



Standard Operating Procedure

Entering Into an Agreement with a Mitigation Provider for Section 7 Conservation Measures

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Review Authority: Mario Mata, NRM Mitigation POC

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Version: 1

Purpose of this SOP

This standard operating procedure (SOP) outlines the process for the department delegate to enter into an agreement with a mitigation partner including but not limited to conservation bank, conservation partner fund, and/or university in the State of Texas to offset effects on federally listed or proposed threatened and endangered species by using Right-of-Way (ROW) funds, and/or using district funds. The effects on federally listed threatened and endangered species must be known and consultation with the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) must be completed prior to expending funds as outlined in this SOP.

Subject Overview,

Section 7 of the Endangered Species Act (ESA, 16 U.S.C. 1531-1544, 87 stat. 884), requires all Federal agencies consult with the USFWS or NMFS to ensure that the actions authorized, funded, or carried out by such agencies do not jeopardize the continued existence of any threatened or endangered species, or adversely modify or destroy designated critical habitat of such species. The USFWS or NMFS will issue a Biological Opinion (BO) or Conference Opinion (CO) that may include conservation measures to offset unavoidable impacts to species protected under the ESA. Carrying out conservation measures may require TxDOT to enter into an agreement with a Mitigation Provider to carry out the measures on behalf of TxDOT.

Authorities

The use of this SOP is an Environmental Affairs Division (ENV) policy in accordance with Section 7 of the Endangered Species Act and Transportation Code 201.617, which provides TxDOT with the authority to “pay a fee to an appropriate public agency or private entity in lieu of acquiring or agreeing to manage property” to mitigate an adverse environmental impact from a highway project.

Personnel

The project sponsor or department delegate, Natural Resources Management (NRM) Mitigation point of contact (POC), Environmental Affairs Division (ENV) Director, Right-of-Way Division (ROW) Director and POC, and General Counsel Division (GCD) POC have responsibilities in the following procedures.

Procedure – Entering into an agreement with a Mitigation Provider with ROW Funds

1. The project sponsor or department delegate determines the conservation measures based on the anticipated impacts to species within the project area. The conservation measures are provided to USFWS or NMFS in the consultation document and approved by USFWS or NMFS in their subsequent BO or CO at the completion of Section 7 consultation.
2. The project sponsor or department delegate identifies all appropriate Mitigation Providers available within the applicable area to determine the appropriate agreement to offset the unavoidable impacts to federally listed and proposed threatened and endangered species.



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3. The project sponsor or department delegate solicits bids (i.e., draft conservation agreements that exhibit costs) if more than one Mitigation Provider is identified as available within the area.
 - a. Contact the Mitigation Provider that can assist with addressing the unavoidable impacts in the USFWS BO or CO.
 - b. Determine whether the Mitigation Provider can assist with addressing the unavoidable impacts in the USFWS BO or CO.
 - c. Request total agreement cost (i.e., a bid) for all necessary mitigation.
4. Provide mitigation value (Select the best value if multiple mitigation providers are identified i.e., lowest cost).
 - a. Create a table of all Mitigation Providers that were contacted:

Best Value Mitigation Table			
Mitigation Provider	Federally Listed or Proposed T & E Species	Total Cost	Selected (Y/N)

- b. Select the best value mitigation option based on total cost and include this table with the draft agreement identified in Step 3, above.
5. The project sponsor or department delegate submits the draft agreement(s), associated table, and selected option(s) with any necessary explanation other than cost via email to the General Counsel Division (GCD) POC and the NRM Mitigation POC for review and comment.
6. The project sponsor or department delegate addresses GCD's comments on the agreement(s), generally by facilitating resolution of disputes pertaining to legal terms of the agreement between the GCD POC, the Mitigation Provider, and USFWS, if necessary.
7. The project sponsor or department delegate submits via email a mitigation memo packet to the ROW and ENV Division Directors, and cc's the ROW POC and NRM Mitigation POC. The following information must be included in the mitigation memo packet:
 - a. A transmittal memo detailing the proposed agreement option that is drafted for signature by the ROW Division Director and routing to the ENV Division Director for signature
 - b. A request for payment from ROW to enter into an agreement with a Mitigation Provider
 - c. The Best Value Mitigation Table or justification for agreement(s) selection
 - d. A copy of the draft agreement(s) (without signatures) from the Mitigation Provider
 - e. The following information, either included as a component of the agreement(s) or provided as additional information by the project sponsor or department delegate:



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- Project or Roadway Name/Number
 - County(ies) where the project is located
 - Project Control Section Job Number (CSJ)
 - USFWS BO or CO number and date of authorization, if applicable
 - Total amount of unavoidable impacts to Federally Listed Threatened and Endangered Species requiring mitigation
 - Total cost for the agreement(s)
8. The ROW Division Director signs the memo, and the ROW POC forwards the memo to the ENV Division Director for review and approval/signature and copies the NRM Mitigation POC.
 9. The ENV Division Director approves the proposed mitigation option and signs the memo.
 10. The NRM Mitigation POC notifies the project sponsor or department delegate that the agreement(s) can be signed.
 11. The District Engineer or Deputy District Engineer signs the agreement(s).
 12. The ROW POC facilitates routing of the funds to the Mitigation Provider.
 13. The Mitigation Provider provides a letter to the USFWS/project sponsor or department delegate indicating that the mitigation has been completed. The letter must include sufficient detail to serve as a receipt, as well as confirmation that the mitigation requirement associated with the USFWS BO, or CO authorization has been satisfied.
 - a. The project sponsor or department delegate must upload in Environmental Compliance Oversight System (ECOS) under the ECOS Activity - Perform Endangered Species Act (ESA) Consultation Commitments, the letter from the Mitigation Provider, as documented evidence, that the mitigation has been completed.
 14. The project sponsor or department delegate notifies the NRM Mitigation POC of the mitigation transaction, and the NRM Mitigation POC reflects the purchase in ENV's mitigation tracking spreadsheet.

The procedure is complete

Procedure – Entering into an agreement with a Mitigation Provider with District Funds

1. The project sponsor or department delegate determines the conservation measures based on the anticipated impacts to species within the project area. The conservation measures are provided to USFWS or NMFS in the consultation document and approved by USFWS or NMFS in their subsequent BO or CO at the completion of Section 7 consultation.
2. The project sponsor or department delegate identifies all appropriate Mitigation Provider within the applicable area to determine the appropriate agreement to offset the unavoidable impacts to federally listed and proposed threatened and endangered species.



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3. The project sponsor or department delegate solicits bids (i.e., draft conservation agreements that exhibit costs) if more than one Mitigation Provider is identified as available within the area.
 - a. Contact the Mitigation Provider that can assist with addressing the unavoidable impacts in the USFWS BO or CO.
 - b. Determine whether the Mitigation Provider can assist with addressing the unavoidable impacts in the USFWS BO or CO.
 - c. Request total agreement cost (i.e., a bid) for all necessary mitigation.
4. Provide mitigation value (Select the best value if multiple mitigation providers are identified i.e., lowest cost).
 - a. Create a table of all Mitigation Providers that were contacted:

Best Value Mitigation Table			
Mitigation Provider	Federally Listed or Proposed T & E Species	Total Cost	Selected (Y/N)

- b. Select the best value mitigation option based on total cost and include this table with the draft mitigation agreement identified in Step 3, above.
5. The project sponsor or department delegate submits the draft agreement(s), associated table, and selected option(s) with any necessary explanation other than cost via email to the General Counsel Division (GCD) POC and the NRM Mitigation POC for review and comment.
6. The project sponsor or department delegate addresses GCD's comments on the agreement(s), generally by facilitating resolution of disputes pertaining to legal terms of the agreement between the GCD POC, the Mitigation Provider(s), and USFWS, if necessary.
7. The project sponsor or department delegate submits via email a mitigation memo packet to the ENV Division Director, and cc's the NRM Mitigation POC. The following information must be included in the mitigation memo packet:
 - a. A transmittal memo detailing the proposed agreement option that is drafted for signature by the ENV Division Director
 - b. The Best Value Mitigation Table or justification for agreement(s) selection
 - c. A copy of the draft agreement(s) (without signatures) from the Mitigation Provider(s)
 - d. The following information, either included as a component of the agreement(s) or provided as additional information by the project sponsor or department delegate:



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- I. Project or Roadway Name/Number
 - II. County(ies) where the project is located
 - III. Project Control Section Job Number (CSJ)
 - IV. USFWS BO or CO number and date of authorization, if applicable
 - V. Total amount of unavoidable impacts to Federally Listed Threatened and Endangered Species requiring mitigation
 - VI. Total cost for the agreement
8. The ENV Division Director approves the proposed mitigation option and signs the memo.
 9. The NRM Mitigation POC notifies the project sponsor or department delegate that the agreement(s) can be signed.
 10. The District Engineer or Deputy District Engineer signs the agreement(s).
 11. The project sponsor or department delegate works with their district finance/contracting staff, as necessary to facilitate routing of the funds to the Mitigation Provider.
 12. The Mitigation Provider provides a letter to the USFWS/project sponsor or department delegate indicating that the mitigation has been completed. The letter must include sufficient detail to serve as a receipt, as well as confirmation that the mitigation requirement associated with the USFWS BO, or CO authorization has been satisfied.
 - a. The project sponsor or department delegate must upload in Environmental Compliance Oversight System (ECOS) under the ECOS Activity - Perform Endangered Species Act (ESA) Consultation Commitments, the letter from the Mitigation Provider, as documented evidence, that the mitigation has been completed.
 13. The project sponsor or department delegate notifies the NRM Mitigation POC of the mitigation transaction, and the NRM Mitigation POC reflects the purchase in ENV's mitigation tracking spreadsheet.

The procedure is complete



Appendix A: Acronyms and Definitions

Acronyms

Acronym	Full Name
BO	Biological Opinion
CO	Conference Opinion
CSJ	Control Section Job Number
ECOS	Environmental Compliance Oversight System
ENV	Environmental Affairs Division
GCD	General Counsel Division
NRM	Natural Resources Management Section
POC	Point of Contact
ROW	Right-of-Way Division
SOP	Standard Operating Procedure
TxDOT	Texas Department of Transportation
USFWS	United States Fish and Wildlife Service



Revision History

Effective Date	Reason for and Description of Change
July 2023	Version 1 was released.