

# Chapter 11

## **Environmental Commitment Compliance**



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# Chapter 11 Environmental Commitment Compliance

## NEPA ASSIGNMENT

Under CE Assignment, NDOT has assumed FHWA responsibilities for determining whether specific projects are categorically excluded from the requirement to prepare an EA or EIS. NDOT, rather than FHWA, now makes CE determinations for most projects (for exceptions, see [Chapter 1, Overview](#), Section 1.5). All EAs and EISs, as well as CE determinations not assignable to NDOT under [23 USC 326](#), continue to be formally approved by FHWA.

During project development, measures intended to avoid, minimize, or mitigate impacts on the environment are often identified. As a state agency, and steward of the state's environmental resources, the Nebraska Department of Transportation (NDOT) implements these measures in the form of environmental commitments that are recorded in project-specific National Environmental Policy Act of 1969 (NEPA) documentation and the NDOT Environmental Commitments Document, commonly referred to as the Green Sheet (see Section 11.4). Commitments result from federal, state, or local regulations; public or agency comment; standing regulatory agreements; permit conditions; or NDOT stewardship, and are incorporated into the design, construction, operation, and maintenance of a transportation project. This chapter describes the types of environmental commitments and explains how they are identified, implemented, and monitored during and following project execution.

The NDOT Environmental Commitments Document is commonly referred to as the Green Sheet.

## 11.1 What is an Environmental Commitment?

Generally defined, an environmental commitment is a project accommodation intended to avoid, minimize, or mitigate project impacts identified by NDOT, the Local Public Agency (LPA), a federal or state government agency, a tribal government, or a member of the public. Once NDOT identifies and documents environmental commitments, implementation of these commitments is mandatory. Environmental commitments may be included in the contract document as special provisions or standard specifications.

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### 11.1.1 Council on Environmental Quality Definition of Mitigation

In its NEPA regulations, the Council on Environmental Quality defines mitigation as follows ([40 Code of Federal Regulations \[CFR\] 1508.20](#)):

- (a) **Avoiding the impact altogether by not taking a certain action or parts of an action.**
- (b) **Minimizing impacts by limiting the degree or magnitude of the action and its implementation.**

- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

## 11.1.2 Federal Highway Administration Mitigation Policy

In [23 CFR 771.105\(e\)](#), the Federal Highway Administration (FHWA) sets forth policy that mitigation of adverse impacts be incorporated into the project. The cited regulation also specifies that costs associated with mitigation activities are eligible for federal funding when (1) the impacts for which the mitigation is proposed result from the FHWA action, and (2) the mitigation represents a reasonable public expenditure.

## 11.2 Types of Environmental Commitments

### 11.2.1 Design Phase Commitments

Design commitments are developed during the project development process and frequently involve the avoidance or minimization of resource impacts through design accommodations. Design commitments are formulated by NDOT roadway design and environmental staff through a series of Project Coordination Meetings (PCM; see [Chapter 1, Overview](#), Section 1.8.6) and are conveyed by design plan drawings or special provisions. Examples of design commitments include, but are not limited to, the following:

- Alignment or grade modifications, including alignment shifts, selection of an entirely new alignment, and grade alterations
- Section 404 permitting and design of compensatory mitigation
- Designation of environmentally sensitive areas that are to be identified on design plans and avoided during construction
- Floodplain and floodway development, including drainage considerations that preclude exceedance of allowable flood elevations
- Inclusion of pedestrian and bicycle facilities, including paths, bike lanes, shared lanes, sidewalks, and crossings, as detailed in [Chapter 8, Technical Resource Analysis](#), Section 8.6
- Installation of barriers, such as noise walls, retaining walls, and visual screen landscaping
- Measures to address airspace obstruction, such as including height restrictions on permanent structures within proximity to an airport
- Measures to address cultural resources, including recordation of historic properties that would incur an adverse effect, or archeological studies of known or newly discovered archeological resources
- Permanent stormwater treatment and National Pollutant Discharge Elimination System (NPDES) permit compliance, consistent with NDOT's [Drainage Design and Erosion Control Manual](#) and [NPDES Municipal Separate Storm Sewer System – Stormwater Management Plan](#)

- Wildlife accommodations, including special fencing to deter wildlife-vehicle collisions, wildlife passages to promote habitat connectivity, and bottomless culverts that are passable by aquatic species

## 11.2.2 Construction Phase Commitments

Construction commitments may be identified and developed during the project development process; however, they are not implemented until construction begins and may be subject to the contractor's determination of means and methods. Like design commitments, construction commitments are often identified by NDOT roadway design and environmental staff through a series of PCMs (see [Chapter 1, Overview](#), Section 1.8.6). Additional construction commitments may be identified during the project constructability meeting, which occurs in the same time frame as PCM 30 and is attended by the NDOT Construction Division. Not all construction commitments are included in design plan drawings or special provisions. Instead, these commitments are commonly included in the NDOT Environmental Commitments Document (see Section 11.4). Examples of construction commitments include, but are not limited to, the following:

- Access maintenance, including the facilitation of commercial and residential access during construction activities
- Borrow site approval requirements, including NDOT or contractor coordination with resource agencies (for example, Platte River depletions and Clean Water Act Section 404 permitting)
- Compensatory wetland mitigation, including wetland construction or restoration
- Construction noise restrictions, including specific times of day when construction can and cannot occur in proximity to sensitive noise receptors
- Measures to address airspace obstruction, such as including height restrictions on construction equipment (cranes) used within proximity to an airport
- Measures to address hazardous materials, such as asbestos, lead-based paint, petroleum byproducts, and unexpected waste
- Migratory birds and avian protection, such as requiring the contractor to provide a Migratory Bird Treaty Act Compliance Plan to avoid impacts on migratory birds
- Public notification, including multiple outreach strategies intended to notify the public of near-term traffic interruptions resulting from construction
- Stormwater best management practices (BMP) implementation, including the installation, inspection, and maintenance of temporary and permanent stormwater BMPs identified in the Stormwater Pollution Prevention Plan (SWPPP)
- Threatened and endangered (T&E) species mitigation, including species surveys, construction timing restrictions, and temporary and permanent lighting and sound restrictions
- Traffic maintenance, including the facilitation of vehicular, pedestrian, and bicycle traffic during construction activities, which may occur via lane closures and traffic controls, or a marked detour
- Wellhead protection, including NDOT's [Standard Specifications for Highway Construction](#) (107.01, 107.09, and 107.18) regarding contractor compliance with all laws and ordinances governing work within a wellhead protection area

### 11.2.3 Post-Construction Commitments

Post-construction commitments may be identified and developed during the project development process; however, they are not implemented until construction ends. Like design and construction commitments, post-construction commitments are commonly identified by NDOT roadway design and environmental staff through a series of PCMs (see [Chapter 1, Overview](#), Section 1.8.6). Examples of post-construction commitments include, but are not limited to, the following:

- Compensatory wetland mitigation, including real-estate instrument filing, post-construction success monitoring, general site maintenance, and necessary remedial actions
- Permit closeout, including NPDES Notice of Termination and Clean Water Act Section 404 Compliance Certification
- Removal of temporary BMPs, such as silt fence and other non-biodegradable items that are not necessary following site stabilization
- Stormwater treatment facilities, including long-term maintenance and operation as required by an NDOT MS4 Permit

### 11.3 Writing Environmental Commitments

Several NDOT environmental commitments are commonly applied to highway projects. These example commitments have been developed and formalized through years of coordination among NDOT design and environmental staff. Example commitments cover a range of environmental considerations, including, but not limited to, contractor staging areas, utilities, wetland avoidance, NPDES, T&E species conservation conditions, hazardous materials, and traffic and access accommodation. As applicable, these commitments should be included in environmental documentation, Environmental Commitments Documents, and/or construction contract documents.

When developing and writing project-specific environmental commitments, the author should do the following:

- Be clear and concise
- Be specific
- Use the appropriate verb (that is, shall or will)<sup>1</sup>
- Include timing, location, and maintenance information
- Assign a responsible party

Environmental commitments should include enough information such that bidding contractors and NDOT construction staff fully understand environmental and design expectations.

Ultimately, environmental commitments should include enough information such that bidding contractors and NDOT construction staff fully understand environmental and design expectations. Prior to formalizing any project-specific commitment, the NDOT NEPA Specialist shall fully vet the commitment with the multi-disciplinary attendees of the PCMs (see [Chapter 1, Overview](#), Section 1.8.6) and project construction meeting to ensure that the commitment can be effectively implemented.

<sup>1</sup> The verb “shall” is used in most of NDOT’s environmental commitments. The verb “will” is used in select instances; however, NDOT does not use the verb “would” in environmental commitments.

## 11.4 Preparing the Environmental Commitments Document (Green Sheet)

During project development, environmental commitments may originate from a variety of sources, such as resource agency coordination and approvals, NDOT Professionally Qualified Staff memos, NEPA documentation, public involvement, or permit authorizations. The NDOT NEPA Specialist documents all environmental commitments in the project-specific Environmental Commitments Document. Appropriate environmental staff review Environmental Commitments Document contents, and if necessary, missing commitments are added. Conversely, completed commitments, or those commitments not pertinent to bid letting, may be removed during review. When the Environmental Commitments Document is complete, the included environmental commitments are provided to bidding contractors as part of the letting package as a special provision. These environmental commitments must be implemented by the successful bidder.

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## 11.5 Environmental Certification

The consistency of the letting package with approved NEPA documentation is checked and documented through Environmental Certification. Every federal-aid project is reviewed by the project's assigned Environmental Project Manager prior to a project being advertised for letting to ensure:

- design phase commitments from the approved NEPA documentation have been completed, and when applicable, included or met in the letting package.
- construction phase commitments from the approved Green Sheet have been included or met in the letting package.
- all applicable permits identified in the approved Green Sheet are included in the letting package.
- the final project footprint matches the approved NEPA document.
- technical environmental reviews used to support the NEPA approval are still valid.
- the letting package meets all environmental requirements for the project to received federal funding.

Although Environmental Certifications are not NEPA re-evaluations, they may result in the identification of the need for NEPA re-evaluation. If a NEPA re-evaluation is required, the re-evaluation must be completed prior to certification. All Environmental Certifications are uploaded to Onbase to be available to other NDOT divisions (Onbase document type "NDOT PD Environmental Certification" is used for state projects and "NDOT LAD PS&E, Environmental Certification" for local projects). Other divisions may use the certification documentation to ensure a project is ready to proceed to the next steps. For example, the NDOT Contracts Division may use the Environmental Certification during completion of the Construction Authorization Form to ensure all environmental requirements are met prior to making federal obligation requests.

## 11.6 Tracking Environmental Commitments

Upon completion of project development and bid letting, environmental commitments are implemented and tracked during and following construction. For tracking purposes, NDOT performs varying levels of inspection, and documents findings using ECO-Database (ECOD), its electronic reporting tool. Within NDOT, these efforts are led by the Roadside Development and Compliance Unit (RDCU), which includes a dedicated environmental-construction liaison position.

### 11.6.1 ECO-Database

To effectively track environmental commitments, NDOT developed and uses ECOD to communicate with NDOT Headquarters staff, NDOT District personnel, contractors, and other project stakeholders. To facilitate this, NDOT NEPA Specialists and other NDOT staff select and enter project-specific commitments into ECOD. During construction, electronic reports are completed by inspectors and automatically distributed to applicable project staff, including NDOT Headquarters staff, NDOT District staff, and contractors. As a recipient of all electronic inspection reports, NDOT's RDCU and District Environmental Coordinators closely monitor corrective actions<sup>2</sup> and associated inspector comments.

### 11.6.2 Inspections

On-site NDOT construction staff conduct frequent project inspections in accordance with the NPDES permit, and the project-specific SWPPP and Environmental Commitments Document. NDOT may also deploy consultants or its own District Environmental Coordinators or RDCU staff to conduct a second level of less frequent inspections called environmental compliance oversight inspections. RDCU staff attempt to visit all projects with SWPPPs once or more during construction of the project. All inspectors are certified via NDOT's Erosion and Sediment Control Inspector Certification, and all levels of inspection include commitment checklist review, photo documentation, and inspection report completion.

For tracking purposes, NDOT performs varying levels of inspection, and documents findings using ECO-Database (ECOD), its electronic reporting tool.

ECOD reports are to be completed within 24 hours of the associated inspection. Before initiating the inspection report, the inspector references any pending corrective actions listed for the project and documents whether or not each corrective action has been implemented. It is important to document the status of corrective actions because they must be implemented within 7 days of report completion and submittal. Those corrective actions noted as requiring immediate action must be responded to within 24 hours.

If the corrective action is not addressed within the time frame identified in the report, then it becomes a deficiency. The deficiency is escalated through the ECOD system.

## 11.7 Laws, Regulations, and Guidance

The following regulations and guidance documents pertain to environmental commitment compliance:

- [23 CFR 771, Environmental Impact and Related Procedures](#)
  - [23 CFR 771.105, Policy](#)

<sup>2</sup> Corrective actions are actions identified by an inspector that are necessary to achieve or restore compliance with one or more environmental commitments.

- [40 CFR 1500–1508, Council on Environmental Quality NEPA Regulations](#)
  - [40 CFR 1508.20, Mitigation](#)
- [NDOT, May 2022, Drainage Design and Erosion Control Manual](#)
- [NDOT, March 2018, NPDES Municipal Separate Storm Sewer System – Stormwater Management Plan](#)
- [NDOT, 2017, Standard Specifications for Highway Construction](#)