

## CHAPTER 8. FEDERALLY-LISTED ENDANGERED OR THREATENED SPECIES

### 1. INTRODUCTION AND DEFINITIONS.

**a. General.** The Biotic Resources chapter in Appendix A of Order 1050.1E combines information on Federally-listed endangered and threatened species and species not protected under the Endangered Species Act (16 USC Section 1531, *et. seq* (ESA)). However, this Desk Reference separates information on these species. The Office of Airports (ARP) has done that to highlight the specificity of the regulations implementing the ESA. Readers seeking information on species not protected under the ESA should review Chapter 2 of this Desk Reference.

**b. The Endangered Species Act.** To satisfy the Endangered Species Act of 1973, the Federal Aviation Administration (FAA) must determine if a proposed action under its purview would affect a Federally-listed species or habitat critical to that species (critical habitat). For purposes of this Chapter, the following definitions apply:

**(1) Major construction activity.** Under the ESA, a "major construction activity" is a construction project (or undertaking with similar physical impacts), which is, in NEPA terms, a major Federal action significantly affecting the quality of the human environment (50 CFR Section 402.02).

**(2) Endangered species.** Any species that either the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) designates in danger of extinction throughout all or a significant portion of the species' range (16 USC Section 1532(6)).

**(3) Threatened species.** Any species that either FWS or NMFS states is likely to become an endangered species within the foreseeable future throughout all or a significant portion of the species' range (16 USC Section 1532(20)).

**(4) Candidate species.** Any species that either FWS or NMFS is considering for listing as "endangered" or "threatened", but has not yet been the subject of a proposed rule. These species have no legal status and do not have protection under the ESA. However, their inclusion is intended to alert Federal agencies of potential proposals or listings (50 CFR Section 402.12(d)).

Note: Candidate species are called "proposed species" throughout 50 CFR Part 402 *et seq*, except at 50 CFR Section 402.12(d). There, Section 402 refers to proposed species as "candidate species." However, due to years of familiarity within the Office of Airports with the term "candidate species," this Desk Reference uses the term "candidate species" as a synonym for "proposed species."

**(5) Critical habitat.** This is a designated area having physical and biological features essential to a listed species' survival. Examples include nesting grounds, migration

routes, wintering grounds, or other areas needed to support a life history stage. A species need not occupy an area for it to be critical habitat. When analyzing impacts that would affect areas within critical habitat boundaries, FAA (or the airport sponsor, or consultant, if FAA designates a non-Federal representative as noted below in section 1.b.(7) of this chapter) will informally consult with either FWS or NMFS. This allows FAA to focus on those areas within those boundaries the species specifically needs to sustain itself (16 USC Section 1532(5)(A)).

**(6) Service Director.** This is the FWS Regional Director or Field Supervisor, or the NMFS Service Director to whom the Secretary of the Interior or the Secretary of Commerce, respectively, has delegated the authority to protect Federally-listed endangered or threatened species (50 CFR Section 402.02).

Note: Consultation with the NMFS is required when the action may affect anadromous or marine fish species, marine mammals, or critical marine habitat.

**(7) Designated non-Federal representative.** A person or consultant a Federal agency designates to act as its representative and on its behalf during informal consultation. The person or consultant may also prepare a biological assessment (BA) on the agency’s behalf, but the Federal agency remains responsible for the BA’s content and effects finding (50 CFR Section 402.02).

**2. APPLICABLE STATUTES AND IMPLEMENTING REGULATIONS.**

APPLICABLE STATUTES AND IMPLEMENTING REGULATIONS	SUMMARY DESCRIPTION	OVERSIGHT AGENCY
The Endangered Species Act, 16 USC Section 1531-1544	Protects Federally-listed endangered or threatened species and their critical habitats.	FWS or NMFS
16 USC Section 1536(a)(2), also known as Section 7(a)(2)	Requires Federal agencies to consult with either the Secretary of the Interior or the Secretary of Commerce (Secretary), as appropriate, through their respective authorized designees.	FWS or NMFS
16 USC Section 1536(a)(3) and (4), also known as Sections 7(a)(3) and (4)	Requires Federal agencies to consult with the Secretary on any actions likely to adversely affect or jeopardize a Federally-listed species or its critical habitat.	FWS or NMFS

APPLICABLE STATUTES AND IMPLEMENTING REGULATIONS	SUMMARY DESCRIPTION	OVERSIGHT AGENCY
16 USC Section 1536(b), also known as Section 7(b)	Requires the Secretary to issue a written biological Opinion (Opinion) describing how the proposed Federal action would affect a Federally-listed species or critical habitat. The Secretary issues this Opinion after reviewing a BA and consulting as the Federal agency on the proposed action’s impacts on the species. If the Secretary issues a Jeopardy Opinion, FAA cannot approve the action. In such cases, FAA can do so only if the airport sponsor changes the action enough to allow the Secretary to issue a No Jeopardy/Adverse Modification Opinion or obtains an exemption from the Endangered Species Committee.	FWS or NMFS
16 USC Section 1536(c), also known as Section 7(c)	Requires Federal agencies to request information from the Secretary on the presence of any Federally-protected species or critical habitat that may be near the proposed action.	FWS or NMFS
16 USC Section 1536(d), also known as Section 7(d)	Prevents a Federal agency or applicant seeking Federal approval from irreversibly or irretrievably committing resources that would effectively foreclose using reasonable and prudent alternatives. Such alternatives would avoid jeopardizing the continued existence of Federally-listed species or adversely modifying their critical habitats.	FWS or NMFS
50 CFR Part 402, Interagency Cooperation	Provides the procedures for agency coordination under Section 7 of the ESA, as amended.	FWS or NMFS

Note: FWS or NMFS critical habitat designations do not create wilderness areas, wildlife preserves, or wildlife refuges for purposes of 49 USC Section 303 (Section 4(f) of the U.S. Department of Transportation [DOT] Act) nor close the area to human access. Under the ESA, FAA approved or financed actions may occur in those habitats, provided the actions do not jeopardize the protected species’ existence or the Secretary issues an exemption under 50 CFR Section 453.

**3. APPLICABILITY TO AIRPORT DEVELOPMENT ACTIONS.**

**a. Airport actions needing ESA compliance.** The activities discussed below require FAA approval of an Airport Layout Plan (ALP) or a change to an ALP, or approval of financing for airport development. Compliance with the ESA is needed for these actions if the

responsible FAA official or Service Director determines the actions may affect Federally-listed endangered or threatened species or their critical habitats.

**(1) Applying the ESA to a proposed action.** To determine if the project's affected area contains any Federally-listed species or critical habitat, the responsible FAA official or FAA's non-Federal designee should review the list of Federally-designated endangered and threatened species it compiles or that the FWS or the NMFS, as appropriate, provides.

**(2) Major construction actions causing direct impacts.** Section 1.b.(1) of this chapter defines the types of activities the ESA would address. For airport actions, these activities normally include: airside development such as a new airport, a new or expanded terminal or hangar, a new or extended runway or taxiway, or installing navigational aids (NAVAIDS) Landside activities include building a new access road or moving one, a remote parking facility, or rental car lots.

**(3) No species or critical habitat present.** If a careful review suggests a project-affected area would not involve a Federally-listed species or its critical habitat, the environmental document should state that fact. Further consultation with either FWS or NMFS under the ESA is not needed, but consultation may be required for Biotic Resources the ESA does not protect (See Chapter 2 of this Desk Reference).

**b. State-listed endangered or threatened species.** Some airport actions do not affect Federally-listed species or their critical habitats, but they may affect state-listed endangered or threatened species. Although the ESA does not protect state-protected species or habitats, the responsible FAA official must ensure the environmental documents prepared for such airport actions address effects on state-protected resources. Chapter 2 of this Desk Reference provides more information.

#### **4. PERMITS, CERTIFICATIONS, AND APPROVALS.**

**a. Sponsor-prepared correspondence.** If an airport sponsor believes its proposed action may affect a Federally-listed species or critical habitat, the airport sponsor may request that FAA start early consultation with the Service Director. In this instance, the airport sponsor must certify in writing to FAA that it:

**(1)** has a definitive proposal outlining the action and its effects; and

**(2)** intends to implement its proposal, if authorized. (50 CFR Section 402.11(b)).

**b. FAA-prepared correspondence.** Usually, FAA must prepare the documents discussed below. This Desk Reference also provides information below and in sections 4.b.(4) and (5) of this chapter to help the responsible FAA official prepare the documents that are not normally needed, but that ESA regulations require for specific situations. The

responsible FAA official should review the following information to determine if it applies to the proposed action.

**(1) Letter seeking the start of early consultation.** The airport sponsor may request early consultation when it has reason to believe the action may affect Federally-listed species or critical habitat (see section 5.a.(1) of this chapter). To start this process, the responsible FAA official must prepare a letter to the Service Director seeking the start of early consultation. The letter must contain the information noted in section 4.a. of this chapter (50 CFR Sections 402.11(b) and (c)).

**(2) Letter requesting information on Federally-listed or candidate species or critical habitat.** This letter helps to determine if Federally-listed or candidate species or their critical or proposed habitats are in the project's affected area. FAA, or its non-Federal designee, must prepare the letter to the Service Director seeking the above information (50 CFR Section 402.12(c); see section 4.b.(4)) of this chapter).

**(3) Letter requesting the start of formal consultation.** FAA must prepare this letter to the Service Director requesting the start of formal consultation. FAA sends this letter after the BA is prepared and the FAA itself, or in consultation with the Service Director, determines whether the action would likely affect a Federally-listed species or alter critical habitat (50 CFR Section 402.14(c)). The letter must provide the following information pursuant to 50 CFR Sections 402.14(c)(1)-(6):

- (a) a description of the major construction action FAA will consider;
- (b) a description of the specific area the action may affect;
- (c) a description of any Federally-listed species or critical habitat the action may affect;
- (d) a description of the manner in which the action may affect any Federally-listed species or critical habitat and an analysis of any cumulative effects;
- (e) any existing, relevant reports, including environmental impact statements, environmental assessments, or BAs or other information sources on the species; and
- (f) any other relevant available information on the action, the affected listed species, or critical habitat.

**(4) Letter notifying the Service Director of a non-Federal designee.** If FAA decides to use a non-Federal designee to conduct *informal* consultation or to prepare the BA, FAA must prepare a letter to the Service Director giving notice of that decision. The letter must identify the non-Federal designee. If the airport sponsor is not the designee, FAA and the airport sponsor will select a consultant. When a designee will prepare a BA, the responsible FAA official must:

- (a) provide guidance and supervision in preparing the BA;
- (b) independently review and evaluate the BA's scope and content; and
- (c) accept responsibility for compliance with Section 7 of the ESA (50 CFR Section 402.08).

**(5) Letter notifying either FWS or NMFS of lead agency designation.** When a proposed action involves more than one Federal agency, a designated lead agency may fulfill the required consultation or conference requirements. In this case, FAA and the other Federal agency(ies) will designate the agency that will meet those requirements. When FAA is the designated agency responsible for complying with the ESA, it must provide written notice to the Service Director. The notice must state that FAA is the designated lead agency for ESA purposes. In making this decision, FAA and the other Federal agency(ies) must consider the time sequence of agency involvement in the action, the magnitude of the agency's involvement, and the agency's relative expertise with respect to the action's environmental effects (50 CFR Section 402.07).

**(6) FAA comments on the Service Director's draft biological Opinion.** If FAA chooses to comment on the Service Director's draft Opinion, it may do so by filing a written request with the Service Director. The filing must occur at least 10 days before the end of the 45-day period the Service Director has to prepare the Opinion (see section 4.c.(4) of this chapter). Although FAA may review the entire Opinion, it may file comments addressing only the reasonable and prudent alternatives the Service Director proposes in the draft Opinion. If FAA submits comments on the draft Opinion within 10 days of the deadline, the Service Director is automatically entitled to a 10-day extension to the 45-day period the Service Director has to prepare the draft Opinion (50 CFR Section 402.14(g)(5)).

**(7) Notifying the Service Director of FAA's final decision on an action.** If the Service Director's Opinion states an action would jeopardize the continued existence of a Federally-listed species or adversely modify critical habitat, FAA must notify the Service Director of its final decision on an action. However, before making that decision, the airport sponsor and FAA should review the Opinion. This review is needed to determine if the airport sponsor will accept those requirements the Service Director deems necessary to avoid jeopardizing the affected Federally-listed species or critical habitat. If, after consulting with FWS or NMFS and FAA, the airport sponsor determines it cannot meet the requirements, FAA may notify the Service Director of the airport sponsor's desire to apply for an exemption under 50 CFR Part 453 (50 CFR Section 402.15).

**c. Service Director documents.** The Service Director must prepare certain documents in addition to those the airport sponsor or FAA prepares. The responsible FAA official must ensure the environmental document prepared for an action contains the appropriate correspondence record.

**(1) Letter addressing the presence of Federally-listed or candidate species or critical habitats.** The Service Director must send a letter to FAA or its non-Federal designee in reply to a request for information on Federally-listed or candidate species or designated or critical habitat that may be in the project area. The Service Director must respond within 30 days after receiving the notification of, or the request for, a species list (50 CFR Section 402.12(d)). When FAA or the airport sponsor provides a list, the Service Director shall either concur with or revise the list. When no list has been provided, the Service Director must provide written information to FAA or its non-Federal designee stating if species or critical habitats are present in the project area. In deciding if the species or habitats are present, the Service Director will use the best scientific and commercial data available (50 CFR Section 402.12(d)).

**(2) Letter discussing the presence of candidate species.** The ESA does not protect candidate species, but the Service Director often provides information on them. The Service Director does this to alert FAA and the airport sponsor that there is a chance the candidate species may be listed before the airport sponsor finishes the proposed project. It also tells FAA and the airport sponsor that FAA's continued oversight of the project requires FAA to meet ESA requirements if the candidate species is later listed as a Federally-protected species (50 CFR Section 402.10(d)).

**(3) Service Director comments on a BA.** The Service Director will provide written concurrence or non-concurrence with the findings presented in the BA. The Service Director must do so within 30 days after receiving the BA from FAA (50 CFR Section 402.12(j)).

**(4) The biological Opinion.** Based on information in the BA and other sources, the Service Director issues this Opinion. It provides the Service Director's findings regarding the severity of project-induced impacts on a Federally-listed species or critical habitat.

**(a)** The Service Director will issue a No Jeopardy Opinion or a Jeopardy Opinion within 45 days after the 90-day formal consultation period ends. The Opinion will:

**(1)** summarize the information on which the Service Director bases the Opinion;

**(2)** provide a detailed discussion of the action's impacts on Federally-listed species or critical habitat; and

**(3)** clearly state if the action is likely to jeopardize the continued existence of a Federally-listed species or destroy or adversely modify any critical habitat (50 CFR Sections 402.14(g)(5) and (h)).

**(b)** The 45-day Opinion preparation period may not be extended, unless FAA obtains the written consent of the airport sponsor to do so, or FAA or the airport sponsor submits written comments on the draft Opinion. When comments are submitted, a 10-day

extension period automatically occurs. FWS or NMFS may not issue its Opinion during the period FAA or the airport sponsor are reviewing the draft Opinion (50 CFR Section 402(g)(5)).

(c) The airport sponsor may request a copy of the draft Opinion from FAA, and submit its comments on the draft Opinion through FAA.

**d. No Jeopardy Opinion.** This Opinion means the Service Director determined that the action would not likely jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat. Issuance of this Opinion ends the ESA process. The action may proceed, provided it would not cause an incidental take of protected species (50 CFR Section 402.14(h)(3); see section 4.f. of this Chapter).

**e. Jeopardy Opinion.** FWS or NMFS issues this Opinion if an action would jeopardize a Federally-listed species (50 CFR Section 402.14(h)(3)). "Jeopardizing a species" means the action would directly or indirectly reduce the likelihood of a species' survival and recovery (i.e., reduces the species' reproductive success, numbers, or distribution).

(1) In addition to the information noted in sections 4.c(4)(a)(1)-(3) of this chapter, the Jeopardy Opinion will contain conservation recommendations to help reduce or eliminate the proposed action's effects on a listed species or critical habitat. The Opinion will also contain recommended reasonable and prudent alternatives. These alternatives will consider:

(a) changes in project design;

(b) changes in construction schedules to avoid animal breeding seasons;  
and/or

(c) extra research or other measures to minimize adverse impacts on the Federally-protected species or habitat.

(2) In evaluating these alternatives, FWS or NMFS will consult FAA or the airport sponsor. If requested, FWS or NMFS will make the Opinion available to FAA so it may analyze the reasonable and prudent alternatives. If, after this review, no alternative is available, the Service Director will state to the best of his or her knowledge no reasonable and prudent alternative is known.

**f. Incidental Take Statement (Statement).** The ESA does not ban a taking if an airport sponsor complies with the Statement's conditions. Therefore, the Service Director issues this Statement when unintentional takings would not jeopardize the species' existence (50 CFR Section 402.14(i)). To ensure the incidental take does not jeopardize the species, the Service Director will issue this Statement with an Opinion. If the Service Director issues an Incidental Take Statement allowing unintentional taking or accidental killing, the airport sponsor *must* adhere to the Statement's terms and conditions. FAA must



include the Statement's conditions in any approvals or grants. The Service Director will include conditions in the Statement specifying:

- (1) the allowable amount or extent of such incidental take of the species;
- (2) those reasonable and prudent measures the Service Director considers necessary or appropriate to minimize the impact of that taking;
- (3) the terms and conditions the airport sponsor must follow, including, but not limited to reporting requirements needed to implement the measures mentioned in section 4.f.(2) of this chapter; and
- (4) the procedures that will be used to handle or dispose of any individuals of a species taken (50 CFR Section 402.14(i)).

## 5. REGULATORY COMPLIANCE PROCEDURES - ENVIRONMENTAL ANALYSIS.

**a. Types of consultation.** FWS or NMFS, FAA, and/or the airport sponsor or its consultant (as non-Federal representatives) participate in the consultation. The following sections describe the various types of consultation and who is responsible for completing each. The consultation depends on the status of the affected species or habitat and the severity of impacts.

**(1) Early consultation.** This is an optional process an airport sponsor may choose when it has information indicating an action may affect Federally-listed species or critical habitat (50 CFR Section 402.11(b)). Here, the airport sponsor must:

- (a) provide FAA with written certification that the airport sponsor intends to carry out the proposed action;
- (b) provide an outline of the action and its effects on the protected species or habitat; and
- (c) request that FAA begin early consultation with either the FWS or the NMFS.

FAA must make a written request to either FWS or NMFS seeking this consultation. That request must include the above information and a BA when the airport sponsor proposes a major construction action. Then, FAA would begin consulting with the Service Director to address the proposed action's potential effects on Federally-listed species or their critical habitat (50 CFR Section 402.11 (c)).

**(2) Informal consultation.** Informal consultation is another optional process. It includes all discussions, correspondence, or other information between the Service Director, FAA, or a non-Federal designee. Informal consultation is designed to help FAA determine if

formal consultation or a conference is needed. The informal consultation also provides an opportunity for the Service Director to recommend changes or modifications to the action that FAA and the airport sponsor could implement to avoid the likelihood of adverse effects to the Federally-listed species or critical habitat (50 CFR Section 402.13). Informal consultation may end if either of the following occurs:

(a) If the responsible FAA official determines the action is unlikely to adversely affect Federally-listed species or critical habitat. If the Service Director concurs, no further FAA responsibilities under the ESA are required (50 CFR Section 402.13(a)). At this stage, the Service Director may also suggest modifications to the action that an applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat (50 CFR Section 402.13(b)).

(b) If, during this consultation or the review of the BA, the responsible FAA official or the Service Director determines the action may affect Federally-listed species or designated critical habitat, formal consultation is necessary (50 CFR Section 402.14(b)(1)).

**(3) Formal consultation.** An action that may affect a Federally-listed species or adversely modify critical habitat triggers formal consultation. Therefore, FAA must review its actions at the earliest possible time. If the responsible FAA official determines an action may affect a protected species or critical habitat, FAA may begin formal consultation without first completing informal consultation. During formal consultation, the Service Director determines if an action's effects would jeopardize the Federally-listed species' continued existence or adversely change its critical habitat. To do so, the Service Director, FAA, and the airport sponsor work cooperatively to determine if any reasonable and prudent alternatives would allow the action to occur without jeopardizing the species' existence or adversely changing critical habitat (50 CFR Sections 402.14(a) and (b)). Within 45 days after concluding formal consultation, the Service Director will deliver a biological Opinion to FAA and the airport sponsor.

**(a) When formal consultation is not needed.** Formal consultation is not needed if either of the following conditions occurs:

(1) FAA determines, and the Service Director provides written concurrence, that informal consultation or the BA indicates the proposed action is not likely to adversely affect any Federally-listed species or critical habitat (50 CFR Section 402.14(b)(1)); or

(2) a preliminary biological Opinion issued after early consultation is confirmed as the final biological Opinion (50 CFR Section 402.14(b)(2)).

**(b) Starting formal consultation.** To begin this 90-day process, FAA must make a written request to the Service Director. For major construction actions, FAA may not file this request until it has reviewed the completed BA and sent it to the Service Director.

Note the Service Director may require formal consultation when no consultation has occurred for actions that may affect a Federally-listed species or critical habitat. In this case, the Service Director must file a written request with FAA explaining why formal consultation is necessary (50 CFR Sections 402.14(b)(2) and (c)).

**(c) Extending formal consultation.** Normally, formal consultation concludes within a 90-day period. However, that 90-day period may be extended for various reasons, including a Service Director's determination that more data would provide a better basis for preparing the biological Opinion.

**(1) Actions involving only FAA and the FWS or the NMFS.** Here, FAA and the Service Director may mutually agree to extend the consultation for a specified period.

**(2) Actions involving an airport sponsor, FAA, and the FWS or the NMFS.** In these instances formal consultation cannot be extended more than 60 days without the airport sponsor's consent. The Service Director will provide the airport sponsor a written statement describing the:

- (a)** reasons why a longer period is required;
- (b)** information that is required to complete the consultation; and
- (c)** the estimated date on which the consultation will be completed.

Note: If more information is needed, but FAA and the Service Director cannot agree on the duration of an extended period needed to obtain the data, the Service Director will develop a biological Opinion based on the best scientific and commercial data available at the time the Service Director prepares the Opinion.

**(d) Terminating formal consultation.** Usually, formal consultation ends when the Service Director issues the biological Opinion (i.e., typically within 45 days after FAA and the Service Director conclude formal consultation). However, FAA may end formal consultation if it determines:

- (1)** the proposed action is unlikely to occur; or
- (2)** the proposed action is unlikely to adversely affect a Federally-listed species or critical habitat, and the Service Director concurs with that determination.

In either case, FAA must provide written notice to the Service Director that it wishes to terminate formal consultation (50 CFR Section 402.14(l)).

**(e) Re-initiating formal consultation.** Re-initiating formal consultation is *required* and will be requested by FAA or the Service Director where FAA retains discretionary involvement over the action, or where it is authorized by law to do so if:

(1) the airport sponsor exceeds the amount or extent of the taking specified in the Incidental Take Statement;

(2) new information reveals an action's impacts may affect a Federally-listed species or critical habitat in a manner or to an extent not previously considered;

(3) the identified action is subsequently modified in a manner that causes an effect to the Federally-listed species or critical habitat that was not considered in the biological Opinion; or

(4) the identified action may affect a newly-listed species or newly-designated critical habitat (50 CFR Section 402.16).

**b. Consultation requirements for actions involving candidate species or proposed critical habitat.** If the Service Director informs FAA that only candidate species or proposed critical habitat may be present in the project area, a BA is not needed. Still, there may be a need to confer with the Service Director. This informal conference helps the Service Director, FAA, and the airport sponsor identify potential conflicts between the action and a candidate species or proposed critical habitat early in project planning. The conference gives the Service Director an opportunity to make advisory recommendations. These may help to minimize or avoid adverse effects that, if not mitigated, could jeopardize the candidate species' continued existence or destroy or adversely modify proposed critical habitat (50 CFR Sections 402.10 and 402.12(d)(1)).

Note: Describe impacts to candidate species in the environmental document's Biotic Resources chapter, not in the chapter on Federally-listed endangered and threatened species. Document preparers should include a note in the document's Federally-listed Endangered and Threatened Species chapter that the Biotic Resources chapter contains information on candidate species or proposed critical habitat. See Chapter 2 of this Desk Reference.

**(1) Determining the need for a conference.** To decide if an action warrants a conference, the responsible FAA official must decide if the proposed action would likely jeopardize the continued existence of any candidate species or cause the destruction or adverse modification of the proposed critical habitat.

**(a)** If the official determines the action is unlikely to jeopardize a candidate species or its habitat, FAA must notify the Service Director of that determination. In this instance, a conference is not needed, unless the Service Director requests one after reviewing FAA's decision and other available information.

**(b)** If the official determines the action is likely to jeopardize the candidate species or adversely modify proposed critical habitat, FAA should begin a conference with the Service Director. Sponsors should be involved in these conferences to the greatest extent practicable (50 CFR Section 402.10(c)).

(2) **Consultation requirements if a candidate species is later Federally-listed.** Sometimes, before an airport sponsor completes an action, FWS or NMFS lists a candidate species as a Federal endangered or threatened species or determines its habitat is designated critical habitat. In either instance, FAA *must* review the action to determine if formal consultation is needed (see section 5.a.(3) of this chapter).

**6. DETERMINING IMPACTS.** If information indicates that a major construction activity may affect Federally-listed endangered or threatened species or critical habitat, the responsible FAA official must ensure that a BA is prepared and completed before a construction contract is signed and construction begins (50 CFR Section 402.12(b)(2)).

**a. The BA.** FAA and the Service Director use the BA:

(1) to discuss the species present in the area of a major construction activity, the severity of the activity's impacts on the species or critical habitat, and measures that may be needed to protect the species or habitat; and

(2) to determine if formal consultation is needed.

**b. When a BA is unnecessary.** No BA is needed when a major construction activity involves any of the following:

(1) The Service Director tells FAA or the non-Federal designee that no known Federally-listed species or critical habitat occurs in the action's impact area;

(2) A Federally-listed species or critical habitat is in the action's impact area, but the action would not disturb land or water;

(3) The Service Director tells FAA or the non-Federal designee that only candidate species or proposed critical habitat occur in the action's impact area; or

(4) If conditions (1) or (3) occur, consultation with the Service Director may be needed. The consultation keeps FAA aware of the status of species or critical habitat. It also ensures that the FAA fulfills its responsibilities regarding Federally-listed species or critical habitat, should the candidate species or habitat be listed or designated during an action's environmental review process (50 CFR Section 402.12(d)(1)).

**c. Preparing the BA.** The BA must provide the Service Director with the best scientific and commercial data available during the consultation period. The information may include results of FAA, airport sponsor, or consultant conducted studies.

(1) To prevent delays in completing an action's overall environmental review process and ESA Section 7 compliance, the BA should be completed while the NEPA document is being prepared. This allows FAA to use the information in the BA during the NEPA process to determine if a major construction activity would significantly affect a

protected species or its critical habitat. It also helps to streamline the overall environmental review process.

(2) If a non-Federal designee prepares the BA, FAA must provide guidance and supervise the document's preparation because FAA is responsible for BA content (50 CFR Section 402.08). Therefore, the responsible FAA official must independently review the completed version.

(3) The BA should include information on candidate species *only* if they are found with Federally-listed species (50 CFR Section 402.12).

**d. BA contents.** The responsible FAA official may use discretion to determine the BA's content. For example, the official must consider the nature of the proposed action and any concerns the Service Director has noted. As appropriate, the FAA official should include some or all of the following information in the BA:

(1) the results of an on-site inspection of the project-affected area to determine the presence (including seasonal occupancy or use) of Federally-listed species or critical habitat;

(2) the views of recognized experts regarding the species of concern;

(3) a review of the literature and other information regarding the species of concern;

(4) an analysis of the action's effects on the species or habitat of concern, including consideration of cumulative effects, and the results of any related studies; and

(5) an analysis of alternate actions the FAA considered for the proposed action (50 CFR Section 402.12.(f)).

**e. BA completion date.** FAA or the designated non-Federal representative must complete the BA within 180 days after preparation of that document begins (i.e., receipt of or concurrence with the species list), unless the Service Director and FAA agree to a different period of time. FAA and the Service Director may extend this 180-day period, but before doing so, FAA must provide the airport sponsor a written statement. The statement must specify the proposed extension's estimated length and the reasons why the extension is needed. FAA must provide this letter to the airport sponsor before the 180-day period ends (50 CFR Section 402.12(i)).

**f. Sending the BA to the Service Director.** FAA must submit the BA to the Service Director for review. The Service Director will respond to FAA in writing within 30 days. That response will note if the Service Director concurs with the findings of the BA. FAA has the option of starting formal consultation concurrently with the submission of the BA (50 CFR Section 402.12(j)).

**g. How FAA uses the BA.** The responsible FAA official uses the BA to determine the degree to which a proposed major construction activity may affect a Federally-listed species or critical habitat. Based on that information, the official will determine whether formal consultation or a conference is required under 50 CFR Sections 402.14 or 402.10, respectively. Note that the Service Director must subsequently concur with the responsible FAA official's opinion about the need for formal consultation.

**(1) No species listed or critical habitat.** If a BA indicates there are no listed species or critical habitat present in the area, or it is unlikely that major construction activity would cause adverse effects, the responsible FAA official may recommend to the Service Director that no formal consultation is needed.

**(2) No adverse effects.** If a BA suggests that it is unlikely that the activity would cause adverse effects on a Federally-listed species or designated critical habitat, the responsible FAA official may recommend to the Service Director that no formal consultation is needed.

**(3) Jeopardizing a candidate species.** If a BA suggests the activity would not adversely affect a Federally-listed species or designated critical habitat, but it is likely to jeopardize candidate species or habitat important to that species, the responsible FAA official may recommend to the Service Director that no formal consultation is required. However, a conference may be needed to discuss project effects on candidate species.

**g. How the FWS or NMFS uses the BA.** The Service Director uses the BA:

**(1)** to determine if FAA should start formal consultation;

**(2)** as the basis for a biological Opinion; or

**(3)** as a basis for a preliminary biological Opinion (50 CFR Section 402.12.(k)(2)).

## **7. DETERMINING IMPACT SIGNIFICANCE.**

**a. General.** After completing the BA and the consultation process discussed earlier in this chapter, the responsible FAA official should consider the following factors in consultation with FWS or NMFS personnel to determine the degree of impact on Federally-listed species or their critical habitats.

ORDER 1050.1E THRESHOLD	FACTORS TO CONSIDER
<p>When the FWS or NMFS determines a proposed action would likely jeopardize a species' continued existence or destroy or modify a species' critical habitat.</p>	<p>The responsible FAA official should consider the information in the biological assessment prepared for the action and all of the information gleaned during the Section 7 consultation process discussed in this chapter. Based on that information, the official should consider the following factors:</p> <ul style="list-style-type: none"> <li>• <i>Critical habitat area:</i> Would sufficient critical habitat area remain in the project area to sustain the protected species?</li> <li>• <i>Reasonable and prudent alternatives:</i> Determine if any reasonable and prudent alternative exists that would then reduce adverse effects on the protected species or critical habitat.</li> <li>• <i>Agency input:</i> Use the expertise of FWS or NMFS personnel to help determine impact severity.</li> </ul>

From: Table 7-1, FAA Order 5050.4B.

**b. Mitigation.** FWS or NMFS normally provide letters addressing effects on Federally-protected species or critical habitat. To meet ESA requirements efficiently and effectively during the environmental review process, FAA would use input from the appropriate Service Director to develop mitigation for impacts on protected species. An appendix to the environmental document should include copies of the FWS or the NMFS letters. The environmental document should summarize the most important information in those letters and accurately cross-reference the appendix and pages in that appendix for further information. If FAA or the sponsor does not adopt any recommended reasonable or prudent alternative or mitigation, the environmental document should clearly explain why the recommendation was not adopted. Based on the level of effect, determine those measure(s) or action(s) that would lessen harm to the species or critical habitat. Note that each affected Federally-listed species or critical habitat may require a separate strategy. Examples of measures that may be considered include the following, provided they do not promote increases in populations of species hazardous to aviation:

- (1) improving existing habitat;
- (2) creating new habitat;
- (3) buying private lands for preservation and management; and
- (4) moving the protected species.



If feasible, provide an estimated schedule for undertaking accepted mitigation.

## 8. ENVIRONMENTAL IMPACT STATEMENT CONTENT.

**a. General.** When the responsible FAA official determines that the project effects meet or exceed the significant impact threshold and mitigation would not reduce those effects below the threshold, FAA must prepare an EIS to address these effects. In this instance, FAA may wish to request that the FWS or the NMFS, as appropriate, participate as a cooperating agency due to their respective expertise and jurisdiction regarding Federally-listed endangered or threatened species and critical habitats. Besides the information the BA contains, the EIS must provide the following material, as appropriate.

**b. Added or expanded studies.** These include results of any additional biological studies that would provide more information to enable the Service Director to modify his/her biological Opinion. The environmental document may incorporate a biological assessment by reference for an action that is very similar to the proposed action (50 Section 402.12(g)). When doing so, the responsible FAA official should provide a written certification that:

(1) the proposed action involves similar impacts to the same species and the same geographic area;

(2) No new species have been listed or proposed or no new critical habitat designated or proposed for the action area; and

(3) FAA has supplemented the biological assessment with relevant changes in information.

**c. Mitigation.** The EIS should describe proposed mitigation FWS or NMFS provide. FAA and the airport sponsor should fully consider the mitigation and balance its benefits against those of the proposed action. The EIS should include any project changes, reasonable and prudent alternatives, or mitigation measures not previously considered that would reduce adverse impacts and prevent jeopardizing the Federally-listed species or destroying or modifying critical habitat. It should explain why the sponsor or FAA did not adopt any mitigation FWS or NMFS recommends. If feasible, the EIS should provide an estimated schedule for completing accepted mitigation.

**d. Exemption.** If the airport sponsor wishes to use this provision, the EIS should include a statement from the airport sponsor (or FAA on the airport sponsor's behalf). The statement should indicate that the sponsor will request an exemption to Section 7(g) of the ESA. See 50 CFR Part 451 for more information on this rarely used provision.