

Title: Biological Resources
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Issued by the Office of Planning and Environment (TPE)

**1. Purpose**

This document provides guidance on the coordination and documentation for proposed projects or actions affecting biological resources, including listed or protected wildlife, plants, fish, birds, reptiles, amphibians, marine mammals and their habitats, to comply with the Endangered Species Act of 1973 (16 U.S.C. § 1531-1544), Migratory Bird Treaty Act (16 U.S.C. § 703-712), Bald and Golden Eagle Protection Act (16 U.S.C. 668-668c), Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801 *et seq.*), Marine Mammal Protection Act of 1972 (16 U.S.C. § 1361-1423h), and Executive Order 13112—*Invasive Species*.

**2. Applicability/Scope**

The National Environmental Policy Act (NEPA) requires analysis and consideration of the effects of a proposed project or action on the quality of the human environment, including protected wildlife and plant species and/or their habitats (42 U.S.C. § 4332). Consideration of impacts to biological resources applies to any Federal Transit Administration (FTA)-funded project, regardless of class of action (i.e., categorical exclusion (CE), environmental assessment (EA), or environmental impact statement (EIS)).

**3. Responsibilities**

FTA Regional staff, in coordination with the project sponsor, is responsible for making effect determinations under Section 7 of the Endangered Species Act and for compliance with other biological resource-related requirements. These other environmental reviews are typically conducted during the NEPA process. FTA Regional staff is responsible for ensuring coordination with appropriate Federal and/or State resource agencies is conducted; the environmental documents include adequate analysis of potential impacts to biological resources; and any applicable Federal agency concurrence is received prior to making a CE determination, issuing a finding of no significant impact (FONSI), a combined final EIS (FEIS)/record of decision (ROD), or ROD.

**4. Standard Procedures**

**4.1. Endangered Species Act of 1973 (ESA).** The ESA (16 U.S.C. § 1531-1544) protects federally-listed endangered or threatened species and their critical habitats. Per 16 U.S.C. § 1536, also known as Section 7 of the ESA, Federal agencies are required to consult with the Secretary of the Interior or the Secretary of Commerce (as appropriate) on any actions likely to adversely affect or jeopardize a federally-listed species or its critical habitat. The Department of the Interior’s United States Fish and Wildlife Service (USFWS) generally has jurisdiction over terrestrial and freshwater species and their critical habitats, as well as bird species and their critical habitats. The Department of Commerce’s National Marine Fisheries Service (NMFS) generally has jurisdiction over marine fish species, marine

mammals, or critical marine habitat. The USFWS/NMFS joint regulations (50 CFR part 402), Interagency Cooperation provide the procedures for agency coordination under Section 7 of the ESA.

4.1.1. **Definitions.** The following definitions are the most applicable for understanding this SOP. Additional definitions are available at 50 CFR § 402.02 and 16 U.S.C. § 1532.

- **Biological assessment (BA):** The information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat (50 CFR § 402.02).
- **Biological opinion (BO):** A document that states the opinion of USFWS/NMFS as to whether the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat (50 CFR § 402.02).
- **Critical habitat** refers to specific geographic areas, whether occupied by listed species or not, that are determined to be essential for the conservation and management of listed species, and that have been formally described in the *Federal Register* (16 U.S.C. § 1532(5)(A)).
- **Endangered species** means any species that either USFWS or NMFS designates in danger of extinction throughout all or a significant portion of the species' range (16 U.S.C. § 1532(6)).
- **Incidental take** refers to "take" of listed species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant (50 CFR § 402.02).
- **Jeopardize the continued existence of** means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species (50 CFR § 402.02).
- **Listed species** means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under Section 4 of the ESA. Listed species are found in 50 CFR §§ 17.11-17.12.
- **Proposed species:** Proposed species means any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under section 4 of the Act (50 CFR § 402.02).
- **Service(s)** refers to the USFWS or the NMFS, or both, as appropriate (50 CFR § 402.02).
- **Take**, as defined by Section 3 of the ESA, means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.
- **Threatened species** means any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of the species' range (16 U.S.C. § 1532(20)).

4.1.2. **Identification of listed endangered or threatened species.** To determine if a proposed project area contains any listed species or critical habitat, FTA Regional staff, in coordination with the project sponsor, reviews the species list compiled or the list that USFWS/NMFS provides. This includes requesting species lists and designated critical habitat areas from USFWS's Information, Planning,

and Consultation System (IPaC)<sup>1</sup> and reviewing State natural resource agency websites. FTA Regional staff then determines whether a field survey and/or a Biological Assessment (BA) will be necessary for the proposed project to comply with Section 7 of the ESA using the species list information. For proposed projects that may adversely affect listed species or critical habitat, FTA Regional staff should invite USFWS/NMFS, as appropriate, to participate as a cooperating agency in the NEPA process for an EIS.

For projects occurring on tribal lands, FTA Regional staff should also coordinate with the tribal biologists. Under Secretarial Orders<sup>2</sup> issued jointly by the Departments of the Interior and Commerce, Federal agencies that administer the ESA must consult with any federally recognized tribe whose lands, trust resources, or treaty rights may be impacted by any decision, determination, or activity implementing the ESA. When the Services enter into formal consultations with FTA on a proposed action which may affect tribal rights or tribal trust resources, the Services must notify the affected Indian tribe(s). FTA should also invite the affected tribe(s) and the Bureau of Indian Affairs to participate in the consultation process, as appropriate.

**4.1.3. Section 7 of ESA Effect Determinations.** Effect determinations for each listed species must be made by FTA for FTA-funded projects. The outcome of effect determinations dictates how FTA proceeds regarding Section 7 consultation.

- **No Effect.** If there are no listed species, critical or suitable habitat in the action area or no listed species or habitat will be impacted by the proposed action, FTA can make a “no effect” determination for the proposed project. Concurrence from the Service is not required and no Biological Assessment is required.
- **May affect, but is not likely to adversely affect/adversely modify critical habitat.** This determination can be made when effects to the species or critical habitat are expected to be discountable, insignificant, or completely beneficial. Beneficial effects are contemporaneous positive effects without any adverse effects to the species or habitat. Insignificant effects relate to the size of the impact and include those effects that are undetectable, not measurable, or cannot be evaluated. Discountable effects are those extremely unlikely to occur. These determinations require written concurrence from the Service (see section 4.1.5) unless another agreement is made with the Service (e.g., Programmatic Agreement).
- **May affect, and is likely to adversely affects/adversely modify critical habitat.** This determination can be made if any adverse effect to listed species or critical habitat may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions, and the effect is not discountable, insignificant or beneficial. Formal consultation with the Service is required<sup>3</sup> (see section 4.1.5).

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<sup>1</sup> <https://ecos.fws.gov/ipac/>

<sup>2</sup> <https://www.doi.gov/pmb/cadr/programs/native/Government-to-Government-Secretarial-Orders>

<sup>3</sup> [https://www.fws.gov/endangered/esa-library/pdf/esa\\_section7\\_handbook.pdf](https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf);  
[https://www.fws.gov/Midwest/endangered/section7/ba\\_guide.html](https://www.fws.gov/Midwest/endangered/section7/ba_guide.html)

4.1.4 **Biological Assessments (BA)** (50 CFR § 402.12). If FTA determines that the proposed action “may affect” listed species, a BA should be prepared. The purpose of a BA is to document FTA’s evaluation of the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are “likely to be adversely affected” by the proposed action (50 CFR § 402.12(a)). The outcome of the BA determines whether formal consultation or a conference is necessary.

The contents of the BA are at the discretion of FTA Regional staff and depend on the nature of the proposed action. As appropriate, the BA should include the following information:

- 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;
- The views of recognized experts regarding the species of concern;
- A review of the literature and other information regarding the species of concern;
- 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
- An analysis of alternate actions FTA considered for the proposed action (50 CFR § 402.12(f)).

FTA Regional staff should also consult USFWS Region or Field Office websites and the Service’s 1998 Consultation Handbook<sup>4</sup> for further guidance on BA preparation. The USFWS/NMFS Director has 30 days to provide written concurrence with the findings presented in the BA after receiving the BA from FTA (50 CFR § 402.12(j)). FTA may initiate formal consultation under § 402.14(c) concurrently with the submission of the BA (see section 4.1.5).

4.1.5 **Types of Section 7 Consultation** (50 CFR § 402). The type of consultation depends on the status of the affected species or habitat and the severity of impacts.

- **Early consultation (optional).** FTA Regional staff may request early consultation with the Service(s) if the project information indicates the proposed action “may affect” federally-listed species or critical habitat (50 CFR § 402.11(b)). To begin this process, FTA Regional staff must prepare a letter to the Service requesting initiation of early consultation. The letter must contain the information outlined in 50 CFR § 402.11(b) and (c) and 50 CFR § 402.14(c). USFWS or NMFS will then issue a preliminary Biological Opinion (BO) in response to this early consultation (50 CFR § 402.02). The contents and conclusions of a preliminary BO are the same as a BO issued after formal consultation except that the incidental take statement provided with a preliminary BO does not constitute authority to take listed species (50 CFR § 402.11(e)).

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<sup>4</sup> [https://www.fws.gov/endangered/esa-library/pdf/esa\\_section7\\_handbook.pdf](https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf)

- **Informal consultation.** If the proposed action “may affect” listed species or critical habitat, FTA Regional staff may request informal consultation with the Service(s). Informal consultation may help FTA determine if a formal consultation or a conference is needed. FTA’s discussion with the Service may include the types of listed species that occur in the proposed action area, and what effect the proposed action may have on those species/critical habitats. The informal consultation also provides an opportunity for the Service to recommend changes or modifications to the proposed project that FTA could implement to avoid the likelihood of adverse effects to the listed species or critical habitat (50 CFR § 402.13(b)). Informal consultation may conclude if either of the following outcomes occurs:
  - If FTA, after discussions with the Service, determines that the proposed action is “not likely to adversely affect” listed species or critical habitat in the project area, and if the Service concurs in writing, the consultation is terminated, and no further action is necessary (50 CFR § 402.13(a)).
  - If, during the informal consultation or the review of the BA, FTA or the USFWS/NMFS Director determines that proposed action “may affect” listed species or designated critical habitat, formal consultation is necessary (50 CFR § 402.14(b)(1)).

FTA’s written request for concurrence of “not likely to adversely affect” determination under informal consultation must include similar information as that required for formal consultation at § 402.14(c)(1), but only at a level of detail sufficient for the Service to determine if it concurs. The Service has 60 days to provide written concurrence from the date of receipt of FTA’s written request. The 60-day timeframe may be extended upon mutual agreement of the Service and FTA, but cannot exceed 120 days from the date the Service receives FTA’s written request (50 CFR § 402.13(c)).

- **Formal consultation.** If FTA determines the proposed action, through a BA or other review, is “likely to adversely affect” a listed species or adversely modify critical habitat, FTA must submit a written request to the USFWS/NMFS Director to initiate formal consultation (50 CFR § 402.14). FTA sends this initiation letter (also known as the initiation package) after the BA is prepared under § 402.12 and FTA, or in consultation with the Director, determines whether the proposed action would “likely adversely affect” a listed species or critical habitat (50 CFR § 402.14(c)). The written request must include:
  - A description of the proposed action;
  - A map or description of all areas to be affected directly or indirectly by the action;
  - Information on the listed species or designated critical habitat in the action area;
  - A description of the effects of the action and an analysis of any cumulative effects;
  - A summary of any relevant information provided by the applicant (i.e., project sponsor), if available;

- Any other relevant available information on the effects of the proposed action on listed species or designated critical habitat, including any relevant reports such as EISs and EAs. (See 50 CFR § 402.14(c)(1)-(6) for more information.)

Formal consultation may last up to 90 days after its initiation. The Service has 45 days after concluding formal consultation to prepare a BO on whether the proposed activity will jeopardize the continued existence of a listed species. Typically, formal consultation ends when the Service issues the BO. A formal consultation will not be needed if a preliminary BO issued after early consultation is confirmed as the final BO (50 CFR § 402.14(b)(2)).

FTA may request (in writing) to review the Service's draft BO at least 10 days before the end of the Service's 45-day time-period to complete the BO. Although FTA may review the entire draft BO, the comments should address only the reasonable and prudent alternatives in the draft BO. If FTA submits comments on the draft BO within 10 days of the deadline, the Service is entitled to an automatic 10-day extension on the deadline (50 CFR § 402.14(g)(5)).

FTA may terminate formal consultation in writing if the proposed project is unlikely to occur or if FTA concludes the proposed project is unlikely to adversely affect a listed species or critical habitat, and the Service concurs with that determination (50 CFR § 402.14(l)).

- **Reinitiation of Consultation.** Reinitiating consultation applies to all Section 7 consultations. FTA Regional staff must reinitiate consultation with the Service if:
  - the amount or extent of taking specified in the incidental take statement is exceeded;
  - new information reveals an action's impacts may affect a listed species or critical habitat in a manner or to an extent not previously considered;
  - the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the BO or written concurrence from the Service; or
  - the identified action may affect a newly-listed species or newly-designated critical habitat (50 CFR § 402.16).
- **Conference.** A conference applies only to proposed species or critical habitats and is required if the BA indicates the proposed project would likely jeopardize a proposed species or cause the destruction or adverse modification of the proposed critical habitat (50 CFR § 402.10). FTA Regional staff should request an informal conference with the Service if there are proposed species or proposed critical habitat in the project area. An informal conference will help FTA, the Service, and the project sponsor to identify potential conflicts between the proposed action and a proposed species or proposed

critical habitat early in project planning and/or to develop recommendations to minimize or avoid adverse effects to proposed species or proposed critical habitat (50 CFR § 402.10 and § 402.12(d)(1)).

- **Programmatic Consultation.** If the proposed action involves potential impacts to Indiana bats and northern long-eared bats, FTA Regional staff should consult the *Programmatic Biological Opinion for Transportation Projects in the Range of the Indiana Bat and Northern Long-Eared Bat* (February 2018) which can be found on USFWS's website<sup>5</sup> for the standardized assessment, mitigation, and consultation approach. FTA Regional staff should also check for regional or statewide programmatic agreements that may exist to cover regionally specific species or activities.
- **Expedited Consultation** (optional and applies only to formal consultation). If the proposed action involves minimal adverse effects or predictable effects based upon the nature, size, scope of the action, and previous consultation experience, FTA Regional staff should discuss this consultation option with the Service to streamline consultation. FTA and the Service need to develop and sign an agreement, which would include expedited timelines to complete this consultation process. FTA would need to provide the necessary information to the Service to initiate consultation (50 CFR § 402.14).

4.1.6 **Documentation.** The environmental document should summarize the results of the Section 7 informal or formal consultation process, FTA's determination/finding, ("no effect," "may affect, but is not likely to adversely affect/adversely modify critical habitat," or "may affect, but is likely to adversely affect/ adversely modify critical habitat") and mitigation measures, as appropriate. An appendix to the environmental document should include copies of the BO or USFWS or NMFS concurrence letters. The BA should be incorporated by reference.

**4.2. Migratory Bird Treaty Act (MBTA).** The Migratory Bird Treaty Act of 1918 (16 U.S.C. §§ 703-712), as amended, prohibits private entities and Federal agencies from intentionally "taking or killing" of migratory birds, their nests, or their eggs unless USFWS authorizes such activities under a special permit.<sup>6</sup> Migratory bird species protected by MBTA are listed in 50 CFR § 10.13.

FTA Regional staff, in coordination with the project sponsor, should review USFWS online tools (IPaC system and Avian Knowledge Network Histogram Tools<sup>7</sup>) and State resource agency websites to identify potential migratory bird occurrence within or near the project area, and breeding season. Field reconnaissance may be necessary in the identification of protected birds and/or to confirm their presence or nesting habitats. FTA Regional staff should coordinate with the respective regional USFWS offices regarding compliance with MBTA, as appropriate.

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<sup>5</sup> <https://www.fws.gov/midwest/endangered/section7/fhwa/index.html>

<sup>6</sup> <https://www.doi.gov/solicitor/opinions>

<sup>7</sup> <https://www.fws.gov/birds/management/project-assessment-tools-and-guidance/decision-support-tools/akn-histogram-tools.php>

The environmental document, as applicable, should document the identification methods (e.g., online review, field survey), specific project activities (e.g., tree removal) that may impact migratory birds or nesting habitats, and the results of agency (i.e., USFWS and/or State resources agency) coordination. Mitigation or project commitments (e.g., no tree removal will occur during the breeding season/timeframe) to avoid impact to migratory birds' nesting and to ensure compliance with MBTA should also be discussed.

**4.3. Bald and Golden Eagle Protection Act.** The Bald and Golden Eagle Protection Act (16 U.S.C. §§ 668-668c) prohibits anyone from "taking" bald or golden eagles, including their parts, nests, or eggs, unless allowed by a permit issued by the Secretary of the Interior (16 U.S.C. § 668(a); 50 CFR part 22). "Take" is defined as "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest or disturb" (16 U.S.C. § 668c; 50 CFR § 22.3). The identification, coordination, and documentation associated with potential impacts to bald or golden eagles should be similar to the process FTA uses for MBTA (see section 4.2 above).

**4.4. Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).** The Magnuson-Stevens Act, as amended (16 U.S.C. § 1855(b)(2) *et seq.*) requires Federal agencies to consult with the Secretary of Commerce on any Federal action that "may adversely affect" any essential fish habitat (EFH). The NMFS's eight regional fishery management councils identify and describe fishery management plans to protect certain anadromous fish species specific to their regions.<sup>8</sup> FTA Regional staff, in coordination with the project sponsor, can determine whether the proposed project is located within or adjacent to EFH using NOAA Fisheries' EFH Mapper tool.<sup>9</sup> If the proposed project may affect EFH, FTA Regional staff must consult with NMFS (50 CFR part 600). The EFH consultation process and EFH Regional contacts can be found on NOAA Fisheries' website.<sup>10</sup> The environmental document should include an impact assessment on the affected EFH and any mitigation identified in consultation with NOAA Fisheries.

**4.5. Marine Mammal Protection Act of 1972 (MMPA).** The Marine Mammal Protection Act (16 U.S.C. § 1361-1421), prohibits the "take" of marine mammals in U.S. waters and by any person under U.S. jurisdiction on the high seas unless an authorized incidental "take" or permit is issued by the Services. "Take" is statutorily defined as "to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal" (50 CFR § 216.3). Under MMPA, USFWS is responsible for the protection of walrus, manatees, sea otters, and polar bears. NMFS is responsible for the protection of whales, dolphins, porpoises, seals, and sea lions. If the proposed action may take a marine mammal, FTA Regional staff must consult with the USFWS or NMFS (50 CFR part 18). Many marine mammals are also listed species under the ESA. Accordingly, FTA Regional staff should coordinate with the Service(s) to determine whether a species is protected by both laws and if so, to comply with both the ESA and

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<sup>8</sup> <https://www.fisheries.noaa.gov/node/2506>

<sup>9</sup> <https://www.habitat.noaa.gov/protection/efh/efhmapper/>

<sup>10</sup> <https://www.fisheries.noaa.gov/national/habitat-conservation/consultations-essential-fish-habitat>



MMPA concurrently. The environmental document should discuss potential impacts to marine mammals associated with the proposed action, mitigation measures as applicable, and the results of coordination with the USFWS or NMFS.

**4.6. Executive Order 13112- Invasive Species.** Executive Order 13112 directs Federal agencies to use relevant programs and authorities to the extent practicable to prevent the introduction of invasive species, provide for their control and restoration of native species and habitat conditions in ecosystems that have been invaded (64 FR 6183). During the environmental review process or NEPA scoping, FTA Regional staff should ensure that the project sponsor coordinates with the appropriate State natural resource agency to identify any potential invasive species issues in the project area. The environmental document should include the result of any agency coordination and identified measures or best management practices (e.g., removing attached plant/vegetation debris from earth-moving and hauling equipment prior to entering or leaving the construction site; seeding specifications) to prevent the introduction or the spread of invasive species.

## **5. Permitting Dashboard**

FTA Regional staff is responsible for entering Federal agency “actions” and their associated “milestones” for permits and authorizations onto the Federal Permitting Dashboard<sup>11</sup> for FTA-funded projects that require either an EA or EIS. The complete list of permits and authorizations, including ESA, is found on the Permitting Dashboard under the “Federal Environmental Review and Authorization Inventory.”<sup>12</sup>


## **6. References**

- Endangered Species Act, [16 U.S.C. § 1531-1544](#)
- Interagency Cooperation- Endangered Species Act, [50 CFR § 402](#)
- Biological Assessments, [50 CFR § 402.12](#)
- Migratory Bird Treaty Act, [16 U.S.C. § 703-712](#)
- List of Migratory Birds, [50 CFR § 10.13](#)
- Bald and Golden Eagles Protection Act, [16 U.S.C. 668-668c](#)
- Eagle Permits, [50 CFR § 22](#)
- Magnuson–Stevens Act, [16 U.S.C. § 1801 et seq.](#)
- Magnuson-Stevens Act Provisions, [50 CFR § 600](#)
- Marine Mammal Protection Act, [16 U.S.C. § 1361-1423h](#)
- Marine Mammals, [50 CFR § 18](#)

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<sup>11</sup> <https://www.permits.performance.gov>

<sup>12</sup> <https://cms8.permits.performance.gov/tools/federal-environmental-review-and-authorization-inventory>

APPROVAL:   
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DATE: 12/20/2019

*This SOP is not legally binding in its own right and will not be relied upon by the Department as a separate basis for affirmative enforcement action or other administrative penalty. Conformity with this guidance document (as distinct from existing statutes and regulations) is voluntary only, and nonconformity will not affect rights and obligations under existing statutes and regulations.*