

MEMORANDUM

Mitigation Required by the U.S. Fish
and Wildlife Service through the
Section 404 Permit Process

MAR 23 1985

HEV-11

Director, Office of Environmental Policy
Washington, D.C. 20590

Mr. E. M. Wood
Regional Federal Highway Administrator
San Francisco, California

Your January 17, 1985, subject memorandum raised a number of general policy questions as they specifically relate to the State Route 94 Sweetwater River Bridge replacement project in San Diego County, California. In addition, Messrs. E. W. Blackmer, Chief for the Office of Environmental Analysis, California Department of Transportation; and Bruce Cannon, California Division Administrator, discussed this project, other projects being developed in San Diego County, and the U.S. Fish and Wildlife Service (FWS) mitigation policy with Mr. Eugene W. Cleckley of my office in January and March, respectively. These discussions concentrated not only on the regulatory and technical requirements but the need to have active involvement by the managerial levels of the State, FWS, Federal Highway Administration (FHWA), and the U.S. Army Corps of Engineers (COE) in the environmental and Section 404 permit processes to resolve issues.

As a result of these discussions and your January 17, 1985, memorandum, Mr. Cleckley met with two officials of the FWS and one official of the COE on February 28, 1985, to discuss the following:

1. Status of the state-of-practice nationwide of the Section 404 permit process as it relates to consultation, coordination, and resolution of issues between the FWS, COE, FHWA, and State.
2. Application of the FWS mitigation policy, including the trapping and monitoring program.
3. Independent review, evaluation, and approval actions by the COE.
4. Appropriate consideration of candidate species.

The following responds to the issues raised in your January 7 memorandum and indicates the results of the February 28 meeting:

What is the Federal policy--FHWA and U.S. Fish and Wildlife Service (FWS)--on State Highway Agency (SHA) involvement in wildlife mitigation and management Programs? Does FHWA agree with the FWS policy?

The FHWA general environmental mitigation policy is codified at 23 CFR, Part 771.105(d).

In regards to wildlife management programs in general, one must consider whether the mitigation measures address impacts which "actually result from the Administration action" and if "the proposed mitigation represents a reasonable public expenditure when considered in light of the severity of impacts of the action." In the case of the Sweetwater River Bridge project, in particular, we question if some of the measures (e.g., the 5-year quantitative analysis, the cowbird trapping program, the 2-year nest monitoring program) address impacts from the taking of 1 acre of wetland. Mr. Cleckley indicated at the February 28 meeting that neither the State nor FEWA could or wanted to conduct a trapping or monitoring program. That appeared to be something the FWS should be doing.

The FHWA policy on wildlife habitat mitigation is stated in 23 CFR, Part 777 which discusses privately owned wetlands and in an April 2, 1984, memorandum on privately owned wildlife habitat (nonwetland). These policy statements should be used in determining the appropriate level of habitat replacement mitigation and depend upon whether the lands impacted are or are not wetlands.

The FWS mitigation policy is an internal guidance document for FWS personnel. It has no standing as a regulations. Even though it was published in the Federal Register for information it is not a regulation. The FHWA Regional Offices were advised of this by memorandum on February 24, 1981. In addition, the FWS is guided by the instructions contained in ES Instructional Memorandum No. 60, Subject - FHWA and Mitigation. This document was transmitted to the FHWA Regional Offices on September 24, 1982, and appears on pages 18-22 of Section 6 of the Environmental Guidebook.

We recognize the need for the SHA and field offices of the FWS to have as much flexibility as possible in their negotiations during the application of the mitigation policy. However, no matter which of the various mitigation approaches is applied, some level of technical analysis should justify the basis for the level of FHWA participation in mitigation. At the February 28 meeting, the FWS basically agreed with this position. On the Sweetwater River Bridge project, this justification, apparently, has not been provided.

What is the FHWA and the SHA responsibility to mitigate highway impacts on nonendangered versus endangered species?

When impacts to listed or proposed threatened or endangered species are identified, the requirements of Section 7 of the Endangered Species Act apply. For unlisted (nonendangered) species, the mitigation policies on privately owned wetlands and wildlife habitat (nonwetlands) would apply. The Sweetwater River Bridge project involves impacts to the least Bell's vireo which is a

candidate species. As such, it requires no additional protection beyond what is afforded an unlisted species. Obviously, a responsible approach would dictate that a candidate species should be given additional consideration in light of its status, but nothing additional is mandatory.

What is the proper role of the Army Corps of Engineers (COE) in the Section 404 permit process?

The COE is required to make an independent evaluation of permit applications (see 33 CFR, Parts 320-330). This evaluation will, by COE regulation, give great weight to fish and wildlife considerations, but quite clearly, the FWS does not have veto authority on the application. The COE shall make the permit decision independently. The COE Washington Office official strongly reiterated this point at the February 28 meeting.

What can an SHA and the FHWA Division and/or Region do when they feel that the FWS field office has gone beyond the Federal policy on highway project wildlife mitigation and when a Section 404 permit is required, the COE will not make an independent determination (i.e., deny or not issue the permit based solely on a FWS veto)?

If, in FHWA's opinion, another agency exceeds its legal authority or does not exercise its legal obligation, the FHWA Division Administrator should meet with the top management of that agency's field office to explain the FHWA views and attempt to obtain resolution of the problem. Mr. Cleckley indicated to the FWS and COE officials at the February 28 meeting that this will occur on this project and future projects. If this is not successful, elevating the discussion to the Regional Administrators of FHWA and FWS and the COE Division Engineer levels should occur. Finally, if the problem persists and is viewed to warrant additional attention, the FHWA Washington Office should be advised, and we will attempt to resolve the issues at the Headquarters level.

The COE Section 404 permit decision is to be made independently. If you believe that the COE district office is not independently evaluating the permit application on the Sweetwater River Bridge or other projects, we suggest meeting with the COE district and/or Division Office to specifically request an independent evaluation of the application. If this does not resolve the issue, please notify this office and we will discuss it with COE Headquarters staff and recommend a suggested course of action. In a similar vein, we recommend additional discussion between the appropriate FHWA and the FWS field offices to address the appropriate level of mitigation for the Sweetwater River Bridge project. If these discussions do not prove fruitful, please advise this office, and we will discuss the issues at the Headquarters level and provide a recommendation. In all cases, every effort should be made to resolve this type of interagency disagreement at the lowest level of the field structure.

If the disagreement cannot be resolved after all avenues have been explored, the FEWA could advise the State of its participation limits based upon a reasonable application of its policy positions. Should the State accept responsibility for additional financial or management requirements, the project could be advanced in the normal manner.

/S/

Ali F. Sevin