



DOT&PF -- ENVIRONMENTAL COMMITMENTS

ISSUE

In early 2018, the FHWA conducted a Compliance Assessment Program (CAP) review of DOT&PF's mitigation measures and environmental commitments contained in DOT&PF environmental documents pursuant to 23 CFR 771.109(b). The CAP review requested that DOT&PF propose an action that would resolve issues identified.

In response, DOT&PF proposed that a short-term solution would be to collaboratively define the terms "environmental commitment" and "mitigation measures" for DOT&PF staff. Additionally, DOT&PF would clarify the process for how mitigation measures stated as environmental commitments should be included in the environmental document and then carried forward through the final PS&E and into construction contract language.

Defining the terms - "Environmental Commitments" and "Mitigation Measures" –

Environmental Commitments are any measures determined necessary to avoid, minimize, or mitigate environmental harm as a result of the preferred project action or alternative. Environmental Commitments are to be agreed-upon by the regional project team, including environmental staff, and include such things as avoidance measures (e.g., alignment adjustments to avoid sensitive resources) that may only receive cursory or no narrative references in the environmental document but are documented in the final PS&E package and contract documents as a road centerline or cut limit. Environmental commitments also include general requirements of compliance with state and federal environmental protections, and also include permit conditions to address project-specific environmental issues.

Mitigation measures are project-specific steps or actions taken to ensure compliance with state or federal law, permit or consultation stipulations from resource agencies, or agreed upon actions as a result of public comment or consultation with other agencies (local planning) or Tribes that are deemed necessary to avoid, minimize, or mitigate adverse environmental impacts. Mitigation measures can also include project-specific measures that create beneficial impacts to the environment.

What goes in the PS&E and Contract Documents? –

FHWA and DOT&PF traditionally have used the terms 'mitigation measures' and 'environmental commitments' interchangeably – which has resulted in some confusion. Under the 327 NEPA Assignment Program and 23 CFR 771.109(b), DOT&PF is responsible for assuring that "those **mitigation measures** stated as **commitments** in the environmental documents" are implemented through the PS&E and into the construction phases of a project. The question then becomes how does DOT&PF document mitigation measures stated as commitments in our NEPA documents to ensure those mitigation measures are incorporated in the PS&E and implemented through the construction contract documents?

Mitigation measures to ensure regulatory compliance for project-specific conditions are one form of environmental commitment, and it is that class of environmental commitment that needs to be in the final PS&E documents and carried through to the bid/construction contract documents. The project-specific mitigation measures are those that the Department is committing to implement, track, monitor and complete. As a general rule of thumb, a special condition of a permit (e.g., timing window for ESA compliance, or avoidance condition for 106 compliance) must be included in the list of mitigation measures stated as environmental commitments in order for this special condition to be tracked accordingly. DOT&PF needs to look at mitigation measures as those requirements that are measureable and trackable. In order for DOT&PF's procurement and construction sections to be aware of project-specific mitigation measures, and



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for the contractor to plan the work to ensure compliance with all special conditions and project-specific measures, these mitigation measures must be made trackable by way of inclusion in the final PS&E package and bid/contract documents.

Most environmental commitments are not project- or activity-specific mitigation measures that are measurable and trackable by DOT&PF. Standard Operating Procedures (SOPs) or Best Management Practices (BMPs) should not be discussed with any particularity in the NEPA document as environmental commitments unless required by an agency as a project-specific condition or, after consultation, the SOPs or BMPs are deemed necessary to avoid, minimize, or mitigate a substantial environmental impact or concern. The most common example of an SOP or BMP would be a measure to ensure compliance with a permit (Construction General Permit, Section 10/404, Title 16, etc.) through implementation of a plan (ESCP, HMCP, etc.). It is sufficient to mention within the NEPA document that the Department (or contractor) will apply for all necessary permits, and remain in compliance with these permits. The regional project team will determine which SOPs and BMPs (if any) are to be included in the list of mitigation measures stated as environmental commitments.

23 CFR 771.127(a) requires that DOT&PF NEPA documents “summarize any mitigation measures that will be incorporated in the project”. DOT&PF has provided for discussion of mitigation measures within the NEPA document with a summary of those mitigation measures that we want to capture as environmental commitments in our NEPA decision documents (CE/FONSI/ROD). The DOT&PF regional project team will continue to address mitigation measures in the various environmental consequences segments of the NEPA documents – with a summary of those mitigation measures that want to capture as environmental commitments in the appropriate location within the NEPA document to ensure consistency with the regulations.

Review by the Regional Environmental Manager –

DOT&PF’s process for incorporating mitigation measures, as environmental commitments within the environmental document through final PS&E and into construction contract language and plans, is outlined within the Highway Preconstruction Manual (Section 450.9.5 of the HPCM). This process has been successful over time with very few errors, and should not be modified, unless the regions feel that the current procedures need modification. The REM (after review of the plans and NEPA Document) signs the project certification form, certifying that “all environmental commitments are included in the PS&E. All regulatory permits necessary for the construction of this project have been obtained.”

Next Steps:

DOT&PF needs to modify the Project Certification Form to allow environmental commitments to be incorporated in all phases of project development. DOT&PF also needs to revise the Environmental Procedures Manual and Highway Preconstruction Manual to incorporate the agreed upon definitions of environmental commitments and mitigation measures. The EPM also needs to be revised to provide clear guidance as to how environmental analysts are to discuss mitigation measures within the body of the NEPA document, but then how to determine what mitigation measures are carried forward as environmental commitments. The CE Documentation Form needs to be revised to clarify that Section V (Environmental Commitments and Mitigation Measures) should only list the mitigation measures stated as environmental commitments, which would be included in the PS&E package and the project’s bid/contract documents.