

Title: Documentation of Mitigation Commitments
Date: August 2016
SOP No.: 12
Issued by the Office of Planning and Environment (TPE)

### **1. Purpose**

This document provides guidance on capturing the mitigation commitments for impacts identified through the environmental review process.

### **2. Applicability/Scope**

This guidance applies to the consideration, development, and documentation of commitments to mitigate adverse environmental and community impacts as assessed during the environmental review process. Per 40 CFR 1508.20, mitigation includes:

- Avoiding an impact by not taking a certain action or parts of an action;
- Minimizing an impact by limiting the degree or magnitude of the action and its implementation;
- Rectifying an impact by repairing, rehabilitating, or restoring the affected environment;
- Reducing or eliminating an impact over time, through preservation and maintenance operations during the life of the action; and,
- Compensating for an impact by replacing or providing substitute resources or environments.

FTA considers mitigation measures for all adversely affected resources and communities identified as part of the environmental review process for proposed projects. For resources that do not have a specific mitigation requirement, FTA may still recommend project sponsors mitigate adverse environmental effects to comply with the intent of the National Environmental Policy Act (NEPA), which may also streamline the environmental review process by alleviating public controversy and/or shorten the consultation process with other resource agencies.

This SOP is applicable to all levels of environmental review as FTA documents mitigation commitments in the categorical exclusion (CE) determination, finding of no significant impact (FONSI), combined final environmental impact statement/record of decision (FEIS/ROD), FEIS (23 CFR 771.133), or re-evaluation. Grants are made conditional on the performance of these commitments.

### **3. Responsibilities**

FTA Regional staff is responsible for managing the environmental review process. FTA Regional staff is also responsible for tracking and monitoring mitigation commitments following completion of the environmental review process as part of the grant oversight process, while the actual responsibility for performing the mitigation usually lies with the applicant.

The Office of Chief Counsel (TCC) reviews mitigation that is a condition of the FTA grant, and that function is usually assigned to the Regional Counsel. Regional Counsel also provides advice on whether the mitigation is an eligible expense.

FTA Headquarters staff in the Office of Environmental Programs (TPE-30) and TCC may advise on mitigation commitments for a particular project when the Region requests assistance.

#### **4. Standard Procedures**

**4.1. Regulations/guidance.** Regional staff should review the proposed project to ensure compliance with all relevant environmental requirements identified in the environmental review process as well as adequacy and reasonableness of mitigation commitments. Most environmental laws require the consideration of mitigation of adverse environmental or community impacts. But the statutory and regulatory directives on the consideration of mitigation are not all the same, and FTA may suggest mitigation for impacts when there are no statutory or regulatory directives in place to meet the intent of NEPA and/or streamline the environmental review process.

The mitigation measures should be clearly identified in environmental documents as well as in the grant. In addition, Regional staff should ensure the proposed mitigation measures are allowable FTA expenses. For example, FTA is prohibited from awarding funding to pay for incremental costs of incorporating art or non-functional landscaping into facilities (49 U.S.C § 5323(h)(2)). In order for landscaping to be considered “functional,” it would need to be done to offset a particular environmental impact.

**4.2. Content and structure of mitigation measures.** Consistent with CEQ guidance on mitigation and monitoring, FTA Regional staff should ensure that the environmental document clearly identifies the impact(s) to be mitigated and carefully specifies any relied-upon mitigation “in terms of measureable performance standards or expected results, so as to establish clear performance expectations” (“Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact,” 2011). FTA Regional staff should also recommend as a mitigation measure, particularly for complex projects, that a project sponsor identify specific individuals early in the design process as responsible for making sure mitigation measures are incorporated into the project. Lastly, FTA Regional staff should ensure that timing of the mitigation measures is addressed.

Regional staff should also ensure that mitigation commitments are not overly detailed. Instead, these may be written to allow the project sponsor some flexibility to develop a tailored solution to an overall goal. This is consistent with CEQ guidance allowing for adaptive management in mitigation, and is particularly important when the project sponsor does not have the ultimate responsibility or authority to approve or implement the mitigation measure (e.g., a project sponsor may identify and commit to funding traffic-related improvements around new stations, but often city or State departments of transportation have the ultimate authority on how traffic intersections are configured). Similarly, environmental documents should list the permits that will need to be obtained by the project sponsor and provide evidence that the project sponsor will be able to obtain a needed permit, but should avoid providing overly specific mitigation commitments to allow for some flexibility during final design. Prior to publishing environmental documents with mitigation measures, FTA Regional staff should recommend that the project sponsor have an individual with appropriate transportation construction experience review the mitigation measures so that the proposed measures are practical and enforceable during construction.

**4.3. Detail of mitigation measures in environmental documents.** FTA makes grants conditional on the performance of mitigation commitments outlined in the environmental document. The project sponsor is responsible for implementing the identified mitigation measures, because

they are commitments made as part of the Federal project. Information below addresses the different levels of detail for mitigation measures in different levels of environmental documents.

**4.3.1. Draft Environmental Impact Statements (DEIS).** In a DEIS, it is appropriate to discuss a number of alternative strategies for mitigating an adverse impact. For example, a DEIS may consider quiet zones, noise walls, alignments variations, vehicle skirts, etc., to mitigate noise impacts. The effectiveness of each measure in reducing or eliminating the impacts, the cost, and any additional impacts (e.g., right-of-way acquisition) should be presented.

**4.3.2. Final Environmental Impact Statements (FEIS).** After taking into account mitigation-related comments by the public and other agencies on the DEIS, FTA should incorporate mitigation into the preferred alternative presented in the FEIS. The FEIS should present the mitigation measures as commitments as specified in 23 CFR 771.109(b) and in 23 U.S.C. § 139(c)(4). Occasionally, comments on the FEIS result in FTA's inclusion in the ROD of additional mitigation not fully described in the FEIS.<sup>1</sup> Please see below for information in the ROD and combined FEIS/ROD.

**4.3.3. Combined FEIS/ROD.** The FEIS must contain a detailed description of mitigation measures. RODs should include a summary of the mitigation measures incorporated into the project [23 CFR 771.127(a)], but should reference the FEIS for a more detailed description of the mitigation measures. The mitigation summary in the ROD is presented in the form of an attached summary table that is subsequently used by the FTA Regional oversight office and the project management oversight contractor (PMOC) to monitor compliance during final design and construction.

**4.3.4. Environmental Assessments (EA)/FONSI.** Mitigation measures are included in the EA: (1) to satisfy other environmental laws and requirements; (2) to avoid, minimize, rectify, reduce, or compensate for potentially significant adverse environmental impacts that would otherwise require full review in an EIS and/or, (3) to mitigate potentially non-significant impacts. FTA can use proposed mitigation measures of potentially significant adverse environmental impacts within the EA to issue a "mitigated FONSI." When FTA issues a FONSI based on the incorporation of mitigation into the project, CEQ recommends in its mitigation and monitoring guidance that FTA specify which mitigation measures reduce an environmental impact below a significant level (CEQ, 2011).<sup>2</sup> Additionally, the draft FONSI must be available for public review for 30 days before FTA makes any final determination on whether to prepare an EIS or proceed with the FONSI (40 CFR 1501.4(e)(2)). Mitigation measures outlined in the FONSI become binding and must be implemented by the project sponsor.

**4.3.5. Categorical Exclusion (CE).** CEs sometimes include mitigation measures, such as measures/conditions/best practices to avoid and/or minimize impacts that do not warrant

---

<sup>1</sup> This process is only available when a project releases two separate documents for the FEIS and ROD. Separate publication of FEIS and ROD documents is only allowed when the project meets the conditions outlined in 23 U.S.C. §139(n).

<sup>2</sup> If the project sponsor does not fulfill these specific mitigation commitments, there could be NEPA compliance implications, such as requiring a re-evaluation or a new environmental review.

consideration of alternative sites. Examples may include the following, which is not meant to be an exhaustive list:

- Stipulations in a Section 106 Agreement;
- The mitigation or enhancements needed to support a Section 4(f) *de minimis* impact determination;
- Designing a bus maintenance facility so the building itself stands between the noise-generating maintenance activities and nearby noise-sensitive receptors, and blocks the noise; or
- Construction practices that limit the generation of dust and stormwater runoff during the construction of a transit facility on a brownfield.

**4.4. Mitigation contingent upon further, post-NEPA analysis.** There may be situations where compliance with all applicable environmental requirements and consultations and the associated mitigation commitments cannot be completed in time for inclusion in the decision document. In these instances, “the final EIS or FONSI should document compliance with requirements of all applicable environmental laws, Executive orders, and other related requirements. If full compliance is not possible by the time the final EIS or FONSI is prepared, the final EIS or FONSI should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met...” (23 CFR 771.133). The decision to publish a decision document in this state should be considered carefully on a case-by-case basis by Regional staff and in consultation with the Regional Counsel.

**4.5. Mitigation monitoring.** FTA Regional staff is responsible for mitigation monitoring after the environmental review process. FTA’s monitoring of the implementation of the mitigation commitments during final design and construction is addressed in many FTA Circulars. Changes in mitigation during final design and construction may require a re-evaluation or supplemental environmental review. For example, if substantial changes to the mitigation measure or findings are made after a ROD, a revised ROD shall be subject to review, per 23 CFR 771.127.

## 5. References

- Efficient environmental reviews for project decisionmaking, [23 U.S.C. § 139](#)
- [Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact](#), (CEQ, 2011)
- CEQ regulations implementing NEPA, [40 CFR parts 1500-1508](#)
- FTA Environmental Impact and Related Procedures, [23 CFR part 771](#)
- Full Funding Grant Agreement Guidance, [FTA Circular 5200.1A](#)
- Grant Management Requirements, [FTA Circular 5010.1D](#)
- FTA Award Management Requirements (proposed), [FTA Circular 5010.1E](#)
- FTA’s Project Management Oversight regulations, [49 CFR part 633](#)
- Section 4(f) regulations, [23 CFR 774](#)
- Section 106 regulations, [36 CFR part 800](#)

APPROVAL:



\_\_\_\_\_  
Christopher S. Van Wyk  
Director, Office of Environmental Programs

DATE:

8/11/2016