	2
US 12	Helena West, MT	US 72	
US 12	Ryegate East, MT	US 84	
I-691	From I-91 westerly to I-84, CT		
Central CT Expressway	I-91 - west-north to I-84, CT		
Route 9	Hartford north to MA State line, CT		
I-91	At northern terminus at I-84		
Route 7	Danbury - at southern terminus at I-95 Norwalk, CT		
I-95	I-95, CT		
Baldwin Bridge & Approaches	Saybrook to Old Lyme		
I-164, Evansville Bypass	Evansville, IN		
US 50, Washington Bypass	Washington, IN		
US 12/20 Spur	Gary, IN		
US 24, South Bend Bypass	South Bend, IN		
US 54	Kingman Co., KS		
US 78	Itawamba Co., MS		
US 98	Forrest & Perry Counties, MS		
US 82	Lowndes Co., MS		
US 49W	Sunflower Co., MS		
US 98	George Co., MS		
US 78	Marshall Co., MS		
US 78	Benton Co., MS		
US 45	Lauderdale Co., MS		
US 98	Forrest & Perry Counties, MS		
US 84	Wayne Co., MS		
SR 25	Leake Co., MS		

Following proposed projects and studies:

Central Expressway

Third Harbor Tunnel

Sevier County Bridge

Route 27

US 17

Henry B. Fowler Hwy.

Fall Line Freeway

US 1

US 82

PR-26 Baldersheim Ave.

PR-52 Baldersheim Ave.

3

3

US 45 Carolina, PR Alcorn Co., MS
 US 78 Itawamba Co., MS
 US 84 Jones Co., MS
 US 49W Sunflower Co., MS
 US 61 Coahoma Co., MS
 K & L Street Connector
 (Capital Parkway West) Lincoln, NE
 I-287 northern NJ
 Trenton Complex (I-295) Trenton, NJ
 State Route 18 Monmouth Co., NJ
 State Route 92 Central, NJ
 State Route 24 Morris Co., NJ
 State Route 55 Gloucester Co., NJ
 State Route 152 near Atlantic City, NJ

Following proposed projects will be in jeopardy under the MOA:

Central Artery/
 Third Harbor Tunnel Boston, MA
 Beverly Salem Bridge Salem, MA
 Route 57 Agawam, MA
 US 17 Richmond Hill, GA
 Harry S. Truman Pkwy. Savannah, GA
 Fall Line Freeway Macon, GA
 US 1 US 31 to I-95 in Marietta, GA
 US 82 Jesup to Ludowicki, GA
 PR-26 Baldorioty Ave. San Juan, PR
 PR-53 Relocation of PR-3 Humacao, Yabucoa, PR

PR-3 Baldorioty Ave.

PR-167 Baldorioty Ave.
Naranjo

PR-109 Baldorioty Ave.

PR-108

PR-109

PR-110

PR-111

PR-112

PR-113

Route 11 Extension

Route 12

Route 13

Route 14

US 931, Baldorioty Ave.
Naranjo

US 932

US 933

US 934

Baldorioty Ave.
Naranjo

9th Street extension

US 935

Baldorioty Ave.
Naranjo

4

PR-3 65th Infantry Ave.	Carolina, PR	US 50
PR-167 Bayamon-Naranjito	Bayamon, PR	SS Corridor Improvement
PR-109 Anasco Bypass	Anasco, PR	US 61
PR-2	Mayaguez, Aguadilla, PR	US 72
PR-406	Anasco, PR	US 72
PR-119	Camuy, PR	
US 93	Darby N. & S., MT	US 82
Route 78	Absarokee-Columbus, MT	US 82
Relocated Route 6	Bolton to Willamantic, CT	US 82
Route 6	Bolton to Rhode Island State line, CT	US 82
Route 11 Extension	Route 82, CT (Salem-4 corners) to I-95	State Route 142
Route 7	Completion of construction between Norwalk and Danbury, CT	County Route 522
I-291	From I-91 - east and South to I-84, CT	
Route 72	Plainville westerly to I-84, CT	
US 231, West Lafayette Bypass	West Lafayette, IN	
US 20	Steuben Co, IN	
US 24	Wabash to Huntington, IN	
I-265 extension	From I-65 east to SR 62 in Clark Co., IN	
National Lakeshore Access Road	Michigan, IN	
96th Street extension	US 31 to I-69 in Hamilton and Marion Counties, IN	
US 50	Knox Co., IN	
South Lawrence Trafficway	Lawrence, KS	

5

US 50

SE Corridor
Improvement

Lyon Co., KS

Pittsburg to Wichita, KS

William E. Gutschlag, P.E.
Commissioner

US 61

Claiborne Co., MS

US 72

Alcorn Co., MS

US 72

Tippah-Alcorn Co., MS
(State Route 15 to Theo)

US 82

Webster Co., MS
(Eupora to Mathison)

US 82

Montgomery Co., MS

NJ Turnpike

northern NJ

US Route 206

central NJ

State Route 147

Cape May Co., NJ

County Route 522

Middlesex Co., NJ

Eisenhower Parkway

Essex Co., NJ

These are representative of all the other States which see unjustified rigidity in the MOA that would create enormous obstacles for highway projects with the real possibility that the end result would be a net loss of wetlands because mitigation options especially those that would take wetlands into the public domain thereby protecting them in perpetuity from draining by private interests would be severely diminished.

I have attached a copy of a letterhead memorandum to a letterhead memorandum dated 1/15/80 which covers my on-going studies of the wetlands and the impact of the proposed project on the wetlands. I have also attached a copy of a letterhead memorandum dated 1/15/80 which covers my on-going studies of the wetlands and the impact of the proposed project on the wetlands.



The State of New Hampshire Department of Transportation

John W. Morton Building
Hazen Drive
P.O. Box 483

Concord, N.H. 03302-0483

ROBERT A. INNOCENZI
ACTING COMMISSIONER

Tel: 603-271-3734

Fax: 603-271-3914

Wallace E. Stickney, P.E.
Commissioner

January 29, 1990

Honorable John Sununu

Chief of Staff to the Governor
The White House

January 19, 1990

Dear Governor Sununu:

Eugene W. Cleckley
Federal Highway Administration
(Telecopy)

Re: Your request to review proposed revision to the EPA and the Department of Army's MOA regarding wetlands.

I have attached a copy of a statement which was made for me before Congressman Laughlin in a session here in New Hampshire today. It sets forth my over-riding concern about the MOA which your proposed amendments do not reflect as yet and that is the MOA would have people who are narrowly focused on wetlands issues make decisions for other expert federal agencies and in contravention of the balancing requirements of the National Environmental Policy Act.

In fact, it repeals NEPA, it is legislative and regulatory change by interagency agreement and is illegal as hell. I wish that the Federal Highway Administration would stand up and say so. Do you really want to delegate your (FHWA's) responsibility for safety to EPA and the Corps?

Beyond that very important basic issue, I am faxing back your draft with hand written comments. This is the best we are going to be able to do as of the close of business today but we will have more on Monday.

Wallace E. Stickney
Commissioner, NHDOT



STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

1035 PARKWAY AVENUE

in contrast to the "private"
are in a unique position, re:
National Environmental Policy
Money Act to their programs
Relationship between two and
three federal agencies at two

ROBERT A. INNOCENZI
ACTING COMMISSIONER

January 26, 1990

Honorable John Sununu
Chief of Staff to the President
The White House
1600 Pennsylvania Avenue
Washington, DC 20503

Dear Governor Sununu:

We have been advised that you recently met with Secretary Skinner, regarding the recently drafted memorandum of agreement (MOA) between the Environmental Protection Agency (EPA) and the Army Corps of Engineers on wetland mitigation. We would like to take this opportunity to present the concerns of the New Jersey Department of Transportation (NJDOT) on this issue.

The November 15, 1989 "Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(B) (1) Guidelines," in its current revised form, will perpetuate and exacerbate a duplicative and grossly inefficient decision making process regarding wetland impacts on federally funded transportation projects. The 404 program, for years, has plagued state transportation agencies with costly delays. In general, we believe that the MOA should acknowledge the unique position of state DOT's, avoid the continued waste of precious transportation dollars, and recognize the input of the United States Department of Transportation (USDOT).

First, we should point out that the NJDOT has, over the years, taken great care in avoiding and mitigating wetland impacts on all projects. With the recent enactment of a state freshwater wetland protection act, NJDOT has been working in close partnership with our state wetland protection agency (The New Jersey Department of Environmental Protection), to continue developing environmentally acceptable projects. We do not question the value of wetland protection -- in fact we strongly support preservation and mitigation (and in New Jersey, we generally replace wetlands at a ratio of two

ACTION

assigned to

CONTROL NO.

800130-007

SIMS

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for every one acre lost) -- but we believe the federal review process is duplicative, flawed, and unfortunately, left unresolved in the current MOA.

Before elaborating on specific problems, we would emphasize that in contrast to the "private sector," state transportation agencies are in a unique position, resulting from the application of the National Environmental Policy Act (NEPA) and Section 404 of the Clean Water Act to their programs. The situation can be described as a "crossfire" between two different federally imposed standards by three federal agencies at two separate phases of project development.

First, to get funding approval from the Federal Highway Administration (FHWA), state DOT's must conduct an exhaustive and lengthy analysis of project alternatives, and select a project design to satisfy the NEPA standard; one that balances all social, economic and environmental considerations. Later, to obtain a section 404 permit from the Army Corps, the DOT's must conduct yet another exhaustive and lengthy analysis of project alternatives, but this time, to satisfy a different standard known as the "Section 404(B)(1)" standard. Unlike the NEPA standard, this standard, jointly administered by EPA and the Corps, is solely concerned with selecting a design that avoids and minimizes impacts to wetlands.

The result is that the transportation improvement initiated by the state DOT culminates in one project design approved by the FHWA, followed later by a different project design approved by the Corps. This "crossfire" has a tremendous cost in terms of time, money and governmental credibility. (In contrast, projects which do not use federal funds and require federal approval only from the Army Corps are subject to only one alternatives analysis, administered by the Corps.)

Another area where state DOT's are in a unique position in contrast to the "private sector," is that their projects are designed with the overall public interest in mind. Unfortunately, the way the 404 program is being administered, these two very important distinctions are unrecognized, and are not addressed in the MOA. The end result is that the public is getting less for its transportation dollars.

Because state DOT's are major participants in the Section 404 program, with billions of dollars worth of transportation projects subject to approval, we firmly believe that important opportunities exist for EPA, the Corps and USDOT to improve program delivery for each agency through creative administration of the Clean Water Act and NEPA. The subject MOA is just such an opportunity.

Four specific points should be addressed in the development of an acceptable MOA:

1. USDOT SHOULD BE MADE A PARTY TO THE PROPOSED AGREEMENT.

Because transportation programs and projects are significant "users" of the 404 program, USDOT should participate in the development and execution of the document. USDOT is in the best position, at the federal level, to articulate the concerns of the state DOT's.

2. CLEAR PROVISIONS SHOULD BE INCLUDED IN THE AGREEMENT TO ACCEPT THE OUTCOME OF ONE ALTERNATIVES ANALYSIS ACCEPTABLE TO EPA, THE CORPS AND USDOT.

Section III. C. of the current agreement indicates that this is not the intent of the federal government.

3. DECISION MAKING ON APPROPRIATE MITIGATION OF WETLAND IMPACTS SHOULD BE SIMPLIFIED.

Since many transportation projects, big and small, involve minor wetland impacts, complicated and lengthy procedures cited in the current MOA (none of which are universally accepted by the federal government) which lead to inevitable conflicts in judgment, should be replaced with a programmatic approach. A size threshold should be established (such as up to two or three acres) for which there would be an automatic one to one -- or even two to one -- compensation ratio. In addition, wetland banking for such small impacts should be the first option, not the last, as currently proposed. As public agencies with well planned yearly construction programs, state DOT's are in a prime position to implement wetland banking. The result would be speedier decisions with no overall loss to wetlands. Additionally, innovative mitigation should be provided for and encouraged where feasible.

4. THERE SHOULD BE A CATEGORICAL FINDING FOR ALL TRANSPORTATION PROJECTS IN THE AGREEMENT THAT, ALTHOUGH NOT WATER DEPENDENT (with the exception of certain Coast Guard and port projects), SUCH PROJECTS SERVE THE OVERALL PUBLIC BENEFIT AND BY DEFINITION, AUTOMATICALLY COMPLY WITH THE WATER DEPENDENCY PROVISION OF SECTION 404(B)(1).

Currently, project need is established during the NEPA stage of project development, and is subject to FHWA approval. It serves no useful public purpose to spend years repeating this exercise for the Corps of Engineers and EPA, with possibly a different project as a result. The federal agencies should provide guidance to the states on how to comply with a unified federal wetland mitigation policy, and such compliance should be mandated only once, not several times.

Although not directly relevant to the MOA, we ask that the Federal Government recognize that the outcome of approvals under Section 404 of the Clean Water Act generates substantial costs to avoid, minimize and replace wetlands lost to projects. Full federal funding should therefore be made available to cover these costs as legitimate project expenses.

In closing, we wish to stress that the problems presented herein are long-standing. The proposed MOA unfortunately will not result in increasing the Federal Government's efficiency in the wetland mitigation process.



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION
HARRISBURG, PENNSYLVANIA 17180

OFFICE OF
SECRETARY OF TRANSPORTATION

January 25, 1990

EPA/Army Memorandum of Agreement

Mr. John H. Sununu
Chief of Staff To The President
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. Sununu:

I am writing to you to express our views on the Memorandum of Agreement (MOA) Between the Environmental Protection Agency (EPA) and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines. Since my agency is routinely involved with complying with the mitigation requirements of the Section 404 Regulatory Program, and often experiences difficulty in working with the many state and federal agencies involved in the permit application review process, I feel it is important to submit our comments and suggestions on this MOA and the Section 404 Program to you.

Background

The State and Federal resource agencies in Pennsylvania began to use the Section 404(b)(1) Guidelines in reviewing our State and Federal waterway permit applications several years ago. This occurred when we were in the midst of designing and constructing several major Interstate Highway completion projects and several hundred critical bridge replacement projects involving waterway and wetland encroachments. Due to the importance of not having project delays caused by inadequate alternatives analysis and mitigation proposals, we learned early how to integrate the required Section 404(b)(1) alternatives analyses and mitigation into our project development process.

Although we have been successful in progressing with our transportation improvement programs while complying with the Section 404(b)(1) Guidelines, we have expended an extraordinary amount of time, manpower and financial resources closely coordinating with the resource agencies involved in the waterway permit process.

Our public involvement and coordination efforts with agencies outside the waterway permit process are routine as compared to the coordination effort required to effectively

EPA/Army Memorandum of Agreement
Page 2
January 25, 1990

acknowledging the fact that the waterway permit process is a complex one and that the EPA and the Army have a role to play in it.

In examining our permit process, we have found that the EPA and the Army have a role to play in it. We have found that the EPA and the Army have a role to play in it. We have found that the EPA and the Army have a role to play in it.

EPA/Army Memorandum of Agreement
Page 2
January 25, 1990

EPA/Army Memorandum of Agreement
Page 3
January 28, 1990

deal with the multiple State and Federal agencies involved in the waterway permit process. In Pennsylvania, waterway permit applications are reviewed by the PA Department of Environmental Resources, the PA Game Commission, The PA Fish Commission, the U.S. EPA, the U.S. Fish and Wildlife Service and four (4) Army Corps of Engineers Districts.

In examining our project development process as it has evolved to respond to the Section 404(b)(1) requirements for streamlining opportunities, we find that it is not the substantive requirements (avoidance, minimization and mitigation) of the (b)(1) Guidelines that cause the most difficulties, it is the coordination and permit application review process. Among the problems we experience in coordinating with the resource agencies are:

- o Inadequate levels of resource agency review staff resources to participate in the project development process as critical location and design decisions are made.
- o Lack of consistent and continuous agency representation.
- o Disagreement among the resource agency staff as to appropriate technical analysis methodologies, particularly in the assessment of wetland values and functions.
- o Absence of a single point of contact or resource agency review coordinator to pull the agency position(s)/comments together.
- o A high level of frustration from their inability to totally prevent the loss of aquatic resources through the existing laws and regulations.

We also find the lack of effective and widely accepted environmental analysis tools based on sound research and training in their use to be serious problems. Analysis techniques and methodologies for wetland delineation, wetland value and functional assessment, wetland impact assessment and mitigation design have been slow to evolve and are not widely accepted. Availability of training for the users has been limited, at best.

Comments on the MOA

Based on our experience in complying with the Section 404 (b)(1) Guidelines and our review of the content of the MOA, we do not see the MOA affecting much change in how the Guidelines are applied to the waterway permit application process for transportation improvement projects in Pennsylvania. We would hope that the MOA will result in a more consistent application of the Guidelines by the resource agencies.

EPA/Army Memorandum of Agreement

Page 3

January 25, 1990

WEST VIRGINIA

Although we support implementation of the MOA, we feel that it will take more than this MOA to improve the effectiveness of the Section 404 (b) (1) Guidelines. Our suggestions for actions the Administration could take to improve the Section 404 Program as well as the parallel state waterway permit programs are briefly outlined below.

Suggestions

We suggest that the following actions be taken to improve the Section 404 Program and the state waterway permit programs:

- 1) The Federal agencies involved in the Section 404 Program should be parties to this MOA, such as the Federal Highway Administration and the U.S. Fish and Wildlife Service.
- 2) The MOA should include provisions for the EPA and the Corps to develop a plan to implement the effective use and application of the Section 404 (b) (1) Guidelines. We would hope that the agencies in developing this plan would consider the adequacy of review staffing levels and the use of budgets; the development and use of widely accepted analysis techniques and methodologies; training for permit review staff and applicants; coordinated research on the design of wetland mitigation measures; and the development of guidance for applicants to use in integrating the Section 404 (b) (1) Guideline requirements into their program and project development processes.

I appreciate the opportunity to take part in the review of this important document and to offer our comments and suggestions.

Sincerely,

Howard Yerusalim

Howard Yerusalim, P.E.
Secretary, Department of Transportation



WEST VIRGINIA DEPARTMENT OF HIGHWAYS

State Capitol Complex

Building Five

Charleston, West Virginia 25305

January 18, 1990

GASTON CAPERTON
GOVERNOR

In the case of the New River
the water surface with the bank
wetland. Much of this riverbank
is only 100 feet from
the area. It is
retaining water or deep flood
this project has been placed

FRED VANKIRK
ACTING COMMISSIONER
STATE HIGHWAY ENGINEER

Mr. John Sununu
Chief of Staff
White House
Washington, D.C. 20500

Dear Mr. Sununu:

Recently the US Army Corps of Engineers and the US Environmental Protection Agency executed the enclosed Memorandum of Agreement (MOA) which addresses the procedures for wetland mitigation. These procedures were drafted to comply with Section 404 (b)(1) Guidelines of the Clean Water Act.

The Department of Transportation is very concerned with certain portions of the MOA. This MOA was to go into effect on December 15, 1989 but it has been delayed until the end of January 1990.

The proposed MOA has far reaching consequences and as such could have major effects on the social, economic and environmental aspects of our society. Being of such magnitude, it would seem that at least the requirements of the Administrative Procedures Act should be applied.

The MOA does not allow other concerns to be properly involved in the decision making process since Paragraph B, Page 2 of the MOA, indicates the determination of mitigation decisions "...shall not be based upon characteristics of the proposed project such as need, societal value, or the nature or investment objectives of the project's sponsor." On Page 5 in Section C, the MOA stipulates that "Other reviews, such as NEPA and the Corps public interest review, cannot be used to nullify any Guidelines requirements or to justify less rigorous Guidelines evaluations."

It appears that the total benefit to the public or the economics of an area is to be ignored and not allowed in any consideration of mitigation strategies. NEPA has required a balance of effects to be considered prior to decision-making in the past, now this MOA appears to place wetlands to the top of all considerations. Originally, the NEPA process required all aspects, social, economic and environmental, to be considered and evaluated. It appears that the social and economic aspects must take a back seat to historical preservation, hazardous waste, endangered species, recreational lands and now wetlands.

We have found that in the consideration of wetlands, the regulatory agencies have no real fiscal or social limits. It is apparent that the total outlay of public funds is not a major concern.

Mr. John Sununu

- 2 -

January 18, 1990

In the case of the New River Parkway, as one example, the intersection of the water surface with the bank has been determined to be a strip riverine wetland. Much of this riverbank was constructed of rock fill approximately twenty years ago when the existing road was widened. Due to the terrain of the area, it will be necessary to fill into the New River or to build massive retaining walls to keep from encroaching upon this area. While the details of this project have not been finalized, we have been informed in discussions that we will not be able to touch this area regardless of the cost. In some areas where the terrain is less harsh, the alternate is to take homes instead of encroaching on the riverine wetland. We feel that the intersection of the riverbank and the water is certainly a wetland but if we can not touch the area, the social and economic costs will soar.

We are working with the resource agencies and are considering these effects in the environmental impact statement but are very concerned with the final details.

We understand that the OMB has requested that no agency set policies on the "No Net Loss" issue prior to completion of the President's Domestic Council Policy Task Force deliberations. This MOA seems to be in conflict with that request.

We request that consideration be given to our comments and the untimeliness of the MOA.

Very truly yours,

ORIGINAL SIGNED BY
FRED VanKIRK

Fred VanKirk
Acting Commissioner -
State Highway Engineer

FV:Rh

Enclosure

cc: Governor Gaston Caperton

Mr. Samuel Skinner, IV
Secretary, US Department of
Transportation

Mr. Thomas Larson, Administrator
Federal Highway Administration

Mr. Billy Higginbotham
Division Administrator
Federal Highway Administration

ARKANSAS STATE HIGHWAY COMMISSION**RAYMOND PRITCHETT, CHAIRMAN**
MANASSA**RON HARRIS, VICE CHAIRMAN**
PERRIS**ROONEY E. SLATER**
JONESBORO**L.W. "MIL" CLARK**
HOT SPRINGS**BOBBY HOPPER**
LITTLE ROCK

P.O. BOX 2261

LITTLE ROCK, ARKANSAS 72203

TELEPHONE No. (501) 569-2000

FAX No. (501) 569-2400

MAURICE SMITHDIRECTOR OF
HIGHWAYS AND TRANSPORTATION**DAN FLOWERS**
ASSISTANT DIRECTOR OF
HIGHWAYS AND TRANSPORTATION**CHARLES VENABLE**
CHIEF ENGINEER

January 19, 1990

The Honorable John H. Sununu
Chief of Staff to the President
The White House
1600 Pennsylvania Avenue N.W.
Washington, D.C. 20500

Dear Mr. Sununu,

I am writing to express my concern regarding the direction in which the Federal Regulatory Agencies are proceeding in wetland protection. The Arkansas Highway and Transportation Department is acknowledged nationally as a leader in the protection of the environment. The Department has received this reputation while achieving its primary goal of providing an excellent transportation system for the citizens of Arkansas.

Strict adherence to the Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency concerning mitigation could have a negative effect on protection of the environment, including wetlands. Had this Memorandum been in effect in 1979, the Department would not have acquired 175 acres of bottomland hardwood wetlands in conjunction with the construction of U.S. 67 and would not have conducted a ten year study of the effects of highway fill on bottomland hardwoods. This monitoring program, a condition of the 404 permit, will provide ten years of data and is expected to be the major baseline research investigation on bottomland hardwoods wetlands in the nation. Another project of significant environmental consequence and benefit which would have been affected by the proposed MDA is the Bayou Bartholomew Expressway in Jefferson County. This project resulted in the destruction of 26 acres of natural wetlands but through consultation and cooperation with the resources and regulating agencies, approximately 100 acres of wetlands will be created and enhanced and 158 acres of existing bottomlands hardwood/wetlands will be purchased. The mitigation plan to lessen the wetland and flooding impacts made the selected alternative acceptable.

ARKANSAS STATE HIGHWAY COMMISSION
LITTLE ROCK, ARKANSAS

Monte Cho is
Southern District Commissioner

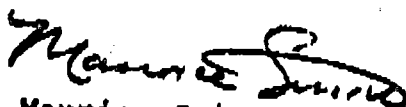
The Honorable John H. Sununu
Page 2
January 19, 1990

The primary concern with the Memorandum is two-fold:

- (1) That wetlands preservation has become a single issue determinant for alternative selection, to the detriment of other legitimate environmental, cultural, social and design factors and irrespective of transportation needs.
- (2) That alternative selection is viewed in a vacuum with no minimizing or mitigation features. In many instances, with appropriate mitigation, the environmental benefits can actually outweigh the negative aspects of an alternative.

The Department will continue to seek ways to lessen environmental impacts while carrying out its primary mission. However, we fully support the Federal Highway Administration and the Department of Transportation in their efforts to promote utilization of the NEPA process to provide a balanced analysis for all environmental, economic, and transportation needs concerns. We further request that implementation of this Memorandum be postponed until a comprehensive national wetlands and no-net-loss policy is fully developed and adopted through full involvement of the affected agencies.

Sincerely yours,



Maurice Smith
Director

MS:ds

Northern District Commissioner

Wayne O. Burkes
Central District CommissionerRonnie Shows
Southern District CommissionerJAMES D. QUIN
DirectorJames D. Quin
Chief EngineerPage 2
January 22, 1990

Mississippi State Highway Department / P.O. Box 1850 / Jackson, Mississippi 39215-1850 / FAX (601) 359-2233

January 22, 1990

The Honorable John H. Sununu
Chief of Staff to the President
Executive Office of the President
The White House
1600 Pennsylvania Avenue
Washington, D. C. 20500

Dear Mr. Sununu:

RE: Army Corps of Engineers and U. S.
Environmental Protection Agency
Memorandum of Agreement on Wetland
Mitigation

We have reviewed the recently executed Memorandum of Agreement between the Army Corps of Engineers and the U. S. Environmental Protection Agency on Wetland Mitigation and are greatly concerned with the content and the procedures of its execution.

The procedures for the issuance of permits by the Secretary of Army through the Corps of Engineers for the discharge of dredged or fill material into waters of the United States as provided in Section 404(a) of the Clean Water Act were promulgated through the rulemaking procedures of the U. S. Government and appear at 33 CFR Part 323 and related Parts 320 through 330.

The guidelines required in Section 404(b)(1) of the Clean Water Act for use by the Secretary of Army (Corps of Engineers) in specifying disposal sites were developed by the Administrator of the Environmental Protection Agency and the Secretary of Army as required through the rulemaking procedures of the U. S. Government.

Should the Administrator of the Environmental Protection Agency determine that an activity proposed for permitting would have an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fishery area (including spawning and breeding areas), wildlife, or recreational areas, he or she is authorized to prohibit the specification of the site as provided in Section 404(c) of the Clean Water Act and procedures promulgated through the rulemaking procedures of the U. S. Government at 40 CFR Part 231.

Mr. John H. Sununu
Page 2
January 22, 1990

The existing procedures and guidelines establish a sensible and workable process for carrying out the provisions of the law.

The process has worked very well in many cases in the administration of the Federal Aid Highway Program, resulting in the issuance of thousands of permits on a timely basis over the years. Likewise, many problems and delays have been encountered regarding what are wetlands - where do they begin and end?, practicable alternatives to avoid or minimize impacts to wetlands and practical mitigation of unavoidable wetland losses. The degree varies depending on the agency personnel administering the permitting process and those of commenting agencies, principally U. S. Fish and Wildlife and EPA.

Our problems with the EPA involvement in most recent years have been their contention that the 404(b)(1) Guidelines embodied the concept of "No Net Loss of Wetlands", both value and area.

It would appear that EPA has worn the Corps of Engineers thin and is trying by the MOA to inject the guidelines with irony.

We believe the MOA is not needed and is not the vehicle for amending policies and guidelines prologued through the rulemaking process.

We believe that the "No Overall Net Loss" concept should not be advanced until the President's Domestic Policy Council's Task Group completes deliberation on the issue.

We, also, think the Task Group should look into the New Federal Policy for Delineating Wetlands with particular reference to disturbed areas in conjunction with any policy established for "No Overall Net Loss".

We are attaching copies of two letters with attachments written on the subjects of "No Net Loss" and the "Delineation Manual" which expresses some of our feelings about the subjects.

Thank you for the opportunity of expressing our concerns on a matter vital to the continuance of our highway program.

Sincerely,

John R. Tabb
John R. Tabb
DIRECTOR

JRT:je

Attachments

Mr. J. M. Tumlin

State
of
1/1261N1A

J. M. Tumlin
J. M. Tumlin
Keith
W. Cotton

January 22, 1990

Mr. Jonn Sununu
Chief of Staff
White House
Washington, D.C. 20500

Dear Mr. Sununu:

The Virginia Department of Transportation (VDOT) completely supports the Federal Highway Administration's (FHWA) call for a comprehensive national wetlands policy to be developed and implemented by a new Executive Order to replace the existing Executive Order 11990 dated May 24, 1977. Until such a policy is developed with adequate opportunity for all affected agencies to participate, new policies, regulations and Memoranda of Agreement (MOA) such as the Environmental Protection Agency (EPA)/Department of Army (Army) MOA on wetlands mitigation should be placed on hold.

The new Executive Order should define "No Net Loss" as it relates to wetlands and articulate its implementation by the federal agencies. Further, the Executive Order should integrate the EPA/Army 404 process with the National Environmental Policy Act (NEPA) which could reduce paperwork and enhance overall environmental protection of our natural resources.

Our major concern with the EPA/Army MOA is its potential to disrupt, cause major delays, if not complete cancellation, of many public work projects by its automatic presumption that alternatives exist for non-water dependent projects (highways) which impact wetlands. This provision discounts all other environmental concerns and elevates wetlands to a sacred status. In Section III C, the EPA/Army MOA specifically states that NEPA cannot be used to nullify any guideline requirements. NEPA was designed to provide a fair and adequate balancing of all environmental concerns with full public participation.

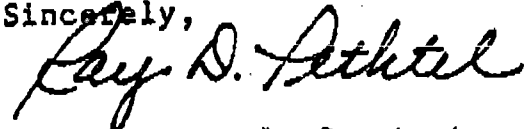
27. 2800
Mr. John Sununu

-2-

January 22, 1990

While we fully support the protection and conservation of the nation's wetlands, we believe that the EPA/Army MOA has enormous potential to disrupt the nation's highway program. Our only request is that the FHWA be given full opportunity to identify and articulate the highway program needs prior to the adoption of any further wetland regulations or MOA.

Sincerely,



Ray D. Pethtel, Commissioner

MHL/jm

cc: Mr. O. K. Mabry
Mr. J. S. Hodge
Mr. R. L. Hundley
Mr. M. H. Thomas
Mr. J. M. Tumlin



If the proposed 40:100 ratio in oil develop projects had resulted in mitigation would not have been per example:

SAMUEL K. SKINNER

I understand that you have received a number of letters from State Highway Directors and governors from all over the country. A representative sample is enclosed for your use. I believe this is a good sample of how people feel about MOA and why it can not be approved in its current form.

Following projects are examples of
under the MOA:

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Noting down: 1958, 1959

1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know how well the study was conducted and whether the results are reliable and valid. They also want to know how the study was funded and whether there were any conflicts of interest.

$$\frac{1}{2} \pi$$

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Dr. H. G. ...

FD-216 (Rev. 5-22-64)
Bureau Only

Dringo et al.
2002, 2010, 2011

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EFFECTS OF THE PROPOSED EPA/ARMY MOA ON HIGHWAY PROJECTS

If the proposed MOA had been in effect it would have been impossible to develop projects that resulted in a net gain in wetland values because the mitigation would not have been possible before avoidance. Following are some examples:

1. Madison South Beltway in Wisconsin where 22 acres of wetlands were compensated by 20 acres of replacement wetlands, and 102 acres of wetlands placed in public ownership preventing from drainage not regulated by Section 404.
2. Pine Bluff bypass in Arkansas which is in development. Twenty-six acres of wetlands are compensated by creation of 100 acres and purchase of 160 acres of existing wetlands, protecting them from drainage not regulated by Section 404.
3. Rancocas Creek Bridge in New Jersey where 2.3 acres of wetlands were compensated by creating 4.5 acres that have successfully duplicated the original value acre for acre resulting in a net gain of 2.2 acres.

Following projects are examples of projects that could not have been built under the MOA:

Route 25	Bourne, MA	US 12/20
I-495	Marsh Field, MA	US 24
I-90	Sterling, MA	US 70
Bobby Jones Expressway	Augusta, GA	US 90
Torras Causeway	Brunswick to Simons Island, GA	US 90
I-95	South Carolina to Florida	US 495
I-16	Macon to Savannah, GA	US 98
Bridge over Anasco River	Mayaguez, PR	US 70
Bridge over Herrera River	Rio Grande, PR	US 70
PR-2/Bridge over Camuy River	Camuy, PR	US 45
Bridge over Boca Prieta Channel	Humacao, PR	US 98
I-15	Bernice-Basin, MT	US 98
US 12	Avon-Elliston, MT	US 98

US 12	Alcona Co., MS	Helena West, MT	US 45	2
US 12		Ryegate East, MT	US 78	
I-691		From I-91 westerly to I-84, CT	US 84	
Central CT Expressway		I-91 - west-north to I-84, CT		
Route 9		Hartford north to MA State line, CT		
I-91		At northern terminus at I-84		
Route 7		Danbury - at southern terminus at		
		I-95 Norwalk, CT		
I-95		I-95, CT		
Baldwin Bridge & Approaches		Saybrook to Old Lyme		
I-164, Evansville Bypass		Evansville, IN		
US 50, Washington Bypass		Washington, IN		
US 12/20 Spur		Gary, IN		
US 24, South Bend Bypass		South Bend, IN		
US 54		Kingman Co., KS		
US 78		Itawamba Co., MS		
US 98		Forrest & Perry Counties, MS		
US 82		Lowndes Co., MS		
US 49W		Sunflower Co., MS		
US 98		George Co., MS		
US 78		Marshall Co., MS		
US 78		Benton Co., MS		
US 45		Lauderdale Co., MS		
US 98		Forrest & Perry Counties, MS		
US 84		Wayne Co., MS		
SR 25		Leake Co., MS		

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US 45	Alcorn Co., MS
US 78	Itawamba Co., MS
US 84	Jones Co., MS
US 49W	Sunflower Co., MS
US 61	Coahoma Co., MS
K & L Street Connector (Capital Parkway West)	Lincoln, NE
I-287	northern NJ
Trenton Complex (I-295)	Trenton, NJ
State Route 18	Monmouth Co., NJ
State Route 92	Central, NJ
State Route 24	Morris Co., NJ
State Route 55	Gloucester Co., NJ
State Route 152	near Atlantic City, NJ

Following proposed projects will be in jeopardy under the MOA:

Central Artery/ Third Harbor Tunnel	Boston, MA
Beverly Salem Bridge	Salem, MA
Route 57	Agawam, MA
US 17	Richmond Hill, GA
Harry S. Truman Pkwy.	Savannah, GA
Fall Line Freeway	Macon, GA
US 1	Folkston to Waycross, GA
US 82	Jesup to Ludowicki, GA
PR-26 Baldorioty Ave.	San Juan, PR
PR-53 Relocation of PR-3	Humacao, Yabucca, PR

PR-5 Baldorioty Ave.

PR-157 Baldorioty Ave.
Humacao

PR-109 Baldorioty Ave.

PR-106

PR-106

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PR-3 65th Infantry Ave.	Carolina, PR	US 50
PR-167 Bayamon-Naranjito	Bayamon, PR	AB Carriol Improvement
PR-109 Anasco Bypass	Anasco, PR	02 61
PR-2	Mayaguez, Aguadilla, PR	03 72
PR-406	Anasco, PR	US 72
PR-119	Camuy, PR	
US 93	Darby N. & S., MT	03 02
Route 78	Absarokee-Columbus, MT	US 08
Relocated Route 6	Bolton to Willamantic, CT	04 00
Route 6	Bolton to Rhode Island State line, CT	US Route 604
Route 11 Extension	Route 82, CT	State Route 147
	(Salem-4 corners) to I-95	County Route 522
Route 7	Completion of construction between Norwalk and Danbury, CT	Diagrammed Parkway
I-291	From I-91 - east and South to I-84, CT	Interchange on I-84
Route 72	Plainville westerly to I-84, CT	Interchange on I-84
US 231, West Lafayette Bypass	West Lafayette, IN	Interchange on I-84
US 20	Steuben Co, IN	
US 24	Wabash to Huntington, IN	
I-265 extension	From I-65 east to SR 62 in Clark Co., IN	
National Lakeshore Access Road	Michigan, IN	
96th Street extension	US 31 to I-69 in Hamilton and Marion Counties, IN	
US 50	Knox Co., IN	
South Lawrence Trafficway	Lawrence, KS	



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US 50

Lyon Co., KS

SE Corridor

Pittsburg to Wichita, KS

Improvement

William E. Galtman, D.R.

US 61

Claiborne Co., MS

Commissioner

US 72

Alcorn Co., MS

US 72

Tippah-Alcorn Co., MS
(State Route 15 to Theo)

US 82

Webster Co., MS
(Eupora to Mathison)

US 82

Montgomery Co., MS

NJ Turnpike

northern NJ

US Route 206

central NJ

State Route 147

Cape May Co., NJ

County Route 522

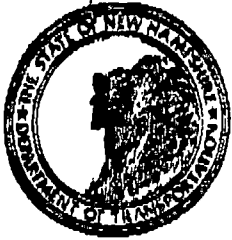
Middlesex Co., NJ

Eisenhower Parkway

Essex Co., NJ

These are representative of all the other States which see **unjustified rigidity** in the MOA that would create enormous obstacles for highway projects with the real possibility that the end result would be a net loss of wetlands because mitigation options especially those that would take wetlands into the public domain thereby protecting them in perpetuity from draining by private interests would be severely diminished.

Howard that very important
view kind station tomorrow. That
as of the first of the year



The State of New Hampshire Department of Transportation

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ROBERT A. INDOENZI
Acting Commissioner

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Wallace E. Stickney, P.E.
Commissioner

January 19, 1990

Eugene W. Cleaveley
Federal Highway Administration
(Telecopy)

Re: Your request to review proposed revision to the EPA and the Department of Army's MOA regarding wetlands.

I have attached a copy of a statement which was made for me before Congressman Laughlin in a session here in New Hampshire today. It sets forth my over-riding concern about the MOA which your proposed amendments do not reflect as yet and that is the MOA would have people who are narrowly focused on wetlands issues make decisions for other expert federal agencies and in contravention of the balancing requirements of the National Environmental Policy Act.

In fact, it repeals NEPA; it is legislative and regulatory change by interagency agreement and is illegal as hell. I wish that the Federal Highway Administration would stand up and say so. Do you really want to delegate your (FHWA's) responsibility for safety to EPA and the Corps?

Beyond that very important basic issue, I am faxing back your draft with hand written comments. This is the best we are going to be able to do as of the close of business today but we will have more on Monday.

Wallace E. Stickney
Commissioner, NHDOT



STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

1035 PARKWAY AVENUE

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TRENTON, N.J. 08625

609-330-3833

ROBERT A. INNOCENZ
ACTING COMMISSIONER

January 26, 1990

Honorable John Sununu
Chief of Staff to the President
The White House
1600 Pennsylvania Avenue
Washington, DC 20503

Dear Governor Sununu:

We have been advised that you recently met with Secretary Skinner, regarding the recently drafted memorandum of agreement (MOA) between the Environmental Protection Agency (EPA) and the Army Corps of Engineers on wetland mitigation. We would like to take this opportunity to present the concerns of the New Jersey Department of Transportation (NJDOT) on this issue.

The November 15, 1989 "Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(B) (1) Guidelines," in its current revised form, will perpetuate and exacerbate a duplicative and grossly inefficient decision making process regarding wetland impacts on federally funded transportation projects. The 404 program, for years, has plagued state transportation agencies with costly delays. In general, we believe that the MOA should acknowledge the unique position of state DOT's, avoid the continued waste of precious transportation dollars, and recognize the input of the United States Department of Transportation (USDOT).

First, we should point out that the NJDOT has, over the years, taken great care in avoiding and mitigating wetland impacts on all projects. With the recent enactment of a state freshwater wetland protection act, NJDOT has been working in close partnership with our state wetland protection agency (The New Jersey Department of Environmental Protection), to continue developing environmentally acceptable projects. We do not question the value of wetland protection -- in fact we strongly support preservation and mitigation (and in New Jersey, we generally replace wetlands at a ratio of two

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for every one acre lost) -- but we believe the federal review process is duplicative, flawed, and unfortunately, left unresolved in the current MOA.

Before elaborating on specific problems, we would emphasize that in contrast to the "private sector," state transportation agencies are in a unique position, resulting from the application of the National Environmental Policy Act (NEPA) and Section 404 of the Clean Water Act to their programs. The situation can be described as a "crossfire" between two different federally imposed standards by three federal agencies at two separate phases of project development.

First, to get funding approval from the Federal Highway Administration (FHWA), state DOT's must conduct an exhaustive and lengthy analysis of project alternatives, and select a project design to satisfy the NEPA standard; one that balances all social, economic and environmental considerations. Later, to obtain a section 404 permit from the Army Corps, the DOT's must conduct yet another exhaustive and lengthy analysis of project alternatives, but this time, to satisfy a different standard known as the "Section 404(B)(1)" standard. Unlike the NEPA standard, this standard, jointly administered by EPA and the Corps, is solely concerned with selecting a design that avoids and minimizes impacts to wetlands.

The result is that the transportation improvement initiated by the state DOT culminates in one project design approved by the FHWA, followed later by a different project design approved by the Corps. This "crossfire" has a tremendous cost in terms of time, money and governmental credibility. (In contrast, projects which do not use federal funds and require federal approval only from the Army Corps are subject to only one alternatives analysis, administered by the Corps.)

Another area where state DOT's are in a unique position in contrast to the "private sector," is that their projects are designed with the overall public interest in mind. Unfortunately, the way the 404 program is being administered, these two very important distinctions are unrecognized, and are not addressed in the MOA. The end result is that the public is getting less for its transportation dollars.

Because state DOT's are major participants in the Section 404 program, with billions of dollars worth of transportation projects subject to approval, we firmly believe that important opportunities exist for EPA, the Corps and USDOT to improve program delivery for each agency through creative administration of the Clean Water Act and NEPA. The subject MOA is just such an opportunity.

Four specific points should be addressed in the development of an acceptable MOA:

In closing, we wish to say the long-standing. The proper in closing the Federal program obligation remains.

1. USDOT SHOULD BE MADE A PARTY TO THE PROPOSED AGREEMENT.

Because transportation programs and projects are significant "users" of the 404 program, USDOT should participate in the development and execution of the document. USDOT is in the best position, at the federal level, to articulate the concerns of the state DOT's.

2. CLEAR PROVISIONS SHOULD BE INCLUDED IN THE AGREEMENT TO ACCEPT THE OUTCOME OF ONE ALTERNATIVES ANALYSIS ACCEPTABLE TO EPA, THE CORPS AND USDOT. Section III. C. of the current agreement indicates that this is not the intent of the federal government.

3. DECISION MAKING ON APPROPRIATE MITIGATION OF WETLAND IMPACTS SHOULD BE SIMPLIFIED. Since many transportation projects, big and small, involve minor wetland impacts, complicated and lengthy procedures cited in the current MOA (none of which are universally accepted by the federal government) which lead to inevitable conflicts in judgment, should be replaced with a programmatic approach. A size threshold should be established (such as up to two or three acres) for which there would be an automatic one to one -- or even two to one -- compensation ratio. In addition, wetland banking for such small impacts should be the first option, not the last, as currently proposed. As public agencies with well planned yearly construction programs, state DOT's are in a prime position to implement wetland banking. The result would be speedier decisions with no overall loss to wetlands. Additionally, innovative mitigation should be provided for and encouraged where feasible.

4. THERE SHOULD BE A CATEGORICAL FINDING FOR ALL TRANSPORTATION PROJECTS IN THE AGREEMENT THAT, ALTHOUGH NOT WATER DEPENDENT (with the exception of certain Coast Guard and port projects), SUCH PROJECTS SERVE THE OVERALL PUBLIC BENEFIT AND BY DEFINITION, AUTOMATICALLY COMPLY WITH THE WATER DEPENDENCY PROVISION OF SECTION 404(B)(1). Currently, project need is established during the NEPA stage of project development, and is subject to FHWA approval. It serves no useful public purpose to spend years repeating this exercise for the Corps of Engineers and EPA, with possibly a different project as a result. The federal agencies should provide guidance to the states on how to comply with a unified federal wetland mitigation policy, and such compliance should be mandated only once, not several times.

Although not directly relevant to the MOA, we ask that the Federal Government recognize that the outcome of approvals under Section 404 of the Clean Water Act generates substantial costs to avoid, minimize and replace wetlands lost to projects. Full federal funding should therefore be made available to cover these costs as legitimate project expenses.

In closing, we wish to stress that the problems presented herein are long-standing. The proposed MOA unfortunately will not result in increasing the Federal Government's efficiency in the wetland mitigation process.

Your assistance is therefore respectfully requested. Please feel free to contact me should any additional information be required. We thank you for your concern.

Sincerely,

Robert A. Innocenzi
Acting Commissioner

Acting Commissioner

New Jersey Department of Transportation

573107 28

[illegible]

EPA/Army Memorandum 03

cc: Honorable Samuel K. Skinner, Secretary of Transportation

On 20th of March, we did a
1400' canopy dive at the
2nd reef edge. The

Mr. [redacted] was assigned to the
[redacted] Division of the
[redacted] Department of Justice.
He was assigned to the [redacted]
Unit of the [redacted] Division,
which was working under the
404 Regulatory Program,
working with the [redacted]
the general application
of [redacted] and [redacted]
to [redacted] and [redacted].

The above is a brief summary of the information received from the various sources mentioned above. It is hoped that this information will be of some assistance to you in your research.

Although we have a
demonstration of improved
Section 404(b)(1) Guide
amount of time, many are
coordinating with the
state, regional, and

...on the ground
...on the ground
...on the ground



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION
HARRISBURG, PENNSYLVANIA 17180

OFFICE OF
SECRETARY OF TRANSPORTATION

January 25, 1990

EPA/Army Memorandum of Agreement

Mr. John H. Sununu
Chief of Staff To The President
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. Sununu:

I am writing to you to express our views on the Memorandum of Agreement (MOA) Between the Environmental Protection Agency (EPA) and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines. Since my agency is routinely involved with complying with the mitigation requirements of the Section 404 Regulatory Program, and often experiences difficulty working with the many state and federal agencies involved in the permit application review process, I feel it is important to submit our comments and suggestions on this MOA and the Section 404 Program to you.

Background

The State and Federal resource agencies in Pennsylvania began to use the Section 404(b)(1) Guidelines in reviewing our State and Federal waterway permit applications several years ago. This occurred when we were in the midst of designing and constructing several major Interstate Highway completion projects and several hundred critical bridge replacement projects involving waterway and wetland encroachments. Due to the importance of not having project delays caused by inadequate alternatives analysis and mitigation proposals, we learned early how to integrate the required Section 404(b)(1) alternatives analyses and mitigation into our project development process.

Although we have been successful in progressing with our transportation improvement programs while complying with the Section 404(b)(1) Guidelines, we have expended an extraordinary amount of time, manpower and financial resources closely coordinating with the resource agencies involved in the waterway permit process.

Our public involvement and coordination efforts with agencies outside the waterway permit process are routine as compared to the coordination effort required to effectively

EPA/Army Memorandum of
Page 2
January 25, 1990

Send with and attach
the waterway permit
applications for review
Harrisburg, PA 17180

An expanding number
of waterway permit
applications are being
submitted to the Army
for review. The Army
is currently reviewing
the applications and
will be submitting
the results to the
EPA for review.

EPA/Army Memorandum of Agreement
Page 2
January 25, 1990

EPA/Army Memorandum of Agreement
Page 2
January 25, 1990

deal with the multiple State and Federal agencies involved in the waterway permit process. In Pennsylvania, waterway permit applications are reviewed by the PA Department of Environmental Resources, the PA Game Commission, The PA Fish Commission, the U.S. EPA, the U.S. Fish and Wildlife Service and four (4) Army Corps of Engineers Districts.

In examining our project development process as it has evolved to respond to the Section 404(b)(1) requirements for streamlining opportunities, we find that it is not the substantive requirements (avoidance, minimization and mitigation) of the (b)(1) Guidelines that cause the most difficulties, it is the coordination and permit application review process. Among the problems we experience in coordinating with the resource agencies are:

- o Inadequate levels of resource agency review staff resources to participate in the project development process as critical location and design decisions are made.
- o Lack of consistent and continuous agency representation.
- o Disagreement among the resource agency staff as to the appropriate technical analysis methodologies, particularly in the assessment of wetland values and functions.
- o Absence of a single point of contact or resource agency review coordinator to pull the agency position(s)/comments together.
- o A high level of frustration from their inability to totally prevent the loss of aquatic resources through the existing laws and regulations.

We also find the lack of effective and widely accepted environmental analysis tools based on sound research and training in their use to be serious problems. Analysis techniques and methodologies for wetland delineation, wetland value and functional assessment, wetland impact assessment and mitigation design have been slow to evolve and are not widely accepted. Availability of training for the users has been limited, at best.

Comments on the MOA

Based on our experience in complying with the Section 404 (b)(1) Guidelines and our review of the content of the MOA, we do not see the MOA affecting much change in how the Guidelines are applied to the waterway permit application process for transportation improvement projects in Pennsylvania. We would hope that the MOA will result in a more consistent application of the Guidelines by the resource agencies.

EPA/Army Memorandum of Agreement

Page 3

January 25, 1990

WEST VIRGINIA

Although we support implementation of the MOA, we feel that it will take more than this MOA to improve the effectiveness of the Section 404 (b) (1) Guidelines. Our suggestions for actions the Administration could take to improve the Section 404 Program as well as the parallel state waterway permit programs are briefly outlined below.

Suggestions

We suggest that the following actions be taken to improve the Section 404 Program and the state waterway permit programs:

- 1) The Federal agencies involved in the Section 404 Program should be parties to this MOA, such as the Federal Highway Administration and the U.S. Fish and Wildlife Service.
- 2) The MOA should include provisions for the EPA and the Corps to develop a plan to implement the effective use and application of the Section 404 (b) (1) Guidelines. We would hope that the agencies in developing this plan would consider the adequacy of review staffing levels and the use of budgets; the development and use of widely accepted analysis techniques and methodologies; training for permit review staff and applicants; coordinated research on the design of wetland mitigation measures; and the development of guidance for applicants to use in integrating the Section 404 (b) (1) Guideline requirements into their program and project development processes.

I appreciate the opportunity to take part in the review of this important document and to offer our comments and suggestions.

Sincerely,

Howard Yerusalem

Howard Yerusalem, P.E.
Secretary, Department of Transportation



WEST VIRGINIA DEPARTMENT OF HIGHWAYS

State Capitol Complex

Building Five

Charleston, West Virginia 25305

January 18, 1990

GASTON CAPERTON
GOVERNOR

In the case of the New River
water surface with the bank
wetland. Much of this riverbank
twenty years ago **FRED VANKIRK**
the area, it was **ACTING COMMISSIONER**
State Highway Engineer
retaining walls to keep from being
this problem have not been fixed.

Mr. John Sununu
Chief of Staff
White House
Washington, D.C. 20500

Dear Mr. Sununu:

Recently the US Army Corps of Engineers and the US Environmental Protection Agency executed the enclosed Memorandum of Agreement (MOA) which addresses the procedures for wetland mitigation. These procedures were drafted to comply with Section 404 (b)(1) Guidelines of the Clean Water Act.

The Department of Transportation is very concerned with certain portions of the MOA. This MOA was to go into effect on December 15, 1989 but it has been delayed until the end of January 1990.

The proposed MOA has far reaching consequences and as such could have major effects on the social, economic and environmental aspects of our society. Being of such magnitude, it would seem that at least the requirements of the Administrative Procedures Act should be applied.

The MOA does not allow other concerns to be properly involved in the decision making process since Paragraph B, Page 2 of the MOA, indicates the determination of mitigation decisions "...shall not be based upon characteristics of the proposed project such as need, societal value, or the nature or investment objectives of the project's sponsor." On Page 5 in Section C, the MOA stipulates that "Other reviews, such as NEPA and the Corps public interest review, cannot be used to nullify any Guidelines requirements nor to justify less rigorous Guidelines evaluations."

It appears that the total benefit to the public or the economics of an area is to be ignored and not allowed in any consideration of mitigation strategies. NEPA has required a balance of effects to be considered prior to decision-making in the past, now this MOA appears to place wetlands to the top of all considerations. Originally, the NEPA process required all aspects, social, economic - environmental, to be considered and evaluated. It appears that the social and economic aspects must take a back seat to historical preservation, hazardous waste, endangered species, recreational lands and now wetlands.

We have found that in the consideration of wetlands, the regulatory agencies have no real fiscal or social limits. It is apparent that the total outlay of public funds is not a major concern.

Mr. John Sununu

- 2 -

January 18, 1990

In the case of the New River Parkway, as one example, the intersection of the water surface with the bank has been determined to be a strip riverine wetland. Much of this riverbank was constructed of rock fill approximately twenty years ago when the existing road was widened. Due to the terrain of the area, it will be necessary to fill into the New River or to build massive retaining walls to keep from encroaching upon this area. While the details of this project have not been finalized, we have been informed in discussions that we will not be able to touch this area regardless of the cost. In some areas where the terrain is less harsh, the alternate is to take homes instead of encroaching on the riverine wetland. We feel that the intersection of the riverbank and the water is certainly a wetland but if we can not touch the area, the social and economic costs will soar.

We are working with the resource agencies and are considering these effects in the environmental impact statement but are very concerned with the final details.

We understand that the OMB has requested that no agency set policies on the "No Net Loss" issue prior to completion of the President's Domestic Council Policy Task Force deliberations. This MOA seems to be in conflict with that request.

We request that consideration be given to our comments and the untimeliness of the MOA.

Very truly yours,

ORIGINAL SIGNED BY
FRED VanKIRK

Fred VanKirk
Acting Commissioner -
State Highway Engineer

FV:Rh

Enclosure

cc: Governor Gaston Caperton

Mr. Samuel Skinner, IV
Secretary, US Department of
Transportation

Mr. Thomas Larson, Administrator
Federal Highway Administration

Mr. Billy Higginbotham
Division Administrator
Federal Highway Administration

ARKANSAS STATE HIGHWAY COMMISSION



RAYMOND PRITCHETT, CHAIRMAN
MANASSA

RON HARROD, VICE CHAIRMAN
PRESCOTT

ROONEY E. SLATER
JONESBORO

L.W. "BILL" CLARK
HOT SPRINGS

BOBBY HOPPER
SPRINGDALE

P.O. BOX 2261

LITTLE ROCK, ARKANSAS 72203

TELEPHONE No. (501) 569-2000

FAX No. (501) 569-2400

MAURICE SMITH

DIRECTOR OF
HIGHWAYS AND TRANSPORTATION

Two Honorable John H. Sununu

Page 2 DAN FLOWERS

Assistant Director of
Highways and Transportation

CHARLES VENABLE
CHIEF ENGINEER

January 19, 1990

The Honorable John H. Sununu
Chief of Staff to the President
The White House
1600 Pennsylvania Avenue N.W.
Washington, D.C. 20500

Dear Mr. Sununu,

I am writing to express my concern regarding the direction in which the Federal Regulatory Agencies are proceeding in wetland protection. The Arkansas Highway and Transportation Department is acknowledged nationally as a leader in the protection of the environment. The Department has received this reputation while achieving its primary goal of providing an excellent transportation system for the citizens of Arkansas.

Strict adherence to the Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency concerning mitigation could have a negative effect on protection of the environment, including wetlands. Had this Memorandum been in effect in 1979, the Department would not have acquired 175 acres of bottomland hardwood wetlands in conjunction with the construction of U.S. 67 and would not have conducted a ten year study of the effects of highway fill on bottomland hardwoods. This monitoring program, a condition of the 404 permit, will provide ten years of data and is expected to be the major baseline research investigation on bottomland hardwoods wetlands in the nation. Another project of significant environmental consequence and benefit which would have been affected by the proposed MDA is the Bayou Bartholomew Expressway in Jefferson County. This project resulted in the destruction of 26 acres of natural wetlands but through consultation and cooperation with the resources and regulating agencies, approximately 100 acres of wetlands will be created and enhanced and 158 acres of existing bottomlands hardwood/wetlands will be purchased. The mitigation plan to lessen the wetland and flooding impacts made the selected alternative acceptable.

Administrative Class 174 (N.Y. Department) P.S.

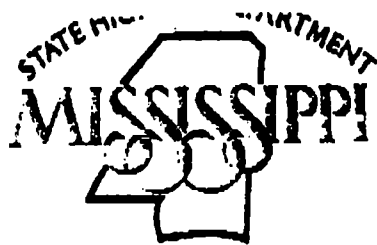
35:

Should the Administrator of the State of California determine that an activity proposed for a "special use" has a "significant adverse effect" on municipal areas (including planning and zoning), he or she may require the applicant to provide a "mitigation" plan. Such a plan may be promulgated through the State of California Department of Planning and Community Development.

Northern District Commissioner

Wayne O. Burkes
Central District Commissioner

Ronnie Shows
Southern District Commissioner



John H. LADD
Director

James D. Quin
Chief Engineer

Mr. John H. Sununu
Page 2
January 22, 1990

Mississippi State Highway Department P.O. Box 1850 / Jackson, Mississippi 39215-1850 / FAX (601) 359-2233

January 22, 1990

The Honorable John H. Sununu
Chief of Staff to the President
Executive Office of the President
The White House
1600 Pennsylvania Avenue
Washington, D. C. 20500

Dear Mr. Sununu:

RE: Army Corps of Engineers and U. S. Environmental Protection Agency
Memorandum of Agreement on Wetland Mitigation

We have reviewed the recently executed Memorandum of Agreement between the Army Corps of Engineers and the U. S. Environmental Protection Agency on Wetland Mitigation and are greatly concerned with the content and the procedures of its execution.

The procedures for the issuance of permits by the Secretary of Army through the Corps of Engineers for the discharge of dredged or fill material into waters of the United States as provided in Section 404(a) of the Clean Water Act were promulgated through the rulemaking procedures of the U. S. Government and appear at 33 CFR Part 323 and related Parts 320 through 330.

The guidelines required in Section 404(b)(1) of the Clean Water Act for use by the Secretary of Army (Corps of Engineers) in specifying disposal sites were developed by the Administrator of the Environmental Protection Agency and the Secretary of Army as required through the rulemaking procedures of the U. S. Government.

Should the Administrator of the Environmental Protection Agency determine that an activity proposed for permitting would have an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fishery area (including spawning and breeding areas), wildlife, or recreational areas, he or she is authorized to prohibit the specification of the site as provided in Section 404(c) of the Clean Water Act and procedures promulgated through the rulemaking procedures of the U. S. Government at 40 CFR Part 231.

The existing procedures and guidelines for carrying out the permit process for the Federal Aid Highway Program of permits on a timely basis and delays have been encountered in the past.

The problems of the Federal Aid Highway Program of permits on a timely basis and delays have been encountered in the past. The existing procedures and guidelines for carrying out the permit process for the Federal Aid Highway Program of permits on a timely basis and delays have been encountered in the past.

Our problems will be solved via law. No one wants to be a part of this.

We believe the MOA is not necessary and is not needed. We believe the MOA is not needed.

We believe the MOA is not needed. We believe the MOA is not needed.

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We believe the MOA is not needed. We believe the MOA is not needed.

Mr. John H. Sununu
Page 2
January 22, 1990

The existing procedures and guidelines establish a sensible and workable process for carrying out the provisions of the law.

The process has worked very well in many cases in the administration of the Federal Aid Highway Program, resulting in the issuance of thousands of permits on a timely basis over the years. Likewise, many problems and delays have been encountered regarding what are wetlands - where do they begin and end?, practicable alternatives to avoid or minimize impacts to wetlands and practical mitigation of unavoidable wetland losses. The degree varies depending on the agency personnel administering the permitting process and those of commenting agencies, principally U. S. Fish and Wildlife and EPA.

Our problems with the EPA involvement in most recent years have been their contention that the 404(b)(1) Guidelines embodied the concept of "No Net Loss of Wetlands", both value and area.

It would appear that EPA has worn the Corps of Engineers thin and is trying by the MOA to inject the guidelines with irony.

We believe the MOA is not needed and is not the vehicle for amending policies and guidelines promulgated through the rulemaking process.

We believe that the "No Overall Net Loss" concept should not be advanced until the President's Domestic Policy Council's Task Group completes deliberation on the issue.

We, also, think the Task Group should look into the New Federal Policy for Delineating Wetlands with particular reference to disturbed areas in conjunction with any policy established for "No Overall Net Loss".

We are attaching copies of two letters with attachments written on the subjects of "No Net Loss" and the "Delineation Manual" which expresses some of our feelings about the subjects.

Thank you for the opportunity of expressing our concerns on a matter vital to the continuance of our highway program.

Sincerely,

John R. Tabb
John R. Tabb
DIRECTOR

JRT:je

Attachments

Mr. J. M. Tumlin

State
of

1/1261N1A

Mr. *J. M. Tumlin**J. M. Tumlin**Rich**Letter*

January 22, 1990

Mr. Joann Sununu
 Chief of Staff
 White House
 Washington, D.C. 20500

Dear Mr. Sununu:

The Virginia Department of Transportation (VDOT) completely supports the Federal Highway Administration's (FHWA) call for a comprehensive national wetlands policy to be developed and implemented by a new Executive Order to replace the existing Executive Order 11990 dated May 24, 1977. Until such a policy is developed with adequate opportunity for all affected agencies to participate, new policies, regulations and Memoranda of Agreement (MOA) such as the Environmental Protection Agency (EPA)/Department of Army (Army) MOA on wetlands mitigation should be placed on hold.

The new Executive Order should define "No Net Loss" as it relates to wetlands and articulate its implementation by the federal agencies. Further, the Executive Order should integrate the EPA/Army 404 process with the National Environmental Policy Act (NEPA) which could reduce paperwork and enhance overall environmental protection of our natural resources.

Our major concern with the EPA/Army MOA is its potential to disrupt, cause major delays, if not complete cancellation, of many public work projects by its automatic presumption that alternatives exist for non-water dependent projects (highways) which impact wetlands. This provision discounts all other environmental concerns and elevates wetlands to a sacred status. In Section III C, the EPA/Army MOA specifically states that NEPA cannot be used to nullify any guideline requirements. NEPA was designed to provide a fair and adequate balancing of all environmental concerns with full public participation.

23, 2000

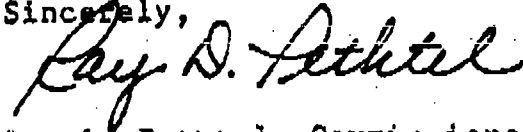
Mr. Jonn Sununu

-2-

January 22, 1990

While we fully support the protection and conservation of the nation's wetlands, we believe that the EPA/Army MOA has enormous potential to disrupt the nation's highway program. Our only request is that the FHWA be given full opportunity to identify and articulate the highway program needs prior to the adoption of any further wetland regulations or MOA.

Sincerely,



Ray D. Pethtel, Commissioner

MnT/jm

cc: Mr. O. K. Mabry
Mr. J. S. Hodge
Mr. R. L. Hundley
Mr. M. H. Thomas
Mr. J. M. Tumlin

NATIONWIDE PUBLIC PROJECTS COALITION

Administrative Office: 1360 S. Clark St., Suite 300, Denver, CO 80210 (303) 777-7564 FAX: (303) 744-9323

RECEIVED
COMMISSIONERS OFFICE

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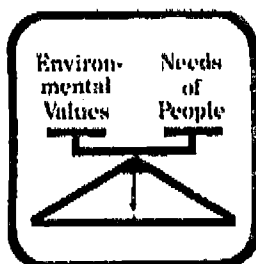
February 9, 1990

THE STATE OF NEW HAMPSHIRE
DEPT. OF TRANSPORTATION

To: Coalition Leadership

From: Bob Tonsing

Re: Cards & Letters to the President



Board of Directors

Chairman:

Robert L. Dorr, Board of Supervisors, El Dorado County, Calif.

Vice Chairman:

William D. Falcone, State of Rhode Island Water Resources Board, Providence, R.I.

Carson Hoge, General Manager, Brazos River Authority, Waco, Tex.

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Robert L. Tonsing, Chairman, Denver Regional Council of Governments, Littleton, Colo.

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John Fraser, Executive Director, Association of California Water Agencies, Sacramento, Calif.

Brian Holmes, Director of Regulatory Affairs, Connecticut Construction Industries Assn., Wethersfield, Conn.

Fred Pfeiffer, General Manager, San Antonio River Authority, San Antonio, Tex.

Wallace E. Stuckney, Commissioner, New Hampshire Dept. of Transportation, Concord, N.H.

William Rothberg, Board of Directors, Water For Metro Denver, Englewood, Colo.

Bobby Wheeler, Executive Director, Bacon County Development Authority, Alma, Ga.

Bob Dorr asked me to draft a letter to the President supporting the cautious stand he is taking on the issue of global warming and the accompanying remarks which he made to the effect that environmental protection and economic development must be balanced. A copy of the letter, which was faxed today, follows.

A copy of the Denver version of a Scripps Howard News Service story which Bob saw in Sacramento also is attached.

It was Bob's observation that perhaps the Coalition themes are beginning to make an impact in the White House. We have positive knowledge that the "needs of people" message has been delivered forcefully to John Sununu, and indeed the version of the Scripps Howard story which ran in Sacramento went on to say:

" . . . Chief of Staff John Sununu, who is cool to the idea that global warming needs immediate action, changed Bush's speech. Administration environmentalists had wanted Bush's speech to be a stronger statement about the problem."

National Public Radio had this to say:

"Environmentalists were not at all pleased. They said they expected more from a President who called himself an environmentalist . . ."

A Sierra Club spokesman said:

"There was really no news from the speech, except the degree to which the President views economics more important than protecting the earth."

- 2 -

NPR went on to report that "Bill Reilly and other administration officials reportedly offered the President a draft speech with a stronger environmental message. Over the weekend, Chief of Staff Sununu admitted on the ABC show "This Week" that he edited the speech to, as he put it, 'better reflect the President's views.'"

Of course the usual media bias reeks in the NPR report. To say that Sununu "admitted" editing the speech is to say that Reilly and his ilk are right to try to dictate to the President what he should say about environmental matters but the White House Chief of Staff is in the wrong if he dares to make input.

The point of all of this is to urge Coalition leaders and friends in the strongest of terms to write or fax the President when he or his staff members seem to understand the need for balance. Please do so on this issue because clearly ~~the White House is being~~ pummeled with Sununu-bashing and extreme attacks on the President for not having followed Bill Reilly down the line.

We need to do that kind of thing, and urge our associates to do likewise, when opportunities such as this one arise.

And, by all means, copy in the Coalition. We will be reporting from time to time in the newsletter (which will become a regular feature as funding comes in) on our effectiveness in communicating with the White House, the agencies and Congress.

Incidentally, for those of you who responded when EPA and the Army tried to ram their wetlands mitigation memorandum of agreement through, "thank you." The White House at least was persuaded to order delays until other views, including those of the Alaska folks and the Coalition, could be taken under advisement.

I can't report in all candor that the revised MOA isn't a further step in the direction of over-regulation, but on the other hand some moderation is evident.

The process of implementing the MOA still has to be questioned. A strong case can be made that the MOA still is backdoor rule-making.

RLT/ps

Enclosures