SUPPLEMENT TO IPDG TRANSMITTAL 19 AND 21, "PROCEDURES FOR COMPLYING WITH FEDERAL REQUIREMENTS FOR PROTECTION OF WETLANDS," ISSUED 1/31/78

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Interim Project Development Guidelines

Supplement to:
Transmittal 19 and
Transmittal 21

PROCEDURES FOR COMPLYING WITH FEDERAL REQUIREMENTS FOR PROTECTION OF WETLANDS

Prepared by Environmental Analysis Section

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ABSTRACT

This Supplement to IPDG Transmittal 19 and 21, furnishes a copy of Executive Order 11990, Protection of Wetlands and a Department procedure to be followed to insure compliance with the executive order.
SUPPLEMENT TO:
IPDG - 19 & IPDG - 21

PROCEDURES FOR COMPLYING WITH
FEDERAL REQUIREMENTS FOR PROTECTION OF WETLANDS

The Federal Highway Administration has required the New York State Department of Transportation to develop and institute procedures to comply with Executive Order 11990, Protection of Wetlands dated May 24, 1977.

Executive Order 11990 (Attachment 4.G.2.A) prohibits Federal agencies from participating in new construction projects located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use. The Executive Order also requires that each agency shall provide opportunity for early public review of any plans or proposals for new construction in wetlands. The procedures that follow incorporate these provisions into our existing Environmental Action Plan process.

I. APPLICABILITY OF IPDG’S 19 AND 21

IPDG’s 19 and 21 are applicable in their entirety with the following modifications for complying with Executive Order 11990.

II. APPLICABILITY OF E.O. 11990

A. The FHWA Division Office has stated that Executive Order 11990 will apply to the same type and size freshwater and tidal wetlands as are identified as wetlands pursuant to the appropriate criteria in the state regulations, 6 NYCRR Part 663 (as modified by Article 24 of the ECL) and 6 NYCRR Part 661. Also, refer to IPDG’s 19 and 21. And as defined by USCOE 1987 Wetland Delineation Manual, and Article 24 of the ECL.

III. FEDERAL ACTIONS REQUIRING AN EIS OR ND

The draft environmental impact statement or draft negative declaration should contain a discussion of the project’s impacts on wetlands for each alternative. The depth and scope of this evaluation of wetlands factors should be in relation to the type of significance of the wetlands, the extent of the project location in the wetlands, and the type and magnitude of the new construction in the wetlands.
Information should also be included concerning the practicability of alternatives avoiding the wetland and the measures proposed to minimize harm. (See IPDG 19 Item IX and IPDG 21 Item IX).

A. Public Notification

1. The public notification requirement shall be satisfied by including specific reference to EO 11990 in the notice of availability of the DEIS or DND, the notice of opportunity for a public hearing and/or notice of a public hearing. See Attachment 4.G.2.B. for a sample legal notice.

2. There will be applicable project on which the above notices have already been published or where the wetland is not identified until after the above notices have been published. In these cases, the region offices shall either:

   a. Publish a legal notice, *Notice of Proposed Construction in Wetlands*, in the same area newspaper(s) that apply for public hearing notices. See Attachment 4.G.2.C. for a sample of this Legal Notice.

   or, if appropriate (See IPDG 19, Item VII and IPDG 21, Item VII),

   b. Use the DEC permit process to satisfy the E.O. requirement to provide the opportunity for early public review.

Under the DEC Uniform Procedures regulations, public notice that DEC has determined a wetlands permit application to be complete is required. DEC publishes this in the Environmental Notice Bulletin and the applicant (NYSDOT) is required to publish *such notice in a newspaper of general circulation in the area in which the proposed project is to be located. In cases where a locality has assumed jurisdiction of Freshwater Wetlands, similar public notification would be required by the locality’s law.

In this situation, it is necessary to make application to DEC (or the locality) for the permit prior to completion of the FEIS or FND.
B. FHWA Finding

Upon selection of a project alternative which would be located in a wetland, it must be established clearly in the FEIS or END that there is no practicable measures to minimize harm that will be required.

*A copy of the letter to the newspaper(s) and a copy of the notice shall be forwarded by the Region directly to FHWA with a copy to the Project Development Bureau or Preliminary Plan Review Bureau and to Public Affairs.

Attachment No. 4 is an example of the finding that the FHWA Division Administrator must sign which must be included in the FEIS or FND. This should be prepared and submitted to FHWA at the same time as preliminary copies of the FEIS or FND are submitted for FHWA Division review. A signed copy will be returned to NYSDOT and copies inserted into the FEIS or FND sent to FHWA for formal acceptance.

IV. FEDERAL ACTIONS NOT REQUIRING AN EIS OR ND

Certain projects of this type will involve draining, dredging, channelization, filling, diking, impounding and related activities and structures (See E.O. definition of new construction) in wetlands. Project reports for these projects shall include a discussion of the project’s impact on the wetland for each alternative. The practicability of alternatives avoiding the wetland and measures to minimize harm should also be discussed.

The E.O. requirements for early opportunity for public review and the FHWA finding must take place prior to design approval.

A. Public Notification

1. For projects requiring a public hearing the public notification requirements shall be satisfied, as in Section III.A.1 above, by including specific reference to EO 11990 in the notice of opportunity for a public hearing and/or notice of a public hearing.

2. For projects which do not require a public hearing (as well as projects on which the public hearing notices(s) have already been published or on which the wetland is not identified until after the above notices have been published) either III.A.2.a. or b. will satisfy the E.O. requirement for an opportunity for early public review.
B. **FHWA Finding**

At or prior to the request for design approval the region will furnish a finding to FHWA showing that there is no practicable alternative to the new construction in the wetland and a discussion of the practicable measures to minimize harm that will be required. The finding shall be in the form of Attachment 4.G.2. This will be sent to FHWA, accompanied by supporting information, for signature by the FHWA Division Engineer. FHWA will return a copy of the signed finding for Department records.
PROTECTION OF WETLANDS

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), in order to avoid to the extent possible the long and short term adverse impacts associated with the destruction of modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative, it is hereby ordered as follows:

Section 1. (a) Each agency shall provide leadership and shall take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency’s responsibilities for (1) acquiring, managing, and disposing of Federal lands and facilities; and (2) providing Federally undertaken, financed, or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities.

(b) This Order does not apply to the issuance by Federal agencies of permits, licenses, or allocations to private parties for activities involving wetlands on non-Federal property.

Section 2. (a) In furtherance of section 101(b)(3) of the National Environmental Policy Act of 1969 (42 U.S.C. 4331(b)(3)) to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may attain the widest range of beneficial uses of the environment without degradation and risk to health or safety, each agency, to the extent permitted by law, shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use. In making this finding the head of the agency may take into account economic, environmental and other pertinent factors.

(b) Each agency shall also provide opportunity for early public review of any plans or proposals for new construction in wetlands; in accordance with Section 2(b) of Executive Order No. 11514, as amended, including the development of procedures to accomplish this objective for Federal actions whose impact is not significant enough to require the preparation of an environmental impact statement under Section 102(2)(c) of the National Environmental Policy Act of 1969, as amended.
Section 3. Any requests for new authorizations or appropriations transmitted to the Office of Management and Budget shall indicate, if an action to be proposed will be located in wetlands, whether the proposed action is in accord with this Order.

Section 4. When Federally-owned wetlands or portions of wetlands are proposed for lease, easement, right-of-way or disposal to non-Federal public or private parties, the Federal agency shall (a) reference in the conveyance those uses that are restricted under identified Federal, State or local wetlands regulations; and (b) attach other appropriate restrictions to the uses of properties by the grantee or purchaser and any successor, except where prohibited by law; or (c) withhold such properties from disposal.

Section 5. In carrying out the activities described in Section 1 of this Order, each agency shall consider factors relevant to a proposal’s effect on the survival and quality of the wetlands. Among these factors are:

(a) public health, safety, and welfare, including water supply, quality, recharge and discharge; pollution; flood and storm hazards; and sediment and erosion;

(b) maintenance of natural systems, including conservation and long term productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife, timber; and food and fiber sources, and;

(c) other uses of wetlands in the public interest, including recreational, scientific, and cultural uses.

Section 6. As allowed by law, agencies shall issue or amend their existing procedures in order to comply with this Order. To the extent possible, existing processes, such as those of the Council on Environmental Quality and the Water Resources Council, shall be utilized to fulfill the requirements of this Order.

Section 7. As used in this Order:

(a) The term "agency" shall have the same meaning as the term "Executive agency" in Section 105 of Title 5 of the United States Code and shall include the military departments; the directives contained in this Order, however, are meant to apply only to those agencies which perform the activities described in Section 1 which are located in or affecting wetlands.

(b) The term "new construction" shall include draining, dredging, channelizing, filling, diking, impounding, and related activities and any structures or facilities begun or authorized
after the effective date of this Order.

THE PRESIDENT

(c) The term "wetlands" means those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats and natural ponds.

Section 8. This Order does not apply to projects presently under construction, or to projects for which all of the funds have been appropriated through Fiscal Year 1977, or to projects and programs for which a draft or final environmental impact statement will be filed prior to October 1, 1977. The provisions of Section 2 of this Order shall be implemented by each agency not later than October 1, 1977.

Section 9. Nothing in this Order shall apply to assistance provided for emergency work, essential to save lives and protect property and public health and safety, performed pursuant to Sections 305 and 306 of the Disaster Relief Act of 1974 (S.8 Stat. 148, 42 U.S.C. 5145 and 5148).

Section 10. To the extent the provisions of Sections 2 and 5 of this Order are applicable to projects covered by Section 104(h) of the Housing and Community Development Act of 1974, as amended (88 Stat. 640, 42 U.S.C. 5304(h)), the responsibilities under those provisions may be assumed by the appropriate applicant, if the applicant has also assumed, with respect to such projects, all of the responsibilities for environmental review, decision making, and action pursuant to the National Environmental Policy Act of 1969, as amended.

THE WHITE HOUSE,

May 24, 1977
NOTICE TO PROPOSED CONSTRUCTION IN WETLANDS
NEW YORK STATE DEPARTMENT OF TRANSPORTATION
PROJECT IDENTIFICATION NO. ____________________

The (brief description of project) is being planned by the Department of Transportation. The project will start at (terminus) and extend to (terminus) generally on existing alignment. The total length of the project is _______ ± miles, all in the Town (Village, City) of ______________ County.

The project under consideration may include construction which affects wetlands covered by Executive Order 11990 of the President of the United States dated May 24, 1977, "Protection of Wetlands."

Maps, drawings and other pertinent information developed by the State are available for public inspection and copying at the office of the Regional Director, New York State Department of Transportation, ______________  
(address)

Any comments concerning the project's effect on the wetland(s) should be sent to the Regional Director by (specify date - 30 days after date of publication of this notice).
SAMPLE FHWA "FINDING" FOR FEIS OR FND

SUBJECT: Executive Order 11990 — Wetlands

(Include a short paragraph or two containing a brief discussion of the practicability of alternatives avoiding the wetlands including the extent of measures to minimize harm to the wetlands.)

Based upon the social, economic and environmental information contained in this Final EIS (or Negative Declaration) in support of Alternate _______ and the preceding summary, I find that (1) there is no practicable alternative to such construction and (2) that the construction of Alternate _______ contains all practicable measures to minimize harm to wetlands which may result from such use.

Victor E. Taylor
Division Administrator
Federal Highway Administration
SAMPLE FHWA "FINDING" FOR NON-EIS AND NON-ND PROJECTS.

SUBJECT: Executive Order 11990 - Wetlands

DATE:

(Include a short paragraph or two containing a brief discussion of the practicability of alternatives: avoiding the wetlands, including the extent of measures to minimize harm to the wetlands.)

Based upon this information, I find that (1) there is no practicable alternative to such construction and (2) that the construction of Alternate ______ contains all practicable measures to minimize harm to wetlands which may result from such use.

Victor E. Taylor
Division Administrator
Federal Highway Administration
DATE: November 8, 1978

In reply refer to: HEV-11

Our September 30, 1977, memorandum transmitted interim "Guidance and Procedures" for implementation of Executive Order 11990, Protection of Wetlands. Since that time, we have received several comments from our field offices regarding these procedures, and the Department of Transportation has revised DOT Order 5660.1A (copy attached) to implement the Executive Order. Consequently, revised interim "Guidance and Procedures" are now issued in this memorandum.

The development of the DOT Order was coordinated closely with FHWA during its preparation. We believe the DOT Order represents a reasonable and practical approach to compliance with the intent and the requirements of the Executive Order. Accordingly, the provisions of DOT Order 5660.1A, with the following guidance, will be applicable to FHWA actions which involve new construction in wetlands:

1. Application

These procedures apply to all projects for which nonmajor actions, negative declarations, or draft or final EIS's are processed after February 1, 1979. Until that date, compliance with either these procedures or with the procedures transmitted with our September 30, 1977, memorandum will be acceptable.

2. Public Involvement

The Division Administrator shall ensure that appropriate opportunity for early public involvement is afforded for all actions which may affect wetlands. This can normally be accomplished under existing public hearing or public notice procedures. However, when existing procedures do not afford adequate opportunity for early public involvement, special measures (public meetings, notices, etc.) shall be identified and implemented by the Division Administrator.
3. Procedures

a. The Division Administrator will ensure that all negative declarations and EIS's contain sufficient information to allow evaluation of a proposed action's impacts to wetlands, practicable alternatives to new construction in wetlands, and practicable measures to minimize harm to wetlands (DOT Order 5660.1A, paragraphs 7.d, f, and g).

b. When there is no practicable alternative to an action which involves new construction located in wetlands, the final negative declaration or EIS should contain the finding required by the Executive Order and by paragraph 7.h of DOT Order 5660.1A in a separate section or exhibit titled "Wetlands Finding" or "Wetlands Finding for the Selected Alternative." The finding should contain, in summary form and with reference to the detailed discussions contained elsewhere in the negative declaration or EIS:

   (1) a reference to Executive Order 11990,
   (2) a discussion of the basis for the determination that there are no practicable alternatives to the proposed action,
   (3) a discussion of the basis for the determination that the proposed action includes all practicable measures to minimize harm to wetlands, and
   (4) a concluding statement as follows: "Based upon the above considerations, it is determined that there is no practicable alternative to the proposed new construction in wetlands and that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use."

c. For purposes of the analysis of alternatives and the finding, "located in wetlands" means wetlands located wholly or partially within the proposed right-of-way or easement limits of the highway location and those wetlands in the vicinity of the highway's location for which there is evidence that the new construction will directly cause long-term damage or destruction of the wetlands.

d. Adoption of a final negative declaration or a final EIS will document compliance with the requirements of the Executive Order. The title sheet of each final EIS
for a project which involves new construction in wetlands should contain the following statement above the Regional Administrator's signature: "This action complies with Executive Order 11990, Protection of Wetlands." The signing and dating of the final negative declaration containing the information indicated in paragraphs 3.a and b, above, by the FHWA Division Administrator will document compliance with the Executive Order.

e. With the exception of the wetlands "finding" requirement, the provisions of the DOT Order and these instructions are applicable to all FHWA actions involving new construction in wetlands. While the formal wetlands finding is required only for major actions, the Division Office's administrative record should document evaluations of alternatives and measures to minimize harm for nonmajor actions.

The provisions of Executive Order 11990 and DOT Order 5660.1A and these procedures will be incorporated into FHPM 7-7-2 during the major revision which will be necessitated by the publication of the Council on Environmental Quality's NEPA regulations.

John S. Hassell, Jr.

Attachment