

PART 777—MITIGATION OF IMPACTS TO WETLANDS AND NATURAL HABITAT

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AUTHORITY: 42 U.S.C. 4321 *et seq.*; 49 U.S.C. 303; 23 U.S.C. 101(a), 103, 109(h), 133(b)(1), (b)(11), and (d)(2), 138, 315; E.O. 11990; DOT Order 5660.1A; 49 CFR 1.48(b).

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§ 777.1 Purpose.

To provide policy and procedures for the evaluation and mitigation of adverse environmental impacts to wetlands and natural habitat resulting from Federal-aid projects funded pursuant to provisions of title 23, U.S. Code. These policies and procedures shall be applied by the Federal Highway Administration (FHWA) to projects under the Federal Lands Highway Program to the extent such application is deemed appropriate by the FHWA.

§ 777.2 Definitions.

In addition to those contained in 23 U.S.C. 101(a), the following definitions shall apply as used in this part:

Biogeochemical transformations means those changes in chemical compounds and substances which naturally occur in ecosystems. Examples are the carbon, nitrogen, and phosphorus cycles in nature, in which these elements are incorporated from inorganic substances into organic matter and recycled on a continuing basis.

Compensatory mitigation means restoration, enhancement, creation, and under exceptional circumstances, preservation, of wetlands, wetland buffer areas, and other natural habitats, carried out to replace or compensate for the loss of wetlands or natural habitat area or functional capacity resulting from Federal-aid projects funded pursuant to provisions of title 23, U.S. Code. Compensatory mitigation usually occurs in advance of or concurrent

with the impacts to be mitigated, but may occur after such impacts in special circumstances.

Mitigation bank means a site where wetlands and/or other aquatic resources or natural habitats are restored, created, enhanced, or in exceptional circumstances, preserved, expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources. For purposes of the Clean Water Act, Section 404 (33 U.S.C. 1344), use of a mitigation bank can only be authorized when impacts are unavoidable.

Natural habitat means a complex of natural, primarily native or indigenous vegetation, not currently subject to cultivation or artificial landscaping, a primary purpose of which is to provide habitat for wildlife, either terrestrial or aquatic. For purposes of this part, habitat has the same meaning as natural habitat. This definition excludes rights-of-way that are acquired with Federal transportation funds specifically for highway purposes.

Net gain of wetlands means a wetland resource conservation and management principle under which, over the long term, unavoidable losses of wetlands area or functional capacity due to highway projects are offset by gains at a ratio greater than 1:1, through restoration, enhancement, preservation, or creation of wetlands or associated areas critical to the protection or conservation of wetland functions. This definition specifically excludes natural habitat, as defined in this section, other than wetlands.

On-site, in-kind mitigation means compensatory mitigation which replaces wetlands or natural habitat area or functions lost as a result of a highway project with the same or like wetland or habitat type and functions adjacent or contiguous to the site of the impact.

Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics, in light of overall project purposes.

Service area of a mitigation bank means that the service area of a wetland or natural habitat mitigation bank shall be consistent with that in