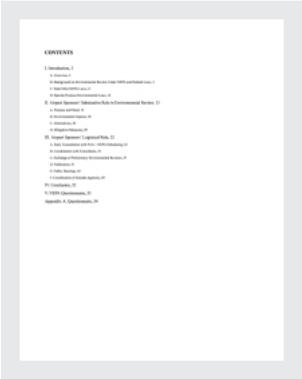

The Role of the Airport Sponsor in Airport Planning and Environmental Reviews of Proposed Development Projects Under the National Environmental Policy Act (NEPA) and State Mini-NEPA Laws

DETAILS

62 pages | 8.5 x 11 | PAPERBACK

ISBN 978-0-309-28386-1 | DOI 10.17226/22386

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THE ROLE OF THE AIRPORT SPONSOR IN AIRPORT PLANNING AND ENVIRONMENTAL REVIEW OF PROPOSED DEVELOPMENT PROJECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) AND STATE MINI-NEPA LAWS

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I. INTRODUCTION

A. Overview

For proposed development projects at public airports, the Federal Aviation Administration (FAA) is responsible for compliance with the environmental review procedures of the National Environmental Policy Act (NEPA). However, development projects are proposed by airport sponsors, not the FAA. As the project proponent, the airport sponsor plays a significant role in the NEPA process.

This digest explores the legal requirements that the airport sponsor and FAA must satisfy under NEPA, related "special-purpose" environmental laws, and state "mini-NEPA" statutes. The digest explores the relationship between the airport sponsor and the FAA in fulfilling such legal requirements, and the role played by each at different stages in the environmental review process, or based on the type of NEPA action (e.g., Categorical Exclusion, Environmental Assessment (EA), or Environmental Impact Statement (EIS)) required for a given development project. This digest offers practical guidance to airport sponsors and their legal counsel on how to fulfill specific requirements for each type of NEPA action and at each stage in the NEPA process.

The digest summarizes relevant statutes, regulations, FAA Orders and Advisory Circulars, and case law related to these legal issues. Additionally, a survey was prepared and sent to the 400 airports or airport sponsors who received the largest amounts of FAA grant funding under the Airport Improvement Program (AIP) from 2004 through 2011. The survey is available at the end of this digest. Fifty-five survey responses were received. In some cases, one survey response was received on behalf of multiple AIP grant recipients (e.g., from regional aviation authorities or block grant states who oversee multiple airports). Survey results are provided throughout the digest.

Section II of the digest explores the roles and responsibility of the airport sponsor and FAA in addressing substantive environmental review requirements, such as formulating the proposed development project's "purpose and need," assessing its environmental impact, evaluating the feasibility of alternatives, and formulating mitigation measures. Section III addresses more logistical issues, such as the responsibility of the airport sponsor and FAA to coordinate the activities of other parties (such as environmental consultants, the interested public, and other government agencies with jurisdiction over specially-protected environmental resources). Section III also addresses the roles and responsibility of the airport sponsor and FAA to hold public hearings, to make certain NEPA documents publicly available, and to respond to public records requests for other documents.

The following section briefly summarizes the environmental review process under NEPA, defining key terms that are used throughout the digest. It also addresses the relationship between NEPA, special-purpose environmental laws, and state mini-NEPA laws.

B. Background on Environmental Review Under NEPA and Related Laws

i. Pre-NEPA Planning and Categorical Exclusions

The environmental review process begins unofficially in the planning stages, when development is first proposed as a way "of solving an airport's problems."[1] The airport sponsor develops a Master Plan to document proposed development projects and "[j]ustify the proposed development through the technical, economic, and environmental investigation of concepts and alternatives."[2] One element of the Master Plan is an updated set of Airport Layout Plan (ALP) drawings showing all planned future development.[3] At the earliest planning stages, the airport sponsor will begin to formulate the rationale or justification for the proposed development project, which will later

[1] FAA Order 5050.4B, § 504.d(1) (2006).

[2] FAA Advisory Circular 150/5070-6B, § 104.c (2005).

[3] FAA Advisory Circular 150/5070-6B, § 202.c (2005).

form the basis for the statement of "purpose and need" required by NEPA.[4]

Another planning tool that may be a valuable resource in developing the Master Plan is a Noise Exposure Map (NEM).[5] A NEM illustrates the noise experienced by areas surrounding the airport due to existing development at the airport, with noise contours calculated according to the FAA's standardized methodology.[6] A NEM depicting a proposed *new* development might not be prepared at the development planning stage (since a similar noise impact analysis will typically be required later under NEPA),[7] but any existing NEMs illustrating adverse noise impacts of *existing* airport development experienced by noise-sensitive land uses surrounding the airport should be incorporated into the development planning process.[8] Based on the NEM, the airport sponsor may elect to enter into a Noise Compatibility Program to mitigate the noise from existing development,[9] regardless of whether the airport sponsor decides to pursue any new development project at that time.

Once a proposed development project is identified, the airport sponsor (in consultation with the FAA) will determine whether the proposed development project constitutes a major federal action subject to NEPA,[10] or whether it is a Categorical Exclusion from NEPA because it is not expected to have a significant adverse effect on the environment.[11] If the FAA grants a Categorical Exclusion for the proposed development, the NEPA process effectively ends. The FAA has determined that a number of development activities are typically Categorical Exclusions (i.e., not subject to NEPA) as long as the project does not involve "extraordinary circumstances."[12] These typical Categorical Exclusions include construction of new cargo buildings, replacement of existing terminal facilities, construction of new airport access roads, improvement of existing runway surfaces, and installation of airfield lighting. Also, the FAA's conditional approval of a revised ALP depicting *future* significant development is typically a Categorical Exclusion, since NEPA review will be required later before the proposed development is undertaken.[13] Accepting federal funds to prepare NEMs and Noise Compatibility Programs to address *existing* development is typically a Categorical Exclusion,[14] as is implementing a Noise Compatibility Program and revising an ALP to depict the implemented noise mitigation measures[15] (as long as extraordinary circumstances are not implicated).[16]

In response to the survey conducted for this digest, airport sponsors indicated a wide range of experience with Categorical Exclusions, as shown in Figure 1. Most survey respondents (29 out of 55, or 53 percent) requested between 1 and 20 Categorical Exclusions from 2004 to the present. One survey respondent reported 400 requests for Categorical Exclusion in that timeframe. However, a significant number of respondents (7 out of 55, or 13 percent) reported no requests for Categorical Exclusion from 2004 to 2012. (These seven survey respondents also all reported having performed minimal or no NEPA reviews in that timeframe.) This is surprising, because all survey respondents received significant AIP grant funding in that timeframe. All AIP-funded projects should either result in a Categorical Exclusion or a NEPA review.[17] All of these survey respondents

[4] FAA Order 5050.4B, § 502 (2006).

[5] FAA Advisory Circular 150/5020-1, ch. 1, § 2, ¶ 20 (1983).

[6] 14 C.F.R. § 150.21 (2012).

[7] FAA Order 1050.1E, App. A, § 14 (2004). FAA Order 1050.1E was revised on March 20, 2006, with FAA Order 1050.1E, Change 1. However, the 2006 revisions did not modify any sections cited in this report. Therefore, citations to FAA Order 1050.1E throughout this digest refer to both the original 2004 Order and the 2006 Change.

[8] FAA Order 5050.4B, § 503.c (2006).

[9] 14 C.F.R. § 150.23 (2012).

[10] 40 C.F.R. § 1508.18 (2012).

[11] 40 C.F.R. § 1508.4 (2012).

[12] FAA Order 5050.4B, Table 6-2 (2006); *see also* FAA Order 1050.1E, § 310 (2004). The proposed development project involves "extraordinary circumstances" if it would encroach on an environmental resource protected by a special-purpose environmental law, or if the proposed development project is otherwise likely to be highly controversial on environmental grounds. FAA Order 1050.1E, § 304 (2004). In these situations, the project cannot be categorically excluded from NEPA.

[13] FAA Order 5050.4B, Table 6-1 (2006).

[14] FAA Order 5050.4B, Table 6-1 (2006); *see also* FAA Order 1050.1E, § 307n (2004).

[15] FAA Order 5050.4B, Table 6-2 (2006); *see also* FAA Order 1050.1E, § 307d (2004).

[16] FAA Advisory Circular 150/5020-1, § 362 (1983) ("Although FAA acceptance of noise exposure maps and approval of noise compatibility programs are both categorical exclusions, any application for Federal funding of any portion of noise compatibility program may involve the need for an environmental assessment before such funding decisions can be made.").

[17] FAA Order 5100.38C, §§ 302.a, 1011.c (2005).

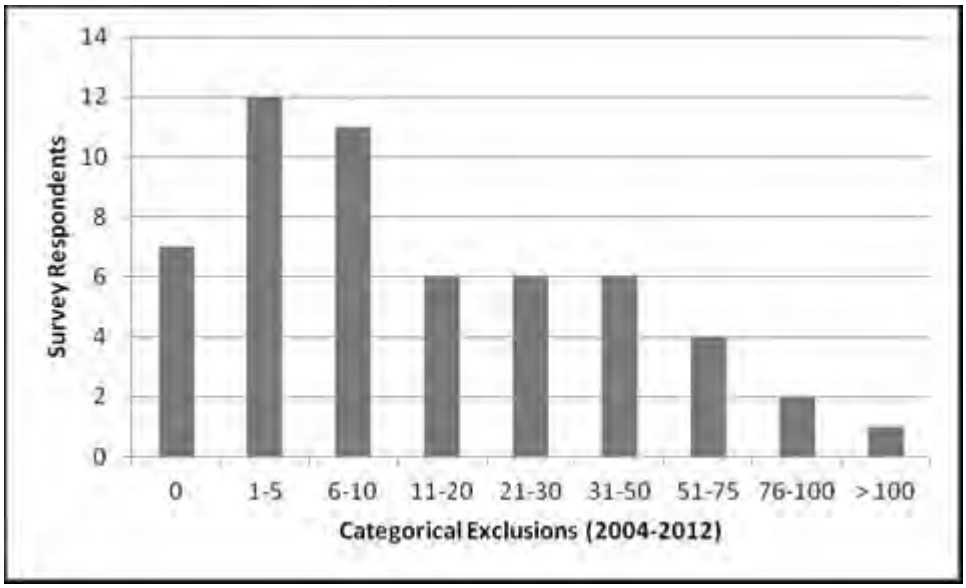

Figure 1. Experience of Survey Respondents with Categorical Exclusions.

would be expected to have requested Categorical Exclusions or performed NEPA reviews since 2004, although a small but significant minority reported that they had not. This survey result is consistent with previous surveys showing that a significant minority of airport sponsors are unaware that all federally funded expansion projects require either a Categorical Exclusion or NEPA review.[18]

ii. Environmental Assessments and Findings of No Significant Impact

When a proposed development project cannot be categorically excluded from environmental review, an EA will typically be prepared. The main purpose of the EA is to determine whether the project is likely to have a significant adverse environmental impact or not.[19] Generally speaking, an EA is required for projects involving a new airport, a new runway, or a major extension to an existing runway.[20] An EA may also be required for lesser developments that involve extraordinary circumstances, such as when the development will impact environmental resources protected by special-purpose environmental laws or when the development is otherwise highly controversial on environmental grounds.[21]

The EA is required to contain "brief discussions" of everything that would be discussed in an EIS:[22]

- The purpose and need of the proposed development.[23]
- Potential alternatives to the proposed development that might also achieve the purpose and need.[24]
- Environmental impacts (or environmental consequences) of both the proposed development and any reasonable alternatives.[25]

[18] U.S. GEN. ACCT. OFF., AVIATION AND THE ENVIRONMENT: AIRPORT OPERATIONS AND FUTURE GROWTH PRESENT ENVIRONMENTAL CHALLENGES 12, 70, GAO REPORT NO. GAO/RCED-00-153 (2000).

[19] 40 C.F.R. § 1508.9(a)(1) (2012).

[20] FAA Order 5050.4B §§ 702.d–702.g (2006); FAA Order 1050.1E § 401k (2004).

[21] FAA Order 5050.4B § 702.a–c, h–j (2006); Jeffrey A. Berger, *False Promises: NEPA's Role in Airport Expansions and the Streamlining of the Environmental Review Process*, 18 J. ENVTL. L. & LITIG. 279, 301 (2003) (In the EA, "the FAA should consider…the unique characteristics of the impacted land, the controversy of the project.").

[22] 40 C.F.R. § 1508.9 (2012); Berger, *supra* note 21, at 301 ("This EA 'hard look,' according to the FAA's internal orders, must essentially examine almost everything that the EIS does, including alternatives and impacts.").

[23] FAA Order 5050.4B § 706.b (2006); FAA Order 1050.1E § 405c (2004).

[24] FAA Order 5050.4B § 706.d (2006); FAA Order 1050.1E § 405d (2004).

• Mitigation measures that could reduce the adverse environmental impacts.[26]

These elements of a NEPA document (statement of purpose and need, discussion of environmental impacts, analysis of alternatives, and mitigation measures) are explained in greater detail in Section I.B.iii *infra*. Generally speaking, the most critical portion of the EA is the discussion of environmental impacts of the proposed development project.[27] This discussion must address not only the direct impact of the proposed project, but also its cumulative impact along with any past, present, and reasonably foreseeable future development at the airport.[28]

If the proposed development project is not expected to have significant adverse environmental impacts, the FAA can issue a Finding of No Significant Impact (FONSI), effectively ending the NEPA review process.[29] (If the proposed development project is expected to have significant adverse environmental impacts that can be mitigated to insignificant levels, the FAA may issue a "mitigated FONSI," representing the FAA's approval of the project subject to specific mitigation requirements.)[30] The FONSI is the FAA's formal statement that the project (as approved) "will not have a significant effect on the human environment," and represents the FAA's adoption of an EA that reaches the same conclusion.[31] A FONSI signifies the FAA's determination that an EIS is not necessary for the proposed development.[32] Therefore, the analysis in the EA must typically be sufficient for the FAA to show that it has taken a "hard look" at the potential environmental impacts before issuing a FONSI.[33]

In response to the survey conducted for this digest, airport sponsors indicated a wide range of experience with EAs, as shown in Figure 2. While a significant number of survey respondents (11 out of 55, or 20 percent) reported no EAs being performed for their airports from 2004 to 2012, one reported preparing 35 EAs in that timeframe. Most survey respondents (29 out of 55, or 53 percent) prepared one or two EAs in that timeframe. Survey respondents reported that 191 of the 205 EAs (or 93 percent) resulted in FONSIs granted by the FAA, suggesting that EAs usually result in FONSIs, effectively ending the NEPA review process.

[25] FAA Order 5050.4B § 706.e–f, h (2006); FAA Order 1050.1E §§ 405e-405f (2004).

[26] FAA Order 5050.4B § 706.g (2006); FAA Order 1050.1E § 405g (2004).

[27] Berger, *supra* note 21, at 301 ("[S]ince the purpose of the EA is to determine whether an EIS is required, the critical part of the EA's analysis is the potential for a significant impact.").

[28] FAA Order 5050.4B § 706.h (2006); FAA Order 1050.1E § 405f(c) (2004). A statistical regression analysis of 140 court cases involving legal challenges to airport expansion showed that failure to adequately consider cumulative impacts is one of the most likely reasons that courts might overturn the FAA's FONSI. Timothy R. Wyatt, *Balancing Airport Capacity Requirements with Environmental Concerns: Legal Challenges to Airport Expansion*, 76 J. AIR. L. & COM. 733, 796, 803 (2011).

[29] Berger, *supra* note 21, at 296 ("Opponents of airport expansion vigorously contest FONSIs because such findings eliminate their participation in the process and terminate the environmental review process.").

[30] FAA Order 5050.4B, § 802.g n.1 (2006).

[31] 40 C.F.R. § 1508.13 (2012).

[32] FAA Order 1050.1E § 406a (2004).

[33] Sierra Club v. U.S. Dep't of Transp., 753 F.2d 120, 127 (D.C. Cir. 1985).

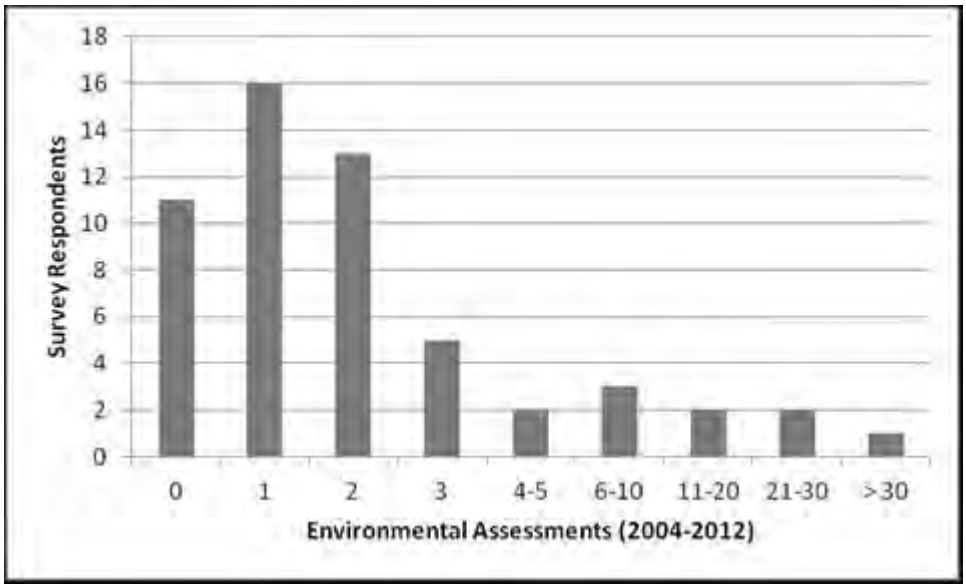

Figure 2. Experience of Survey Respondents with Environmental Assessments.

iii. Environmental Impact Statements

Where the EA reports that the proposed development project will have a significant impact on the environment that cannot be satisfactorily mitigated to insignificant levels, for the FAA to recommend or approve federal funding for the project, an EIS must be prepared.[34] For development proposals that are expected to have significant environmental impacts that cannot be satisfactorily mitigated, or are otherwise highly controversial on environmental grounds, the FAA may bypass the EA entirely and proceed directly to preparation of the EIS.[35] Generally speaking, an EIS is "normally" (but not necessarily) required for projects involving a new commercial service airport, or a new runway at an existing commercial service airport, located in a metropolitan statistical area, and the FAA may (but will not necessarily) bypass the EA process for such projects and begin preparing an EIS.[36] Even in those cases, however, the FAA may issue a FONSI if its partial EIS analysis suggests there will be no significant adverse impact (at which point the EIS preparation will cease), or where an EA was prepared for the project that suggests no significant adverse impact.[37]

EIS's are rarely required for airport development, as illustrated by Figure 3. In response to the survey conducted for this digest, the vast majority of airport sponsors (47 out of 55, or 85 percent) reported no EIS's from 2004 to 2012. One survey respondent reported a partial EIS, three reported one EIS, three reported two EIS's, and one reported four EIS's in that timeframe.

[34] 42 U.S.C. § 4332(C) (2012).

[35] FAA Order 5050.4B § 903.b (2006); FAA Order 1050.1E § 400c (2004); *see, e.g.*, St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 620 (7th Cir. 2007) ("On December 5, 2001, the Mayor of Chicago and the Governor of Illinois announced that they had reached an agreement on the central components of the proposed [O'Hare Airport expansion plan]. Shortly thereafter, the FAA submitted its Notice of Intent to Prepare an Environmental Impact Statement (EIS).").

[36] FAA Order 5050.4B § 903.b (2006). *But see* Allison v. U.S. Dep't of Transp., 908 F.2d 1024, 1027 (D.C. Cir. 1990) (describing the FAA's decision to wait to begin preparing an EIS for a new commercial service airport until the airport sponsor completed an EA for the project).

[37] *See, e.g.*, Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1140 (9th Cir. 2011) (declining to require an EIS for a new runway, where the FAA issued a FONSI on the basis of the EA).

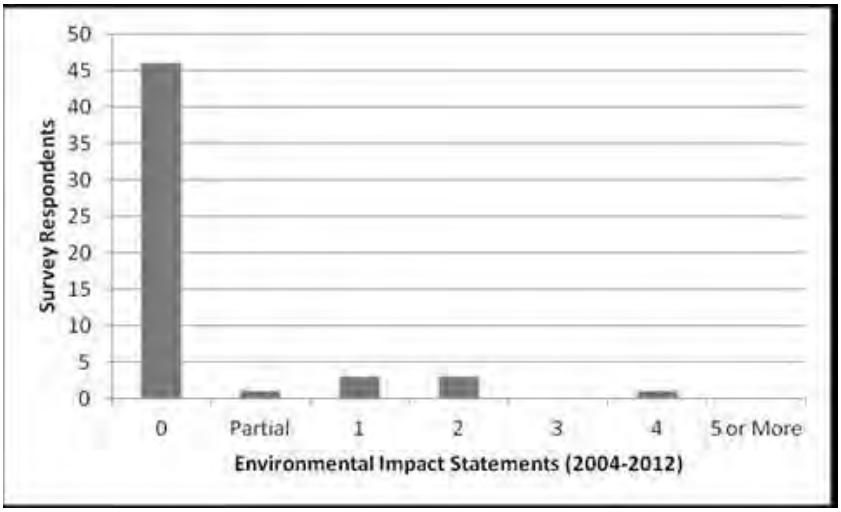

Figure 3. Experience of Survey Respondents with Environmental Impact Statements.

The EIS is to accomplish the following:

- "[B]riefly specify the underlying purpose and need" of the proposed development.[38]
- "Rigorously explore and objectively evaluate all reasonable alternatives" that might achieve the purpose and need.[39]
- "[S]uccinctly describe the environment of the area(s) to be affected" by the proposed development,[40] and discuss "the environmental impacts of the alternatives including the proposed action, [including] any adverse environmental effects which cannot be avoided should the proposal be implemented."[41]
- Discuss "[m]eans to mitigate adverse environmental impacts" of the proposed development.[42]

Note that these four elements of an EIS are also the four elements of an EA, although the discussions in the EIS generally should be more thorough. Descriptions of these four elements of a NEPA document follow:

1. Purpose and Need.—The statement of purpose and need describes the rationale for the proposed development project—the project's ability to solve problems faced at the airport. The "need" describes the problem to be solved at the airport; e.g., an airport may have the *need* to expand capacity, reduce delays, or improve safety. As a general rule, the "purpose" describes the function of the proposed development; e.g., a runway expansion project may serve the *purpose* of expanding the class of aircraft that can use the airport. There might be multiple alternatives to the proposed development project that could also satisfy the airport's "need."[43]

2. Impacts.—The EIS is to contain a "detailed statement" of the environmental consequences of the proposed development project[44] (as opposed to the "brief discussions" in the EA). The discussion of environmental impacts in the EIS "shall be supported by evidence that the agency has made the necessary environmental analyses."[45] The FAA has compiled a list of "impact categories" that are typically considered (e.g., air quality, water quality, noise, light emissions, and visual impacts) and has prescribed analysis methods for evaluating environmental impacts in each category.[46] Typically, the underlying technical analysis required for assessing environmental impacts under the EIS is the same as the analysis under the EA for determining whether significant environmental impacts are anticipated. For impact categories where the EA indicates that there will not be significant impacts, the discussion for that

[38] 40 C.F.R. § 1502.13 (2012).

[39] 40 C.F.R. § 1502.14(a) (2012).

[40] 40 C.F.R. § 1502.15 (2012).

[41] 40 C.F.R. § 1502.16 (2012).

[42] 40 C.F.R. § 1502.16(h) (2012).

[43] FAA Order 5050.4B, § 504.e (2006).

[44] 42 U.S.C. § 4332(C) (2012).

[45] 40 C.F.R. § 1502.1 (2012).

[46] FAA Order 1050.1E, App. A, § 1.2 (2004).

impact category may be substantially the same in the EA and EIS.[47] The FAA may determine that additional technical analysis is warranted for the EIS,[48] especially for impact categories where the EA indicates that significant impacts are anticipated.

The discussion of environmental impacts is to include not just the impact of the proposed development project, but also its cumulative impact in conjunction with "other past, present, and reasonably foreseeable future" development at the airport.[49] Failure to adequately consider cumulative impact is one of the most likely reasons that a court might reject an EIS (or an EA/FONSI) for an airport development project.[50]

3. Alternatives.—Where the proposed development project is expected to have a significant environmental impact, the EIS is to contain a detailed discussion of "alternatives to the proposed action."[51] The discussion of alternatives is the "heart" of the EIS.[52] The EIS must present a rigorous analysis of the environmental impacts of "all reasonable alternatives" for comparison with the environmental impacts of the proposed development project.[53] The alternatives considered must include "no action"[54]—to provide a baseline for comparing the environmental impacts of the proposed development project and all other alternatives.

In considering whether an alternative is "reasonable" (and thus deserving of detailed environmental impact analysis), the FAA is known to conduct a "tiered" screening process.[55] The FAA first determines whether each alternative could satisfy the "purpose and need" of the proposed development. Only the "no action" alternative and those alternatives that potentially satisfy the "purpose and need" are considered further for detailed environmental impact analysis. All others are deemed to not be "reasonable" alternatives.

Although the purpose of the alternatives analysis is to make it possible to compare the environmental impact of different approaches that satisfy the purpose and need of the proposed development, there is no requirement in NEPA to select the alternative with the least environmental impact. However, for projects involving a new airport, new runway, or major runway extension, upon finding that the proposed development will have a significant environmental impact, the FAA is required to find that there is "no possible or prudent alternative" to the proposed development project for the project to receive federal funds.[56] There may also be special-purpose environmental laws that require selection of the alternative with the least environmental impact on specially-protected environmental resources. For example, if the proposed development project would impact wetlands, and there is a "practicable alternative" that would not impact wetlands, that alternative becomes the "preferred alternative" in the EIS.[57] If the proposed development project will impact a wildlife refuge, public park, or historic site, there must be "no feasible and prudent alternative" to the preferred alternative in the EIS.[58]

Although these requirements appear to be stricter than the NEPA requirement to discuss "reasonable" alternatives, in practice, courts do not require airport sponsors to adopt "a rigid least-harm standard" when selecting from multiple feasible alternatives.[59] In part, this is because the FAA's tiered screening process is effective in removing from consideration more environmentally-friendly alternatives that would not address the airport's needs. Courts routinely uphold environmental reviews where the FAA has determined that certain alternatives are not "prudent" because they do not satisfy the purpose and need (e.g., expand capacity, reduce delays, or improve safety).[60] Environmental reviews for airport de-

[47] *See, e.g.*, FAA Order 1050.1E § 12.3a ("The EIS description of potential annoyance from airport lighting and measures to minimize the effects should be documented in a similar fashion in an EIS to that in an EA.").

[48] *Id.* ("It is possible that the responsible FAA official will judge that a special lighting study is warranted.").

[49] 40 C.F.R. §§ 1508.7, 1508.8(b) (2012); *see also* Grand Canyon Trust v. FAA, 290 F.3d 339, 345 (D.C. Cir. 2002) ("Indeed, the FAA's own NEPA policy calls for consideration of cumulative impact, parroting the language of the NEPA regulations to include proposed projects and past, present, and reasonably foreseeable future actions.").

[50] *See supra* note 28 and accompanying text.

[51] 42 U.S.C. § 4332(C)(iii) (2012).

[52] 40 C.F.R. § 1502.14 (2012).

[53] 40 C.F.R. § 1502.14(a), (b) (2012).

[54] 40 C.F.R. § 1502.14(d) (2012).

[55] Alliance for Legal Action v. U.S. Army Corps of Eng'rs, 314 F. Supp. 2d 534, 538–39 (M.D.N.C. 2004); *see also* Nat'l Mitigation Banking Ass'n v. U.S. Army Corps of Eng'rs, No. 06-CV-2820, 2007 U.S. Dist. LEXIS 10528, at *19–20 (N.D. Ill. Feb. 14, 2007).

[56] 49 U.S.C. § 47106(c)(1)(B) (2012).

[57] FAA Order 1050.1E, App. A, § 18.2d (2004).

[58] FAA Order 1050.1E, App. A, § 6.1a (2004).

[59] City of Bridgeton v. Slater, 212 F.3d 448, 462 (8th Cir. 2000).

[60] *See, e.g.*, Safeguarding the Historic Hanscom Area's Irreplaceable Res., Inc. v. FAA, 651 F.3d 202, 211 (1st Cir.

velopment projects are practically never overturned due to inadequate analysis of alternatives.[61]

4. Mitigation Measures.—The EIS is to discuss "[m]eans to mitigate adverse environmental impacts" of the proposed development project.[62] To offset the environmental impact of the project, an airport sponsor may incorporate mitigation measures into its proposed project. Alternatively, some alternatives considered by the FAA in the EIS may combine the airport sponsor's proposed project with various mitigation measures.[63] The FAA's "preferred alternative" in the EIS may incorporate mitigation measures, so that the FAA's approval of the development project is conditioned upon the airport sponsor implementing the mitigation measures.[64] However, unless the mitigation measures are expressly incorporated into the proposed development or preferred alternative approved by the FAA, there is no strict requirement in NEPA to actually implement any mitigation measures discussed in the EIS.

Although NEPA does not expressly require mitigation, for projects involving a new airport, new runway, or major runway extension, upon finding that the proposed development will have a significant environmental impact, the FAA cannot approve the project without finding "that every reasonable step has been taken to minimize the adverse effect."[65] Although this provision appears to impose a strict mitigation requirement, the FAA defines "reasonable" mitigation measures to be those that satisfy the statement of "purpose and need." The FAA thus attempts to ensure that any required mitigation measure incorporated into its preferred alternative is tailored to the purpose and need.[66]

There may also be special-purpose environmental laws that impose strict mitigation requirements if the proposed development project will impact specially protected environmental resources. For example, if the project will impact wetlands, the preferred alternative in the EIS must employ "all practicable measures to minimize harm" to the wetlands.[67] If the project will impact a wildlife refuge, public park, or historic site, the preferred alternative in the EIS must include "all possible planning to minimize harm" to that resource.[68] Environmental reviews for airport projects that satisfy the NEPA requirement to discuss mitigation measures have been overturned for failing to find that the proposed development *minimizes* harm to a specially protected environmental resource.[69]

iv. Record of Decision

When NEPA review is complete, the FAA will often issue a Record of Decision (ROD) either approving the airport sponsor's proposed development project; approving the FAA's preferred alternative to the proposed development; approving a range of potential alternatives, including required mitigation measures; or simply approving no action. For projects requiring an EIS, FAA funding and airport sponsor implementation of the project can only take place after an ROD has been issued.[70] On the other hand, where the FAA has issued a FONSI based on an airport sponsor's EA, an ROD is optional. Where the FAA has prepared a FONSI but no EIS, the FAA will typically still issue an ROD for actions requiring a mitigated FONSI, for actions that would normally require an EIS, for actions that are without precedent, and for actions that are highly controversial on environmental grounds.[71]

v. Supplementation

The NEPA environmental review is to be supplemented if, at any time (i.e., before or after an ROD has been issued), substantial changes are

2011); City of Dania Beach v. FAA, 628 F.3d 581, 587 (D.C. Cir. 2010); Natural Res. Def. Council, Inc. v. FAA, 564 F.3d 549, 569 (2d Cir. 2009).

[61] Wyatt, *supra* note 28, at 751, 796, 800 (finding that, based on 140 court cases involving environmental review of airport expansion, a legal challenge to the alternatives analysis has a statistically insignificant effect on the outcome of the case, and almost never results in overturning a NEPA review). *But see* People *ex rel* Van de Kamp v. Marsh, 687 F. Supp. 495, 497 (N.D. Cal. 1988).

[62] 40 C.F.R. § 1502.16(h) (2012).

[63] 40 C.F.R. § 1502.14(f) (2012).

[64] FAA Order 1050.1E, §§ 506h(2), 512b (2004).

[65] 49 U.S.C. § 47106(c)(1)(B) (2012).

[66] *See, e.g.*, Complaint for Declaratory, Injunctive and other Equitable Relief at 9, Avellaneda v. FAA, No. 08–10718–DPW (D. Mass. 2009) ("[T]he FAA concluded that the Preferred Alternative, and the proposed 10-knot northwest/southeast wind restriction as a mitigation measure…would allow the FAA 'to achieve the purpose and need of the project to reduce delays during northwest wind conditions.'").

[67] FAA Order 1050.1E, App. A, § 18.4a(5) (2004).

[68] 49 U.S.C. 303(c)(2) (2012).

[69] *See, e.g.*, Stewart Park & Reserve Coal., Inc. v. Slater, 352 F.3d 545, 557 (2d Cir. 2003).

[70] FAA Order 1050.1E, § 512 (2004).

[71] FAA Order 5050.4B, § 805.a (2006); FAA Order 1050.1E, § 408b (2004).

made to the proposed development project (or approved alternatives) or significant new circumstances or information become known relevant to the environmental impact of the project.[72] Where an ROD has been issued, but more than 3 years have passed and the project has not been implemented, the FAA requires a written reevaluation of the EIS (or EA) to determine whether there are significant new circumstances or information that require supplementation.[73] The Supplemental EIS (or EA) must satisfy the requirements of an EIS (or EA), and an ROD (and/or FONSI, as applicable) must be issued before the project can be implemented.[74]

C. State Mini-NEPA Laws

A number of states have adopted what are known variously as "mini-NEPA," "little NEPA," or "NEPA-like" statutes, which require an environmental review procedure similar to NEPA for state actions having a significant impact on the environment.[75] These include the California Environmental Quality Act (CEQA)[76] and the Massachusetts Environmental Protection Act (MEPA).[77] These state mini-NEPA laws may require a state environmental agency or airport sponsor (e.g., a state or regional aviation authority) to perform an environmental review for a proposed development project at an airport, in addition to the FAA's environmental review requirements under NEPA. The FAA requires any state mini-NEPA environmental review to be conducted jointly with the NEPA environmental review to the extent possible.[78] As a general rule, no significant airport development (e.g., to expand capacity or reduce delay) will take place without FAA funding (or without the FAA's unconditional approval of an ALP). Therefore, Federal NEPA review will practically always be required for any significant airport development project, and that NEPA review, in most cases, will satisfy most requirements of the state mini-NEPA review (once adopted by the appropriate state agency). However, the airport sponsor should contact the lead state agency under a mini-NEPA law and encourage that state agency to coordinate its efforts with the FAA to minimize duplication of effort.[79]

Where the proposed development project will have a significant environmental impact, state mini-NEPA laws typically establish procedural requirements for state agencies (or airport sponsors) to prepare an Environmental Impact Report (EIR). An EIR is analogous to the Federal EIS and contains the same basic content:[80] a discussion of environmental impacts, an analysis of alternatives, and a discussion of measures to mitigate the environmental impact of the proposed development project. However, state mini-NEPA laws (unlike NEPA) may also have substantive environmental requirements that require the state agency (or airport sponsor) to adopt the alternative with the least environmental impact or to adopt mitigation measures to "minimize" the environmental impact.[81] Airport sponsors should be aware of any such substantive requirements in relevant state mini-NEPA laws that might influence the joint NEPA environmental review with the FAA.

In response to the survey conducted for this digest, most airport sponsors reported no issues with integrating their state mini-NEPA procedures (if any) into the Federal NEPA review process. The lone exception was California, where airport sponsors consistently expressed frustration with having to address CEQA requirements that go beyond the NEPA requirements. Specifically, actions that may be categorically excluded from NEPA review may not be excluded from CEQA review, so the airport sponsor often has to prepare CEQA documents in situations where NEPA

[72] 40 C.F.R. § 1502.9(c)(1) (2012); *see also* FAA Order 1050.1E, §§ 411a, 516a (2004).

[73] FAA Order 5050.4B, § 1401(c) (2006).

[74] 40 C.F.R. § 1502.9(c)(4) (2012); *see also* FAA Order 1050.1E, §§ 411b, 516b (2004).

[75] Wyatt, *supra* note 28, at 739.

[76] CAL. PUB. RES. CODE § 21000 *et seq*. (2012).

[77] MASS. GEN. LAWS ch. 30, § 61 (2012).

[78] FAA Order 5050.4B, ch. 1, § 9.m (2006).

[79] DONALD G. ANDREWS ET AL., APPROACHES TO INTEGRATING AIRPORT DEVELOPMENT AND FEDERAL ENVIRONMENTAL REVIEW PROCESSES 25 (ACRP SYNTHESIS 17 2009).

[80] *See, e.g.*, Mass. Port Auth. v. City of Boston, No. 0102731BLS2, 17 Mass. L. Rep. 158, 2003 Mass. Super. LEXIS 425, at *3 nn.4–5 (Nov. 18, 2003) (indicating that the requirements for an EIR under MEPA and an EIS under NEPA are so interchangeable that they can be combined into a single report).

[81] *See, e.g.*, CAL. PUB. RES. CODE § 21002 (2012) ("[P]ublic agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects."); MASS. GEN. LAWS ch. 30, § 61 (2012) ("All agencies…shall review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and shall use all practicable means and measures to minimize damage to the environment.").

documents are not required. One survey respondent stated, "In California, the NEPA process is often of far less importance than CEQA. The only time NEPA comes into play on most projects is when FAA grant money and/or ALP modification is involved, and most of those projects are Categorical Exclusions." Another survey respondent from California reported similar observations, and expressed frustration that Federal AIP funds are available to prepare NEPA documents but not to prepare the analogous CEQA documents when the action is categorically excluded from NEPA review. A third survey respondent from California indicated that although the differences between NEPA and CEQA create a less efficient environmental review process, airport sponsors in California are well aware of the differences and have adapted. No survey respondent from any other state reported any issues coordinating the environmental reviews under NEPA and state mini-NEPA laws.

For airport sponsors located in states that participate in the FAA's State Block Grant Program, funding decisions for specific airport development projects are typically made by the administering state agency rather than the FAA.[82] In that case, NEPA does not technically apply (since approval of airport development by the Block Grant state is not a federal action, but rather a state action). However, the FAA has ensured that NEPA or NEPA-like review is conducted for Block Grant projects that may have a significant impact on the environment. If the Block Grant state is not subject to a mini-NEPA law, then the proposed development project is subject to NEPA review (under the terms of the Block Grant Program), but the administering state agency takes on the FAA's responsibility to oversee the NEPA process.[83] If the Block Grant state is subject to a mini-NEPA law, then the proposed development project is not subject to NEPA, but the administering state agency is required to fulfill the mini-NEPA process[84] (which may be stricter than NEPA). However, all airport development projects in Block Grant states are required (under the terms of the Block Grant Program) to satisfy federal special-purpose environmental laws, since those laws would have applied to the project had the FAA retained responsibility for the project.[85] These special-purpose environmental laws are discussed in the following section.

Although Congress has only authorized 10 states to participate in the FAA's Block Grant Program, in the survey conducted for this digest, 19 of the 55 responses (34.5 percent) came from airport sponsors located in Block Grant states. Although airport development in these states may not technically be subject to NEPA, in general, survey responses from airport sponsors located in Block Grant states do not indicate reduced compliance with NEPA. If anything, survey respondents from the Block Grant states reported higher-than-average numbers of EAs and Categorical Exclusions.

D. Special-Purpose Environmental Laws

Although NEPA requires discussion of the environmental impacts, reasonable alternatives, and possible mitigation measures of a proposed development project, NEPA itself does not impose a substantive requirement to select the alternative that minimizes environmental impact. However, there are a number of special-purpose environmental laws, typically established to protect specific categories of environmental resources, and these special-purpose laws often do impose substantive requirements if the project will impact the specially protected resources. The FAA has integrated consideration of federal special-purpose laws into the NEPA process of evaluating environmental impacts.[86] Specially protected resources commonly impacted by airport developments that implicate special-purpose environmental laws with substantive requirements include wetlands,[87] floodplains,[88] coastal zones,[89] and wildlife refuges, public parks, or historic sites.[90] Airport sponsors should keep in mind that there may also be state special-purpose laws that apply and should be addressed during environmental review.

Typically, there will exist a non-FAA government agency with jurisdiction over the specially protected environmental resource or special-

[82] FAA Order 5050.4B, § 210.d (2006).

[83] FAA Order 5050.4B, § 212.c (2006).

[84] FAA Order 5050.4B, § 212.b (2006).

[85] FAA Order 5050.4B, §§ 212.b, c (2006).

[86] FAA Order 5050.4B, ch. 1, § 9.t (2006); FAA Order 1050.1E, App. A (2004).

[87] FAA Order 5050.4B, § 1206 (2006); FAA Order 1050.1E, App. A, § 18 (2004).

[88] FAA Order 5050.4B, § 1207 (2006); FAA Order 1050.1E, App. A, § 9 (2004).

[89] FAA Order 5050.4B, § 1208 (2006); FAA Order 1050.1E, App. A, § 3 (2004).

[90] FAA Order 5050.4B, § 1204 (2006); FAA Order 1050.1E, App. A, § 6 (2004).

purpose law, from whom approval of some sort (e.g., a permit) is required if the proposed development project will impact the specially-protected environmental resource. In some cases, the act of granting a permit under the special-purpose law might itself be considered federal action subject to NEPA (or state action subject to a state mini-NEPA law), requiring that agency to perform its own NEPA (or NEPA-like) review. To avoid parallel environmental reviews and duplication of effort by other government agencies, in December 2003, Congress enacted the *Vision 100—Century of Aviation Reauthorization Act*, which calls for "an expedited and coordinated environmental review process for airport capacity enhancement projects at congested airports, aviation safety projects, and aviation security projects."[91] The legislation "provides that all environmental reviews, analyses, opinions, permits, licenses, and approvals that must be issued or made by a Federal agency or airport sponsor for such a project will be conducted concurrently, to the maximum extent practicable."[92] The legislation also encourages state environmental agencies (other than airport sponsors) to be subject to this streamlined environmental review process.[93] The FAA is the lead agency in the streamlined environmental review process, and all participating agencies "shall give substantial deference" to the FAA's decisions and directives.[94] The FAA also encourages intra-agency coordination of the environmental review process for other airport development projects that are not subject to streamlined environmental review (i.e., development projects that do not involve "congested airports, aviation safety projects, and aviation security projects").[95]

In summary, NEPA and mini-NEPA laws prescribe a process by which government agencies like the FAA are required to document a proposed development project's purpose and need, environmental impacts, reasonable alternatives, and possible mitigation measures. The level of detail of this documentation depends upon the significance of the impact that the project is anticipated to have. Where a specially protected environmental resource will be significantly impacted, special-purpose laws will influence the consideration of alternatives and mitigation measures. Section II examines the role and responsibility of the airport sponsor and the FAA in preparing these components of an environmental review.

II. AIRPORT SPONSORS' SUBSTANTIVE ROLE IN ENVIRONMENTAL REVIEW

Preparing the content of a NEPA (or NEPA-like) document (e.g., the purpose and need, discussion of environmental impact, analysis of alternatives, and mitigation measures) typically involves specialized technical knowledge. Therefore, airport sponsors (and their legal counsel) often rely on engineering consultants to ensure that the technical content is adequately prepared. However, airport sponsors (and their legal counsel) should have a working understanding of these requirements:

- What technical content is legally required at different stages in the environmental review process.
- Who is required to prepare the content at each stage.
- Whether the technical content of the NEPA document adequately supports the official decision (e.g., FONSI and/or ROD) that is recommended by the airport sponsor or ultimately made by the FAA.

This Section addresses these legal requirements, as opposed to the technical requirements, of the NEPA document content.

A. Purpose and Need

As discussed in Section I, under NEPA, both the EA and the EIS are to state the purpose and need of the proposed development project, and the statement of purpose and need is key to the identification of alternatives. This section examines the role of the airport sponsor in formulating the purpose and need at different stages in the environmental review process.

i. Purpose and Need at the Planning Stage

Formulating the purpose and need of a proposed development project begins long before the environmental review process. Airport sponsors are responsible for identifying the airport's needs

[91] 49 U.S.C. § 47171 (2012); *see also* FAA Order 1050.1E, App. D, § 6.c (2004).

[92] 49 U.S.C. § 47171(a)(2) (2012).

[93] 49 U.S.C. § 47171(e) (2012).

[94] FAA Order 1050.1E, App. D, § 6.g (2004).

[95] FAA Order 5050.4B, § 1100.b (2006); FAA Order 1050.1E, § 213 (2004).

and proposing solutions.[96] Airport sponsors are expected to "know well in advance when they must take an action to meet an airport need."[97] During the master planning stage, airport sponsors are expected to critically analyze how well a proposed development project will serve its purpose[98] (i.e., whether there is a rational fit between the project and the airport's need).

The proposed development project will generally first appear as an update to the airport's ALP.[99] An airport sponsor's change to its ALP requires FAA approval.[100] Even if the FAA is not yet committing federal funds to the development project, the FAA's approval of an ALP is potentially a federal action subject to NEPA.[101] Therefore, the airport sponsor should consider formulating the purpose and need of the proposed development at the time the sponsor requests approval of an ALP, well before the environmental review process formally begins.[102]

"Conditional" approval of an ALP (meaning that formal environmental review is incomplete) normally qualifies as a Categorical Exclusion from NEPA.[103] To determine whether to conditionally approve certain features shown on an ALP, the FAA must first determine that "the features are not yet needed."[104] To make this determination, the FAA must first know what the airport's *needs* are, which would be facilitated by a preliminary statement of purpose and need from the airport sponsor. A formal NEPA statement of purpose and need will be required later to obtain "unconditional" approval and FAA funding for the project.

ii. Purpose and Need in the Environmental Assessment

As will be discussed further herein, it is typically the airport sponsor's responsibility to prepare an EA when a proposed development project cannot be categorically excluded. Thus, the statement of purpose and need in the EA is the airport sponsor's statement.[105] The airport sponsor, however, may ask the FAA for assistance in developing the purpose and need.[106] In defining the purpose and need, the airport sponsor is directed to consider not just its own goals and objectives, but also "the statutory objectives of the proposed Federal actions"[107] (i.e., the FAA's statutory mission).

Before 1996, the airport sponsor's needs and the FAA's statutory objectives were closely aligned, as the FAA's primary statutory mission was the promotion of "air commerce." Since 1996, however, the FAA's primary statutory mission has been the "promotion of safety."[108] Therefore, the airport sponsor should consider any safety purpose served by the proposed development project, and consider incorporating that safety purpose into its statement. (This can have the added advantage of casting the project as an "aviation safety" project suitable for streamlined environmental review.) However, the airport sponsor cannot mask its true "need" for the project by casting the project "purpose" entirely in terms of the FAA's statutory mission of promoting safety.[109]

When an airport sponsor submits an EA to the FAA, it is the FAA's responsibility to "ensure the purpose and need is rational and supported by

[96] FAA Order 5050.4B, § 201.a (2006) ("[A]irport sponsors are responsible for deciding when and where airport development is needed and for building and operating airport facilities.").

[97] FAA Order 5050.4B, § 603.a (2006).

[98] FAA Order 5050.4B, § 501.b (2006).

[99] FAA Order 5050.4B, § 202.a (2006) ("An ALP identifies all existing and future runways, runway extensions, terminal buildings and other airfield facilities, and the descriptions of the development needed to support them. The ALP is for planning purposes only.").

[100] FAA Airport Sponsor Grant Assurance 29 (2012).

[101] FAA Order 5050.4B, § 202.b (2006).

[102] *See* City of Dania Beach v. FAA, 628 F.3d 581, 585, 588 (D.C. Cir. 2010) (upholding the FAA's approval of an ALP based on an evaluation of the project's purpose and need).

[103] FAA Order 1050.1E, § 307p (2004).

[104] FAA Order 5050.4B, § 202.c(1)(b) (2006).

[105] *See, e.g.*, FAA Order 5050.4B, App. 1, Chart 2 (2006) ("Sponsor identifies problem (i.e., need) and proposes a solution (i.e., purpose) that is an action normally requiring an Environmental Assessment (EA)").

[106] FAA Order 5050.4B, § 707.a(2) (2006).

[107] FAA Order 5050.4B, § 705.b(1) (2006).

[108] J. David Grizzle et al., *Navigating the Turbulence of Competing Interests: Principles and Practice of the Federal Aviation Administration*, 75 J. AIR L. & COMM. 777, 779 (2010) (citing Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104–264, § 401, 110 Stat. 3213 (1996)).

[109] California v. U.S. Dep't of Transp., 260 F. Supp. 2d 969, 974 (N.D. Cal. 2003) ("If the only *purpose* of airport expansion was to improve the *safety* and convenience of existing air service, the FEA might be sufficient to comply with NEPA…[T]he FEA states, however, that the *need* for an improved airport is to stimulate regional growth." (emphasis added)).

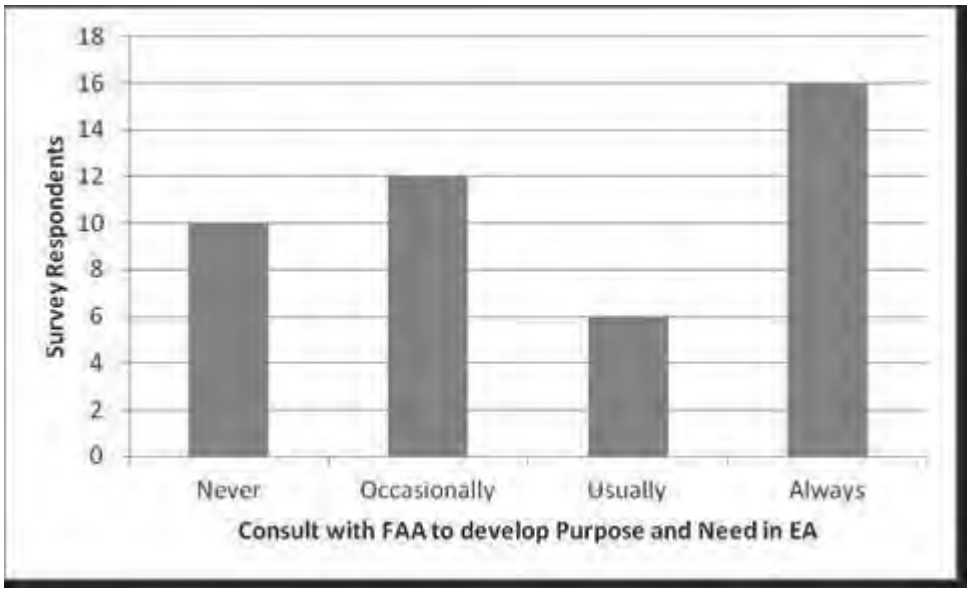

Figure 4. Tendency of Survey Respondents to Consult with FAA to Develop Purpose and Need.

current, available data."[110] The FAA may ask the airport sponsor to supply "any supporting data, inventories, assessments, analyses, or studies" that will help justify the airport sponsor's purpose and need, or that will help make it understandable to the general public.[111] The airport sponsor's "need" will often involve demand for use of the airport (particularly the future demand forecast at the airport) and the airport's lack of existing capacity to satisfy future demand. In formulating its purpose and need, the airport sponsor should consult with the FAA to ensure that the airport sponsor's forecasts are reasonably consistent with the FAA's terminal area forecast. The FAA is to ensure that the airport sponsor and FAA "resolve the differences between those forecasts before completing the Purpose and Need."[112]

Responses to the survey conducted for this digest suggest that there is no standard approach taken by airport sponsors regarding FAA consultation in formulating the purpose and need. As shown in Figure 4, of the 44 survey respondents who have prepared EAs from 2004 to the present, half of them (22) "never" or "occasionally" consult with the FAA, and half of them (22) "usually" or "always" consult with the FAA, to develop the purpose and need. There are few disadvantages to consulting with the FAA, as it is unlikely that the FAA will recommend a wholesale change to the airport sponsor's proposed development project at the EA stage. As shown in Figure 5, very few EA survey respondents (6 of 44, or 14 percent) report that the FAA "usually" recommends a change to the airport sponsor's purpose and need in an EA. Survey respondents repeatedly indicated that any changes recommended by the FAA were only for "clarification" of the statement, and did not change the project proposed by the airport sponsor.

[110] FAA Order 5050.4B, § 706.b (2006).

[111] FAA Order 1050.1E, § 405c (2004).

[112] FAA Order 5050.4B, § 706.b(3)(c) (2006); *see also* Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1129 n.7, 1143 (9th Cir. 2011) (overturning the FAA's approval of an EA, where the airport sponsor's 5-year forecast differed significantly from the FAA's 5-year forecast).

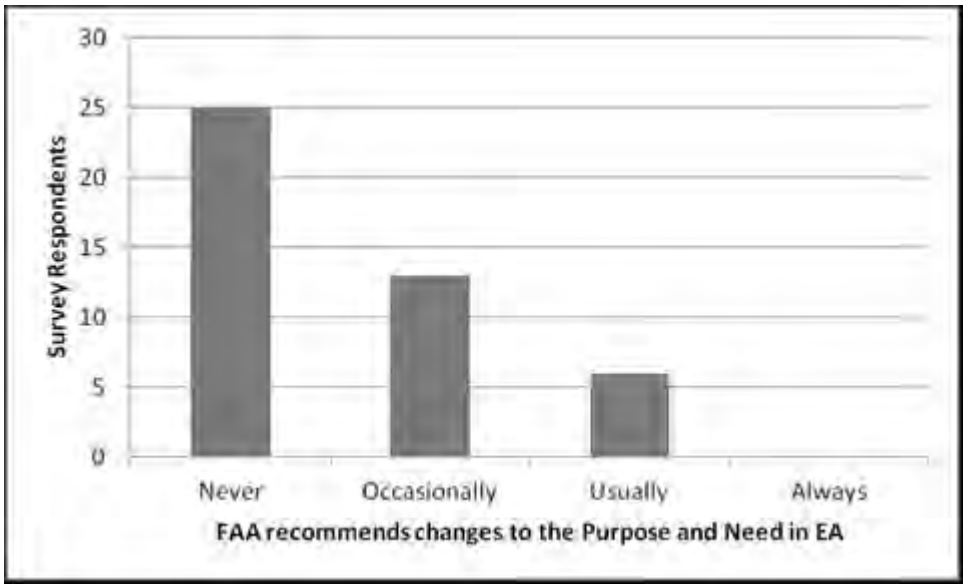

Figure 5. Tendency of FAA to Suggest Changes in Airport Sponsor's Purpose and Need.

In at least one case identified in the survey, the FAA recommended that the airport sponsor refocus the statement of purpose and need on the FAA's statutory mission of promoting safety:

> The [purpose and need (P&N)] for one airport project was to install an [instrument landing system (ILS)], with an initial need for improved access to the airport in peri-ods of inclement weather. Based on [FAA] review comments, the P&N was redefined to focus on the safety aspects of an ILS, especially for the ability to allow medical flights during periods when they would not be able to occur due to weather. The shift in emphasis of the P&N did not change the proposed project.

In another case identified in the survey, the FAA provided guidance to help the airport sponsor revise its purpose and need to better "explain the project's relationship with previously funded projects." Such guidance would help the airport sponsor preemptively address concerns about the cumulative impact of the proposed development project. In short, consulting with the FAA to develop the purpose and need can help the airport sponsor strengthen its EA against potential challenges from the public or non-FAA government agencies.

iii. Purpose and Need in the Environmental Impact Statement

As will be discussed further herein, it is the FAA's responsibility to prepare an EIS; thus, the statement of purpose and need in the EIS is the FAA's statement, not that of the airport sponsor. The purpose and need in the EIS is to distinguish "between the need for the proposed action and the desires or preferences of" both the airport sponsor and the FAA.[113] The airport sponsor plays a limited supporting role in formulating the purpose and need in the EIS. Primarily, the airport sponsor is to provide background data requested by the FAA to support the FAA's assessment of purpose and need.[114]

If the airport sponsor previously prepared an EA, the FAA may directly adopt the purpose and need from the airport sponsor's EA, *only* if the FAA "determines the EA fully explains why FAA is considering the proposed action."[115] The airport "sponsor's goals play a large role in determining how the purpose and need is stated. …At the same time, the goals that Congress has set for the [FAA] must also figure into the formulation of the

[113] FAA Order 1050.1E, § 506d (2004).

[114] *See, e.g.*, FAA Order 5050.4B, § 904.b(2) (2006) (recommending that the airport sponsor include "good planning data" with a proposal for development, "because they allow FAA to…[d]efine a purpose and need."); FAA Order 1050.1E, § 503 (2004) (showing that the FAA alone "determines need for EIS," after the FAA *or airport sponsor* "collects background data and analyzes information.").

[115] FAA Order 5050.4B, § 1007.d(2) (2006).

statement."[116] Accordingly, the purpose and need in the FAA's EIS may deviate from the purpose and need in the airport sponsor's EA to better reflect the FAA's statutory objectives.[117] The purpose and need in the FAA's EIS will typically focus on how the proposed development promotes safety.[118]

Generally, the airport sponsor need not be concerned that the FAA will radically alter the proposed development project based on the FAA's revised statement of purpose and need. Even where the FAA does not directly adopt the airport sponsor's purpose and need, the airport sponsor's purpose and need is still relevant to any action approved by the FAA.[119] All survey respondents with EIS experience reported that the FAA's EIS directly adopted the airport sponsor's purpose and need from the EA without making any changes.

Historically, a bigger concern for airport sponsors has been that other state or federal agencies, with different statutory objectives than the FAA, conducting a parallel environmental review under a special-purpose or mini-NEPA law, might recommend a different project than that proposed by the airport sponsor, because the non-FAA agency may define the project's purpose and need differently.[120] Even if the non-FAA agency recommended the same project as proposed by the airport sponsor and the FAA, a different statement of purpose and need by the non-FAA agency could make the project recommendation the subject of a legal challenge.[121] Since non-FAA agencies do not share the FAA's statutory mission, such an agency's decision to directly adopt the airport sponsor's or FAA's statement of purpose and need could also historically be subject to legal challenge.[122]

The streamlined environmental review process for any "airport capacity expansion project at a congested airport," or for any project designated by the FAA as "an aviation safety project or aviation security project,"[123] helps resolve these legal challenges. For any such project, the FAA is required "to request and consider comments on project purpose and need from interested people and governmental entities according to the NEPA process."[124] However, the final statement of purpose and need in the EIS is the FAA's alone, and all other participating government agencies, as well as the airport sponsor, "are bound by the project purpose and need" defined by the FAA.[125] In the survey conducted for this digest, only one survey respondent with EIS experience reported that the FAA revised its purpose and need in the EIS to address comments from other government agencies.

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[116] Alliance for Legal Action v. FAA, 69 F. App'x 617, 622 (4th Cir. 2003) (citing Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991)).

[117] Florida Clean Water Network, Inc. v. Grosskruger, 587 F. Supp. 2d 1236, 1244 (M.D. Fla. 2008) ("In its Record of Decision, the FAA noted that its own evaluation of the project purpose coincided with the [airport sponsor]'s 'except in the area of economic goals and forecast aviation demand.'").

[118] *See* Town of Stratford, Conn. v. FAA, 285 F.3d 84, 86 (D.C. Cir. 2002) ("[T]he FAA prepared an EIS evaluating possible safety measures at the airport. The EIS' Statement of Purpose and Need outlined its general objective of increasing safety.").

[119] Natural Res. Def. Council v. FAA, 564 F.3d 549, 568 (2d Cir. 2009) (upholding an EIS where the FAA determined that only the airport sponsor's proposed project "meets both the FAA's and the Airport Sponsor's purposes and needs").

[120] This has been a prevalent occurrence where the U.S. Army Corps of Engineers performs a parallel environmental review of a proposed airport development project under the Clean Water Act. *See infra* notes 121–22, 124–25.

[121] *See* Fla. Clean Water Network, Inc. v. Grosskruger, 587 F. Supp. 2d 1236, 1241 (M.D. Fla. 2008)

> In evaluating the project, the Corps, like the FAA, considered FAA safety and design standards and included the [airport sponsor]'s request for a runway that could support international flights. The Corps [unlike the FAA] also included the need for the project to be compatible with local and regional planning efforts.

[122] *See* Alliance for Legal Action v. U.S. Army Corps of Eng'rs, 314 F. Supp. 2d 534, 550 (M.D.N.C. 2004) (The Corps noted that "given our own lack of expertise in the area of airport expansion, the FAA is the appropriate agency to determine the applicant's purpose and need for the project. Our analysis of the FAA-FEIS indicates that FAA has done an adequate job of analyzing the purpose and need for the project.").

[123] 49 U.S.C. § 47171 (2012).

[124] FAA Order 5050.4B, § 1505.i(2) (2006); *see also* Nat'l Mitigation Banking Ass'n v. U.S. Army Corps of Eng'rs, No. 06-CV-2820, 2007 U.S. Dist. LEXIS 10528, at *11 (N.D. Ill. Feb. 14, 2007) ("When and as requested by FAA, the Corps will attend and participate in O'Hare Modernization EIS meetings, particularly as related to project purpose and need.").

[125] FAA Order 5050.4B, § 1505.i(1) (2006); *see also* Nat'l Mitigation Banking Ass'n v. U.S. Army Corps of Eng'rs, No. 06-CV-2820, 2007 U.S. Dist. LEXIS 10528, at *28 (N.D. Ill. Feb. 14, 2007) ("The Corps stated that it was a cooperating agency in the review of the DEIS, and that it 'agreed to adopt and incorporate the [FEIS] into our decision making process with respect to key issues such as…purpose and need.'").

B. Environmental Impacts

As discussed in Section I, under NEPA, both the EA and the EIS are to discuss the environmental impacts of the proposed development project. This section examines the role of the airport sponsor in analyzing and documenting environmental impacts of proposed development projects at different stages in the environmental review process.

i. Impact Analysis at the Pre-NEPA Planning Stage

Although detailed EIS's are not typically performed at the planning stage, airport sponsors are directed to "critically analyze…the environmental issues" related to a proposed development project "during early project planning."[126] The airport sponsor's environmental impact analysis at the planning stage is largely limited to 1) identifying potential environmental impacts that will have to be considered as the project moves forward (such as affected environmental resources protected by special-purpose environmental laws), and 2) developing good planning data (e.g., demand forecasts) that will be used in later detailed environmental impact studies.

When a proposed development project is first identified, the airport sponsor is encouraged to contact both the FAA and the airport's own environmental consultants "early in master planning efforts."[127] The purpose of this early contact is "to identify potential major environmental impacts" before the NEPA environmental review process officially begins.[128] This is both to identify the environmental impact analyses that may be required under NEPA, and also to avoid delays in funding approval because an affected environmental resource is identified late in the NEPA process. The FAA and the airport sponsor's environmental consultants should help identify both environmental concerns that are typically associated with airport development projects of that type,[129] as well as specific environmental resources near the airport that may implicate special-purpose environmental laws.[130] The airport sponsor is also to consider how the potential environmental impacts identified during the planning stage "could potentially affect airport operations."[131]

In addition to identifying potential environmental impacts, the airport sponsor is expected to gather data during the planning stage that will be used in environmental impact analyses later in the NEPA process. The airport sponsor and/or the FAA will later rely upon accurate planning data to efficiently "[p]rovide analyses of potential environmental impacts the proposed project and its reasonable alternatives could cause."[132] Planning data that the airport sponsor should gather in anticipation of NEPA include accurate aircraft operations forecasts, the airport's existing capacity, facility requirements to accommodate the forecasts, and an up-to-date ALP showing all proposed development.[133] Later, during the NEPA process, the "FAA will consider whether the [airport] sponsor provided sufficient planning data or information to meaningfully evaluate…potential environmental effects."[134] The FAA strongly emphasizes the relationship between a successful NEPA process and good planning data supplied by the airport sponsor:

> During the past decade, [FAA] has found that a lack of well-conceived and well-developed airport planning information or failure to resolve planning issues have caused substantial delays in the NEPA process. Many times these delays were not NEPA-related, but were due to a lack of good planning data. This lack of data severely hampered FAA's ability to meaningfully evaluate project impacts and prepare the EIS.[135]

Often, noise will be the environmental impact of greatest concern anticipated from a proposed development project. Therefore, impact data gathered at the planning stage should include any existing NEMs depicting the existing airport layout. A NEM illustrates the anticipated noise impacts based on forecast airport operations at the airport for a forecast period at least 5 years in the future, calculated using the FAA's standardized noise impact analysis methodology.[136] A NEM also illustrates the compatibility of surrounding land uses with the anticipated noise impact of the airport as it exists,[137] so the NEM can be an important planning tool for identifying nearby land uses or specially protected environmental resources that could be sensitive to additional development and

[126] FAA Order 5050.4B, § 501.b (2006).

[127] FAA Order 5050.4B, § 201.b(1) (2006).

[128] FAA Order 5050.4B, § 501.b(2) (2006).

[129] FAA Order 5050.4B, § 501.b(1) (2006).

[130] FAA Order 5050.4B, § 201.b(1)(a) (2006).

[131] FAA Order 5050.4B, § 911.a(1) (2006).

[132] FAA Order 5050.4B, § 502.c (2006); *see also* FAA Order 5050.4B, §§ 503.b, 904.b(2)(c) (2006).

[133] FAA Order 5050.4B, § 503.a (2006).

[134] FAA Order 5050.4B, § 904.b(1) (2006).

[135] FAA Order 5050.4B, § 904.b(1) (2006).

[136] 14 C.F.R. § 150.21(a)(1) (2012).

[137] 14 C.F.R. § 150.21(a)(2) (2012).

increased noise exposure.[138] A NEM depicting a proposed *new* development might not be prepared at the development planning stage (since a similar analysis will be required later in an EA or EIS),[139] but any existing NEMs illustrating potential adverse noise impacts from *existing* airport development to noise-sensitive land uses surrounding the airport should be incorporated into the development planning process.[140] If the airport sponsor has concerns about the noise impacts of the existing airport layout, a NEM may be prepared at the planning stage as a precursor to a Noise Compatibility Program to mitigate the noise from existing development,[141] regardless of whether any new development is ultimately proposed. One purpose of a Noise Compatibility Program is to allow an airport sponsor to further assess the noise impact of an airport's existing layout and operations,[142] and that impact analysis should influence future development planning.

ii. Impact Analysis for the Categorical Exclusion

If a proposed development project is not a major federal action, or will not have a significant environmental impact, then the project is categorically excluded from environmental impact analysis under NEPA. As a general rule, a Categorical Exclusion is appropriate where a proposed development project "does not create environmental impacts outside the airport property."[143] Airport sponsors may wonder how they can determine that there will not be significant environmental impacts without first performing a NEPA environmental impact analysis. The suggested process follows.

First, the airport sponsor should review lists of typical Categorical Exclusions provided by the FAA, to determine whether the proposed development project would ordinarily qualify for a Categorical Exclusion.[144] The fact that a certain type of development project appears on a list of Categorical Exclusions does not automatically exempt the project from NEPA; there may be extraordinary circumstances associated with any proposed development project that would require the airport sponsor to undergo NEPA review.

As a general rule, administrative, regulatory, and certification actions that do not involve airport development or expansion of airport operations are categorically excluded and are unlikely to involve extraordinary circumstances.[145] Typical Categorical Exclusions under this category include obtaining conditional approval of an ALP, accepting federal grants to perform airport planning or to prepare NEPA documents, and accepting federal grants to prepare NEMs and Noise Compatibility Programs.

Also as a general rule, airport sponsors should assume that airport development activities that involve some construction, but do not expand the airport's capacity, might involve extraordinary circumstances even if they would otherwise be categorically excluded.[146] Typical Categorical Exclusions under this category include repair of or improvement to existing runways; construction of new taxiways, aprons, and roads; installation of equipment such as airfield lighting; and implementation of Noise Compatibility Programs (including any associated revisions to an ALP to reflect the noise mitigation measures).

After reviewing the FAA's lists of typical Categorical Exclusions, the airport sponsor is to review lists of extraordinary circumstances compiled by the FAA.[147] Airport development activities typically involve extraordinary circumstances if they affect an environmental resource protected by special-purpose environmental laws apart from NEPA. If the proposed development would create a noise impact in a noise-sensitive area (e.g., as indicated on a NEM), it involves extraordinary circumstances.[148] Also, extraordinary circumstances are involved if the cumulative impact of the proposed development project (in conjunction with past and future development at the airport) would likely be significant.[149] Finally, extraordi-

[138] FAA Order 5050.4B, § 503.c (2006).

[139] FAA Order 1050.1E, App. A, § 14 (2004).

[140] FAA Order 5050.4B, § 503.c (2006).

[141] 14 C.F.R. § 150.23 (2012).

[142] 14 C.F.R. § B150.1(b)(1) (2012).

[143] West v. FAA, 320 F. App'x 782, 783 (9th Cir. 2009) (upholding the FAA's categorical exclusion of a project for the "repair, strengthening, and resurfacing of an existing runway").

[144] FAA Order 5050.4B, Chart 1 (2006).

[145] The FAA publishes lists of typical administrative, regulatory, and certification actions that are categorically excluded. FAA Order 5050.4B, App. 1, Table 6-1 (2006); FAA Order 1050.1E, §§ 307–308 (2004).

[146] The FAA publishes lists of typical airport development activities that are categorically excluded, but may involve extraordinary circumstances. FAA Order 5050.4B, Table 6-2 (2006); FAA Order 1050.1E, §§ 309–310 (2004).

[147] FAA Order 5050.4B, § 603.b (2006); *see also* FAA Order 5050.4B, Chart 1 (2006). The FAA publishes lists of typical extraordinary circumstances. FAA Order 5050.4B, Table 6-3 (2006); FAA Order 1050.1E, § 304 (2004).

[148] FAA Order 1050.1E, § 304f (2004).

[149] FAA Order 1050.1E, § 304k (2004).

nary circumstances are involved if the proposed development is "likely to be highly controversial on environmental grounds," such as when there is "reasonable disagreement" over whether the proposed development project will have significant environmental impacts.[150] Therefore, to determine whether there are extraordinary circumstances, the airport sponsor must at least perform a preliminary assessment of the environmental impacts of the development that the airport sponsor seeks to categorically exclude from NEPA review.

The mere presence of extraordinary circumstances does not necessarily mean that NEPA review is required.[151] The FAA (not the airport sponsor) is ultimately responsible for determining whether extraordinary circumstances exist, and whether a proposed development project can be categorically excluded.[152] After reviewing the FAA's lists of typical Categorical Exclusions and the FAA's lists of extraordinary circumstances, the airport sponsor should contact the FAA to confirm whether a Categorical Exclusion is appropriate for the project, given the anticipated environmental impacts. The FAA will determine whether the action can be categorically excluded despite extraordinary circumstances, or whether the airport sponsor will need to prepare an EA.[153]

In some cases, the FAA may categorically exclude a proposed development project even though extraordinary circumstances do exist, such as the applicability of special-purpose environmental laws. In those cases, even though the activity is excluded from NEPA review, the airport sponsor and the FAA still must prepare any documentation that may be required to comply with the special-purpose laws.[154] Generally, the airport sponsor is responsible for performing any analytical studies required by the special-purpose laws (e.g., to show that the environmental impact of the proposed activity will be below the exemption thresholds for the special-purpose laws), and for providing the FAA with documentation of the studies.[155] Ultimately, however, it is not the airport sponsor's obligation, but rather the obligation of the FAA, to determine that the project conforms to federal special-purpose laws.[156]

The airport sponsor must be consistent in its interpretations of the FAA criteria for Categorical Exclusions, and whether Categorical Exclusions apply to development proposals made by airport tenants. Airport sponsors are required to avoid discriminatory treatment of their tenants, so as not to give one tenant an economic advantage over the other.[157] In 2008, an airport maintenance business at the Modesto City-County Airport complained of economic discrimination when the airport sponsor first told the tenant that installation of fuel storage tanks would be categorically excluded from NEPA and CEQA, then later informed the tenant that environmental review would be required.[158] The FAA found that the airport sponsor was not acting in a discriminatory manner. However, the FAA cautioned the airport sponsor to establish

> minimum standards that address various aeronautical activities that businesses may wish to engage in on the Airport, including any environmental reviews that would potentially be required…. Once the airport sponsor has established minimum standards, it should apply them objectively and uniformly to all similarly situated on-airport aeronautical activities and services. Therefore, the airport sponsor should consider the FAA's lists of typical Categorical Exclusions and extraordinary circumstances, then document any *additional* circumstances in which the airport sponsor might require its tenants to undergo environmental review for typically excluded activities.

If the FAA grants a Categorical Exclusion for a proposed development, then NEPA does not apply. Thus, the airport sponsor is not required to

[150] FAA Order 1050.1E, § 304i (2004).

[151] FAA Order 1050.1E, § 304 (2004) ("The presence of one or more of [extraordinary] circumstance(s) in connection with a proposed action is not necessarily a reason to prepare an EA or EIS.").

[152] FAA Order 5050.4B, §§ 506, 605 (2006).

[153] *See* Giuliano v. State, No. X01UWYCV014002704S, 2007 Conn. Super. LEXIS 3467, at *4 (Dec. 20, 2007) (FAA declining to categorically exclude a departure change due to extraordinary circumstances (*i.e.*, the change would occur "in a noise sensitive area"), and informing the airport sponsor that an EA was required).

[154] FAA Order 5050.4B, Chart 1 (2006) ("Sponsor and/or FAA prepare required documentation to comply with special purpose laws that apply to the proposed action.")

[155] FAA Order 5050.4B, § 603b (2006); *see also* City of Tempe v. FAA, 239 F. Supp. 2d 55, 60 n.5 (D.D.C. 2003) (FAA reviewing emissions study prepared by a consultant for the airport sponsor, to determine that a runway expansion project would have a *de minimis* impact on air quality and thus fall below the conformity threshold for the Clean Air Act).

[156] FAA Order 1050.1E, § 306 (2004); *see also* City of Tempe v. FAA, 239 F. Supp. 2d 55, 62 (D.D.C. 2003) ("[I]t is not the airport [sponsor] which has an obligation under federal law to perform a conformity determination; rather, it is the federal agency (the FAA).").

[157] FAA Airport Sponsor Grant Assurance 22 (2012).

[158] Corbett v. City of Modesto, FAA Docket No. 16-08-10 (Apr. 5, 2010).

further consider alternatives to the proposed development or ways to mitigate the environmental impact of the proposed development. The analysis begins and ends with the determination that the environmental impact is so insignificant that the activity is categorically excluded from NEPA.

iii. Impact Analysis in the Environmental Assessment

If a proposed development project cannot be categorically excluded, the next step typically is preparation of an EA, to determine whether the project will have a significant environmental impact.[159] The EA is to contain "concise analyses" of the potential environmental impacts of 1) the proposed development project, 2) reasonable alternatives to the project, and 3) no action.[160] Preparation of the EA is typically the responsibility of the airport sponsor (or an environmental consultant hired by the airport sponsor).

The FAA prescribes methods for analyzing environmental impacts and specifies numeric thresholds for determining whether the anticipated environmental impacts will be "significant" for most potential impact categories.[161] Impact categories that will usually be analyzed in the EA include noise, light emissions or visual impacts, air quality, and water quality or impact on water resources (e.g., due to construction runoff). Other impact categories apply when extraordinary circumstances (e.g., historical sites or wetlands) implicate special-purpose environmental laws.

Often, noise will be the environmental impact of greatest concern anticipated from a proposed development project. The FAA-approved analysis methodology for assessing noise impacts in an EA (or EIS) is similar to the methodology used in preparation of NEMs and Noise Compatibility Programs.[162] NEMs depicting the *existing* airport layout can be incorporated into an EA (or EIS), although existing NEMs are not likely to be sufficient to depict the noise impact of the *proposed* development.[163] Specifically, existing NEMs (as long as they are based on current forecast data) may accurately represent the noise impact of the "no action" alternative, for comparison with the noise impact of the proposed development. (Likewise, the noise impact analysis prepared for an EA or EIS may be used after the project has been constructed, like a NEM, in support of a Noise Compatibility Program.[164])

For some impact categories, the environmental impact analysis performed by the airport sponsor for an EA may be substantially the same as what would be required in an EIS,[165] particularly where the environmental impact in a given category is not likely to be significant, or where the environmental impact is relatively easy to quantify without special studies. For other impact categories, the EA may anticipate further special studies. For example, if the EA indicates that the environmental impact in a certain category is likely to be significant, so that an EIS will need to be prepared by the FAA, the airport sponsor may elect not to perform the special studies at the EA stage and defer them to the EIS. Likewise, where the proposed development project is expected to *reduce* adverse environmental impacts (e.g., a Noise Compatibility Program), the airport sponsor may issue an EA prior to performing time-consuming special studies in that impact category.[166] In the general case, however, where the airport sponsor hopes to obtain a FONSI (and thus avoid preparation of an EIS), but the project is likely to have adverse environmental impacts, the EA should not be issued before all analytical studies are complete. The analyses generally need to be available to the FAA to consider when deciding

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[159] Berger, *supra* note 21, at 287.

[160] FAA Order 5050.4B, § 706.f (2006).

[161] The FAA has documented the typical impact categories, prescribed analytical methods, and "significant" impact thresholds. FAA Order 1050.1E, App. A (2004).

[162] *Compare* FAA Order 1050.1E, App. A, § 14.3 (2006), *with* 14 C.F.R. § 150.21(b) (2012); *see also* Heide v. Molnau, FAA Docket Nos. 16-04-11, 16-05-05, 16-05-15 (Jul. 7, 2006) (explaining that the FAA uses the day/night noise level (DNL) metric to assess noise impacts under both NEPA and 14 C.F.R. pt. 150).

[163] FAA Advisory Circular 150/5020-1, § 26 (1983); *see also* FAA Order 1050.1E, App. A, § 14.7 (2006).

[164] FAA Advisory Circular 150/5020-1, § 23 (1983).

[165] *See, e.g.*, FAA Order 1050.1E, App. A, § 12.3a (2004) ("The EIS description of potential annoyance from airport lighting and measures to minimize the effects should be documented in a similar fashion in an EIS to that in an EA. …It is possible that the responsible FAA official will judge that a special lighting study is warranted" for the EIS.).

[166] *See, e.g.*, Giuliano v. State, No. X01UWYCV014002704S, 2007 Conn. Super. LEXIS 3467, at *5 (Dec. 20, 2007)

> Although the FAA advised the state to consider conducting the [Noise Compatibility Program], rather than a smaller study of just runway 24 departures, [the airport sponsor] opted for the smaller scale study of runway 24. [The airport sponsor] did so because the [Noise Compatibility Program] would have taken several years to complete and he did not feel that it was appropriate for those affected by the change implemented.

whether to issue a FONSI, and may need to be made available to the public (as discussed in Section III.D.i herein) so that the public can adequately review and comment upon the EA.[167]

Whereas the discussion of alternatives is the "heart" of the EIS, the discussion of environmental impacts of the airport sponsor's proposed development project is "the critical part" of the EA.[168] This is because the main purpose of the EA is to allow the FAA to determine whether it can issue a FONSI—effectively approving the project without subjecting it to further environmental review. If the airport sponsor's EA suggests that environmental impacts in any impact category are likely to exceed the FAA's "significance" thresholds, or that environmental impacts cannot be satisfactorily mitigated down to insignificant levels, a FONSI cannot be issued and the FAA will need to prepare an EIS.[169] However, even if the airport sponsor determines that significant environmental impacts are not likely, the FAA is required to "carefully review" the EA[170] and take a "hard look" at the airport sponsor's analysis. A FONSI may be issued if the airport sponsor's analysis in the EA properly assesses that all environmental impacts of the project (as approved) will be below the FAA's "significance" thresholds, as courts will defer to the FAA's interpretation of what constitutes a "significant" environmental impact. However, the FAA's FONSI will be subject to legal challenge if the EA indicates that the airport sponsor did not satisfy all NEPA procedural requirements, because "Congress did not entrust administration of NEPA to the FAA alone."[171] In particular, the FAA's FONSI is subject to legal challenge if the EA suggests that the airport sponsor inadequately analyzed the cumulative impact of the proposed development project along with all past and reasonably anticipated future development at the airport.[172]

The EA or FONSI should document whether the proposed development project will affect environmental resources protected by special-purpose laws.[173] However, because these special-purpose laws exist apart from NEPA, there may be additional permitting and public notice requirements under special-purpose laws that must be satisfied prior to proceeding with the project, even if the EA suggests there will be no significant environmental impact in the category governed by a given special-purpose law. Generally, the FAA will confer with the agency responsible for administering the special-purpose law, or the agency with jurisdiction over the protected environmental resource, to confirm whether the airport sponsor's analysis in the EA suggests there will be a significant impact in that impact category (i.e., whether an EIS must be prepared). In those cases, the non-FAA agency with special-purpose jurisdiction generally must consent to the proposed development project (indicating that the agency is satisfied that any significant impacts to specially protected resources will be mitigated to acceptable levels) before the FAA can issue a FONSI.[174] The terminology for describing environmental impacts under some special-purpose laws may be different than under NEPA (e.g., "compatibility,"[175] "conformity,"[176] or "consistency"[177] determination rather than "significant impact"). In some cases, the different terminology may imply that there is a different numeric threshold for invoking a special-purpose law than the FAA's "significant impact" threshold under NEPA.[178] Although the FAA

[167] California v. U.S. Dep't of Transp., 260 F. Supp. 2d 969, 973 n.5 (N.D. Cal. 2003) ("Even if it is proper to consider all subsequent documents as part of the FEA, the environmental analysis is still lacking because aspects of the environmental impacts…were not appropriately evaluated in any document. Moreover, as far as I can tell, analyses subsequent to the FEA were not subject to public comment.").

[168] Berger, *supra* note 21, at 301.

[169] FAA Order 1050.1E, App. A, § 1.6 (2004).

[170] *See, e.g.*, Safeguarding the Historic Hanson Area's Irreplaceable Res., Inc. v. FAA, 651 F.3d 202, 217 (1st Cir. 2011) (upholding the FAA's FONSI where the EA relied heavily on an older environmental status and planning report prepared by the airport sponsor, but the FAA "carefully reviewed" the report's analysis of environmental impacts).

[171] Grand Canyon Trust v. FAA, 290 F.3d 339, 342 (D.C. Cir. 2002).

[172] *See supra* note 28 and accompanying text; *see also* Grand Canyon Trust v. FAA, 290 F.3d 339, 345 (D.C. Cir. 2002).

[173] FAA Order 1050.1E, § 406b(4) (2004).

[174] *See, e.g.*, FAA Order 1050.1E, App. A, § 3.4a (2004)

[175] *See, e.g.*, FAA Order 1050.1E, App. A, § 4.3 (2004).

[176] *See, e.g.*, FAA Order 1050.1E, App. A, § 2.1h (2004).

[177] *See, e.g.*, FAA Order 1050.1E, App. A, § 3.4a (2004).

[178] For example, what constitutes an "adverse effect" to a historical resource under special-purpose laws may not rise to the level of a "significant impact" under NEPA, and thus a FONSI might still be issued despite such an "adverse effect." FAA Order 1050.1E, App. A, § 11.3 (2004). But "substantial impairment" of a historical resource under special-purpose laws generally is comparable to a "significant impact" under NEPA and does require an EIS. Likewise, a "significant impact" to an endangered species under special-purpose laws is one that would tend to make

will be primarily responsible for consulting with the outside agency, the airport sponsor should be prepared to provide additional analysis or data in these impact categories, above and beyond what may be required by the FAA for NEPA purposes, in order to obtain the necessary permit or consent from the outside agency.

iv. Impact Analysis in the Environmental Impact Statement

An EIS must be prepared if the airport sponsor's EA suggests that the proposed development project would have significant environmental impacts that cannot be satisfactorily mitigated, or if the FAA does not issue a FONSI for any reason, and the airport sponsor still wishes to proceed with the project. Where it is clear that there will be significant impacts, or that the project is highly controversial on environmental grounds, the FAA may even bypass the EA and proceed directly to preparation of the EIS.[179] (The airport sponsor may also be required to prepare an EIS or equivalent EIR under a state mini-NEPA law. However, where the FAA is preparing an EIS, this requirement is typically satisfied by the airport sponsor's adoption of the FAA's EIS, and the airport sponsor becomes merely a participant in the FAA's coordinated environmental review process.[180])

Because the EIS is prepared by the FAA (or a contractor working under the direction of the FAA), not the airport sponsor, the airport sponsor's role is much reduced in comparison to the airport sponsor's role in preparing the EA. However, although the FAA controls the content of the EIS, the airport sponsor still plays an important role, because the airport sponsor is uniquely situated to provide the FAA with the data required to support the FAA's environmental impact analysis.[181] The FAA's discussion of environmental impacts in the EIS may rely heavily on the airport sponsor's previous discussion of environmental impacts in an EA, especially for impact categories or environmental resources that are not expected to be significantly impacted.[182] The FAA will tell the airport sponsor what additional environmental studies the airport sponsor needs to perform and what additional environmental data the FAA needs from the airport sponsor for the FAA to complete the EIS.[183]

The airport sponsor is often best situated to describe all past development at the airport, including efforts made by the airport over time to be compatible with existing land uses around the airport (such as Noise Compatibility Programs).[184] This is key information for the cumulative impact analysis that is required in the EIS. Failure to adequately consider the cumulative impact of the proposed project in conjunction with all past and reasonably foreseeable future development is one of the most likely reasons that an EIS may be overturned on a legal challenge.[185]

While the FAA's EIS is being prepared, the airport sponsor may continue to perform such preliminary work (including special-purpose environmental impact analyses) as may be required to obtain the necessary permits or financial assistance from other federal, state, or local agencies.[186] However, the allowable preliminary work generally will not include any significant construction activity. If the FAA learns that the airport sponsor "is about to take an action…that would have an adverse environmental impact…, the responsible FAA official shall promptly notify the applicant that the FAA will take appropriate action to insure that the objectives and procedures of NEPA are achieved."[187] In other words, the airport sponsor has an obligation to not create any adverse environmental impacts until the proposed development has been finally approved by the FAA and recorded in an ROD.

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the species extinct, but lesser impacts (than extinction) can be considered "significant impacts" for NEPA purposes and trigger preparation of an EIS. FAA Order 1050.1E, App. A, § 8.3 (2004).

[179] *See, e.g.*, St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 620 (7th Cir. 2007) (FAA decided to prepare an EIS shortly after the airport sponsor announced its plan to increase airport capacity).

[180] *See, e.g.*, Communities Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 687 (D.C. Cir. 2004) ("As a cooperating state agency in a joint federal-state environmental review, [the airport sponsor] had a significant official role to play in jointly overseeing the preparation of the EIS.").

[181] *Id*. (The airport sponsor is "in a unique position to provide valuable information about the project; its exclusion from the environmental review process would have been counterproductive, to say the least.").

[182] FAA Order 5050.4B, § 1007.g(4) (2006).

[183] FAA Order 5050.4B, § 904.a (2006).

[184] FAA Order 5050.4B, § 911.b(1) (2006).

[185] *See supra* note 28 and accompanying text.

[186] FAA Order 1050.1E, § 522b (2006).

[187] FAA Order 1050.1E, § 522b (2006).

C. Alternatives

i. Alternatives Analysis at the Pre-NEPA Planning Stage

The airport sponsor's analysis of alternatives to its proposed development begins during project planning, well before the NEPA process. The FAA advises, "during early project planning, it is critical that the airport sponsor critically analyze" feasible alternatives to its proposed development project ("reasonable ways to achieve the goal") as well as "the environmental issues surrounding the alternatives considered to achieve that goal."[188] It is rare that any significant development project will completely satisfy the airport sponsor's purpose and need without having adverse environmental impacts; therefore, realistic alternatives often consist of combinations of proposed development projects and mitigation strategies.[189]

"[T]he range of reasonable alternatives during an airport sponsor's master planning process is different than the range of alternatives needed for the NEPA process."[190] During project planning, "the widest range of layout or design options exists," so the airport sponsor can consider a wider range of alternatives that might have less environmental impact. For example, in *Barnes v. DOT*,[191] the airport sponsor considered two alternatives ("increasing radar coverage and building additional exit taxiways to the primary runway") during master planning before concluding that its preferred approach for increasing capacity was adding a new runway. Later, during the NEPA process, the airport sponsor did not seriously consider any alternatives that did not include the new runway (except for the NEPA-required "no action" alternative).[192] The other taxiway alternatives considered during master planning were no longer under consideration during the NEPA process because they failed to satisfy the airport sponsor's purpose and need.[193] During master planning, however, considering a wider range of alternatives (e.g., the taxiway alternatives) can help the airport sponsor formulate its justification for its proposed development project because the sponsor is forced to articulate the reasons why it has rejected alternatives that would have less environmental impact than the airport sponsor's preferred approach.

NEMs, depicting the noise impact of the existing airport layout and noise-sensitive land uses surrounding the airport, can be a valuable tool for identifying the feasibility of alternatives. The NEM may indicate that there are existing noise concerns or incompatible land uses surrounding the airport, even in the absence of new development. If the additional impact of the proposed development project would not be tolerable without a plan to mitigate *existing* noise impacts, the airport sponsor would prefer to identify that issue during the planning stage. The planning process may indicate to the airport sponsor the need to enter into a Noise Compatibility Program instead of, or in combination with, the proposed development. In planning a Noise Compatibility Program, the airport sponsor will consider a wide range of alternatives including noise controls and land use controls.[194] One purpose of a Noise Compatibility Program is for an airport sponsor to further examine the costs and benefits of various alternative approaches to noise reduction.[195]

During project planning, the airport sponsor is also directed to consider whether the proposed development project will implicate special-purpose laws or specially protected environmental resources.[196] If so, then it is likely that there will be stricter criteria for alternatives considered later during the NEPA phase, and the airport sponsor may begin considering whether there are "practicable, possible, or prudent alternatives" that would entirely avoid impacting specially protected environmental resources.[197] Identifying such alternatives early in the planning stage could help the sponsor avoid preparing an EIS or EA later, especially if the airport sponsor decides that it can accept the more environmentally-friendly alternative.

ii. Alternatives Analysis in the Environmental Assessment

If the airport sponsor's proposed development project cannot be categorically excluded, an EA must be prepared. Because the airport sponsor prepares the EA, the airport sponsor is primarily

[188] FAA Order 5050.4B, § 501.b (2006).

[189] FAA Advisory Circular 150/5020-1, § 306 (1983).

[190] FAA Order 5050.4B, § 504.d (2006).

[191] 655 F.3d 1124, 1128 (9th Cir. 2011).

[192] *Id.* at 1129 ("The alternatives differed only as to the new location of the Charlie helipad, which needed to be moved in order to make room for the new runway.").

[193] *Id.* ("The [airport sponsor] eliminated five of these alternatives as not meeting the purpose and need of the project and focused on the three remaining alternatives.").

[194] FAA Advisory Circular 150/5020-1, § 33.

[195] 14 C.F.R. § B150.1(b)(1) (2012).

[196] FAA Order 5050.4B, § 201.b(1)(b) (2006).

[197] *Id.*

responsible for the identification and analysis of alternatives that are required in the EA. The identification of alternatives is heavily influenced by the airport sponsor's statement of purpose and need: The alternatives are to include "no action," the airport sponsor's proposed development project, and all reasonable alternative "ways to achieve the stated purpose and need," including alternatives "that are within the sponsor's or FAA's purview, and those alternatives outside FAA's jurisdiction."[198] However, it is unlikely that an airport sponsor will be required to abandon its proposed development project in favor of an alternative outside the purview of the FAA or airport sponsor. For example, in response to the survey conducted for this digest, one airport sponsor indicated that the FAA encouraged it to consider alternatives outside the jurisdiction of both the airport sponsor (e.g., other public use airports) and the FAA (e.g., other modes of transportation) to satisfy the airport's capacity problem. Ultimately, consideration of these alternatives did not change the airport sponsor's proposed development project.

When it begins preparing the EA, the airport sponsor is encouraged to contact the FAA to help identify the reasonable alternatives that will be discussed in the EA.[199] Upon the airport sponsor's request, the FAA will help the airport sponsor identify alternatives that will both achieve the airport sponsor's purpose and need, and also satisfy the FAA's airport design and planning standards.[200] This consultation with the FAA during EA preparation is important, because before the FAA can approve an EA (and issue a FONSI), the FAA must be "assured that the proposed action and the reasonable alternatives [in the EA] can achieve the purpose and need and meet applicable airport design and planning standards or qualify for waivers to those standards."[201] However, as shown in Figure 6, airport sponsors often do not involve the FAA in developing alternatives for the EA. In response to the survey conducted for this digest, a minority (19 of 44, or 43 percent) of airport sponsors with EA experience reported that they "usually" or "always" consult with the FAA to develop alternatives for the EA; most (25 of 44, or 57 percent) "occasionally" or "never" do. Most survey respondents who consulted with the FAA stated that additional alternatives recommended by the FAA did not ultimately change the airport sponsor's proposed development project.

Once the airport sponsor has identified all reasonable or feasible alternatives, NEPA generally requires the EA to discuss the environmental impacts of each. However, NEPA does not require the airport sponsor to select the lowest-impact alternative as its proposed development project. Special-purpose environmental laws, on the other hand, may have a stricter requirement to show that there is no practicable or prudent alternative to the airport sponsor's proposed development. As a general rule, if the proposed development project will not impact environmental resources protected by special-purpose laws, then the EA only needs to analyze that impact category for the proposed project (i.e., make a "compatibility," "conformity," or "consistency" determination for the proposed project under the special-purpose law), and not for all the alternatives.[202] However, if the proposed development project will impact the specially protected environmental resource, then the EA must analyze that impact category for *all* feasible alternatives, to demonstrate that there is no practicable or prudent alternative to the airport sponsor's proposed development project.[203]

In response to the survey conducted for this digest, a significant number of airport sponsors with EA experience (12 of 44, or 27 percent) indicated that they were required to consider additional alternatives based on comments from other government agencies with jurisdiction over specially-protected resources. The issue most frequently cited by survey respondents was that there were practicable alternatives to the airport sponsor's proposed development that would avoid impacting wetlands, causing the airport sponsor to revise the preferred alternative in the EA. One survey respondent described the role played by other government agencies in identifying the preferred alternative in one EA: "[R]ealignment of a taxiway from a completely parallel configuration to an-

[198] FAA Order 5050.4B, § 706.d(6) (2006).

[199] FAA Order 5050.4B, § 706.d(5)(c) (2006).

[200] FAA Order 5050.4B, § 707.a(3) (2006).

[201] FAA Order 5050.4B, § 706.b (2006).

[202] FAA Order 1050.1E, App. A, § 2.1i (2004) (Under the Clean Air Act, "[g]eneral conformity requirements are distinct from NEPA requirements. For example, NEPA may require FAA to analyze several alternatives in detail. If a general conformity determination is required, only the proposed action must be addressed.").

[203] FAA Order 1050.1E, App. A, § 18.2d (2004) (Under the Clean Water Act, "[i]f the action would affect wetlands and there is a practicable alternative that avoids the wetland, this alternative becomes the environmentally preferred alternative…The EA should state that…selection of the practicable alternative enabled the project proponent to avoid the wetlands.").

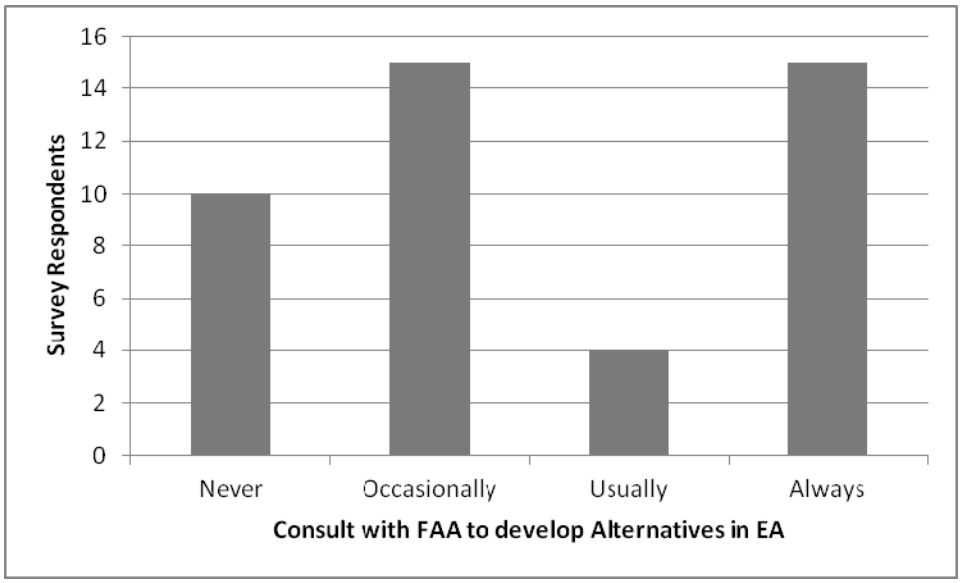

Figure 6. Tendency of Survey Respondents to Consult with FAA to Develop Alternatives.

other route was added to the alternatives and became the preferred alternative. This change was made to avoid wetlands, thereby addressing U.S. Army Corps of Engineers and state environmental agency concerns." Another survey respondent recalled, "EPA [and a state environmental agency] requested geometric changes to design that avoided wetlands and we were 'required' to agree with them." It is more likely that an airport sponsor will have to modify its preferred alternative because of the strict requirement on alternatives in special-purpose environmental laws than because of any alternatives that the FAA might recommend for NEPA compliance.

In preparing the EA, the airport sponsor makes the initial determination as to whether an alternative is feasible (for NEPA) or practicable (for special-purpose laws).[204] Ultimately, however, it is up to the FAA to determine whether to approve the EA and adopt the airport sponsor's preferred alternative.[205] After reviewing the airport sponsor's EA, the FAA "may select an alternative that differs from the sponsor's proposed action, provided FAA's preferred alternative meets the action's purpose and need."[206] At that point, the airport sponsor must decide whether to concur with the FAA's preferred alternative (and begin implementing it, if the FAA issues a FONSI for its preferred alternative).[207] Typically, there will not be major differences between the proposed development project in the airport sponsor's EA and the preferred alternative in the FAA's FONSI, so the airport sponsor will simply concur with the FAA's preferred alternative. The airport sponsor has the option to reject the FAA's preferred alternative[208] and simply take no action, but that would leave the airport sponsor's purpose and need unaddressed.[209] Typically, rather than reject the FAA's preferred alternative outright (and run the risk of losing federal funds for an approved project), the airport sponsor might propose a new alternative not previously presented in its EA.[210] Of course, a new alternative would require additional environmental impact analysis and probably a new, or revised, EA. To avoid such additional expense, the airport sponsor should consult with the FAA at an early date to "try to reach consensus on the alternative FAA will select as its

[204] Lewanee County v. Wagley, Docket Nos. 268819, 268820, 268821, 268822, 268823, 2007 Mich. App. LEXIS 823, at *7 (Mar. 22, 2007) ("The evaluation of feasibility and practicability is determined by the airport sponsor.").

[205] *Id.* ("The [block grant state], acting on behalf of the FAA, in coordination with the airport sponsor, makes this determination.").

[206] FAA Order 5050.4B, § 801.a (2006).

[207] FAA Order 5050.4B, § 801.b(1) (2006).

[208] FAA Order 5050.4B, § 801.b(2) (2006).

[209] FAA Order 5050.4B, § 801.b(4) (2006).

[210] FAA Order 5050.4B, § 801.b(3) (2006).

preferred alternative."[211] In response to the survey conducted for this digest, all of the airport sponsors with EA experience reported that the FAA never selected a different preferred alternative after reviewing the airport sponsor's Final EA.

iii. Alternatives Analysis in the Environmental Impact Statement

The analysis of alternatives is the heart of the EIS.[212] Because the EIS is prepared by the FAA, not the airport sponsor, the airport sponsor's role in developing alternatives for projects that require an EIS is greatly reduced from the airport sponsor's role in developing alternatives for an EA.[213] However, the FAA's "consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project."[214]

Certainly, the alternatives considered by the FAA will include the airport sponsor's proposed development project[215] as well as "no action." Also, if the airport sponsor prepared an EA, the FAA generally must consider all alternatives from the airport sponsor's EA in the FAA's EIS.[216] (The FAA is to consult the airport sponsor before deleting from consideration any of the alternatives listed in the airport sponsor's EA, and explain to the airport sponsor why the FAA does not believe the alternative is reasonable.)[217] However, in addition to alternatives proposed by the airport sponsor, the FAA must consider all reasonable alternatives that satisfy the FAA's statement of purpose and need in the EIS, which will include alternatives outside of the jurisdiction of both the FAA and the airport sponsor.[218] These may include alternatives not considered by the airport sponsor, including all alternatives proposed by the public and non-FAA government agencies that "are reasonable solutions to the sponsor's problem(s)" (i.e., those that "meet the purpose and need").[219] As noted in Section II.A.iii, the FAA's purpose and need in the EIS is not necessarily identical to the airport sponsor's purpose and need in the EA, so it is understandable that there would be different alternatives considered in the EIS and EA. The airport sponsor thus has little control over the proliferation of alternatives at the EIS stage. The best way to limit surprise alternatives at the EIS stage is to have consulted with the FAA during EA development, regarding both the airport sponsor's purpose and need and also its list of reasonable alternatives.

After developing a list of possible alternatives, the FAA typically employs a three-tiered analysis process to pare down the list to those alternatives that are feasible.[220] This approach has proven to be effective at eliminating unreasonable alternatives from consideration and is practically immune from legal challenge.[221]

At the first tier, the FAA eliminates from consideration alternatives that do not satisfy the purpose and need in the EIS. (Once again, the purpose and need in the EIS will typically be similar to the purpose and need in the airport sponsor's EA, with perhaps more focus on the FAA's statutory mandate to promote air safety.) Often, alternatives proposed by the public or non-FAA government agencies in opposition to the airport sponsor's proposed development project will be rejected at this first tier.[222]

At the second tier, the FAA considers the "constructability"[223] of the remaining alternatives—to identify those alternatives "that are practical or feasible from the technical and economic standpoint and using common sense."[224] The second-tier review has been criticized by some as a "cost/benefit test," whereby certain environmentally-friendly alternatives are rejected because they "do not meet the project's cost/benefit parameters."[225] However, at the second tier, the FAA considers such varied feasibility factors as "im-

[211] FAA Order 5050.4B, § 801.b (2006).

[212] 40 C.F.R. § 1502.14 (2012).

[213] *See, e.g.*, FAA Order 5050.4B, § 911.a(1) (2006) (The "FAA develops the range of reasonable alternatives the EIS will analyze in detail," taking "[s]ponsor input" into account.).

[214] Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 197–98 (D.C. Cir. 1991).

[215] FAA Order 5050.4B, § 906.b(1) (2006).

[216] FAA Order 5050.4B, § 1007.e(3) (2006).

[217] FAA Order 5050.4B, § 906.d(1) (2006).

[218] FAA Order 5050.4B, § 504.d(2) (2006).

[219] FAA Order 5050.4B, § 1007.e(2) (2006).

[220] Berger, *supra* note 21, at 315 ("[T]he FAA's three-tiered approval process eschews a consideration of environmental concerns until the last stage of the process.").

[221] *See supra* note 61 and accompanying text.

[222] *See, e.g.*, Natural Res. Def. Council, Inc. v. FAA, 564 F.3d 549, 569 (2d Cir. 2008) (upholding the FAA's rejection of alternatives that do not satisfy the "purpose and need" of both the FAA and the airport sponsor).

[223] Alliance for Legal Action v. U.S. Army Corps of Eng'rs, 314 F. Supp. 2d 534, 538 (M.D.N.C. 2004).

[224] Nat'l Mitigation Banking Ass'n v. U.S. Army Corps of Eng'rs, No. 06-CV-2820, 2007 U.S. Dist. LEXIS 10528, at *88 (N.D. Ill. Feb. 14, 2007).

[225] Berger, *supra* note 21, at 308, 315.

pacts to existing infrastructure, property acquisition, relocation of residences and businesses, costs, and preliminary environmental impacts."[226] Also at the second tier, the FAA considers "environmental and social factors, operational efficiency factors, economic factors, and national policy factors."[227] The preliminary environmental impacts considered at the second tier may include conformity, compatibility, or consistency determinations required by special-purpose environmental laws, so that alternatives that would impact specially protected environmental resources are rejected at the second tier in favor of other "practicable" alternatives that do not implicate the special-purpose laws.[228]

Only alternatives that survive to the third-tier are subjected to detailed analysis of environmental impacts. At this third tier review, the FAA will rely on the airport sponsor to provide its planning data (e.g., forecasts), as well as some environmental data, such as any environmental analysis performed at the EA stage.[229] The EIS will expand upon the airport sponsor's EA analysis only for the alternatives that survive to the third tier.

After completing the EIS, the FAA will typically issue an ROD describing the FAA's preferred alternative. If the FAA selects a preferred alternative that is different than the airport sponsor's proposed development project, the FAA is to notify the airport sponsor as soon as that decision is made, and discuss the decision with the airport sponsor, before the FAA's preferred alternative appears in the ROD.[230] The airport sponsor should not be surprised if the FAA's preferred alternative in the EIS differs somewhat from the airport sponsor's proposal. The FAA will have performed more detailed environmental impact analysis of alternatives in the EIS than the airport sponsor would have performed in an EA, and the FAA is also more likely to have received proposed alternatives from the public and from other agencies during the EIS process, due to the high degree of public interest in most projects requiring an EIS. However, the FAA's preferred alternative will typically be very similar to the airport sponsor's proposed development project, with only modest modifications to address public comments or mitigate environmental impacts identified in the EIS.[231] In response to the survey conducted for this digest, of the airport sponsors with EIS experience, only one reported that the FAA issued an EIS or ROD with a preferred alternative that differed from the airport sponsor's proposed development project.

Other federal, state, and local agencies conducting parallel environmental reviews for the purposes of special-purpose environmental laws or state mini-NEPA laws may arrive at a different preferred alternative than that selected by the FAA. Typically, this does not hinder the airport sponsor's project, since the FAA is the agency that will primarily be taking federal action (by approving or funding the project). However, where another agency is required to take action such as issuing a permit, and the relevant special-purpose law imposes a stricter requirement on alternatives, the preferred alternative of another agency could conceivably impose a roadblock for the airport sponsor's project. To reduce the likelihood of conflicting "preferred alternatives" on high-priority airport development projects that are subject to streamlined environmental review, all other federal or state agencies participating in the streamlined review process are required to consider *only* the alternatives that the FAA has determined are reasonable.[232] Thus, alternatives that are rejected by the FAA during its three-tiered review process can *never* be selected by a

[226] Alliance for Legal Action v. U.S. Army Corps of Eng'rs, 314 F. Supp. 2d 534, 538 (M.D.N.C. 2004).

[227] Nat'l Mitigation Banking Ass'n v. U.S. Army Corps of Eng'rs, No. 06-CV-2820, 2007 U.S. Dist. LEXIS 10528, at *19 (N.D. Ill. Feb. 14, 2007).

[228] *Id.* ("The FAA stated that in applying its second tier of review, it was keeping the [Clean Water Act] 'practicable alternatives' standard in mind.")

[229] FAA Order 5050.4B, § 904.b(1) (2006) ("FAA will consider whether the sponsor provided sufficient planning data or information to meaningfully evaluate alternatives.").

[230] FAA Order 5050.4B, §§ 1202, 1301.c(3)(b) (2006).

[231] *See, e.g.*, City of Dania Beach v. FAA, 628 F.3d 581, 583 (D.C. Cir. 2010) ("After considering several possible alternatives to the [airport sponsor]'s proposal and conducting a lengthy environmental review process, the FAA issued a Record of Decision that with minor modifications approved the [sponsor]'s proposal."); Alliance for Legal Action v. FAA, 69 F. App'x 617, 620 (4th Cir. 2003) ("On the basis of the EIS, the FAA selected…a slight modification of the original proposal, and approved the expansion in a Record of Decision (ROD."); St. John's United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887, 892 (N.D. Ill. 2005) ("The FAA concluded that the alternative proposed by [the airport sponsor]—with some refinement—was the preferred alternative.").

[232] 49 U.S.C. § 47171(k) (2012); *see also* FAA Order 5050.4B, § 1505.j(1) (2006).

cooperating agency as its "preferred alternative."[233]

While the FAA's EIS is being prepared, the airport sponsor will continue to perform such preliminary work as may be required to obtain the necessary permits and other releases from other federal, state, or local agencies under special-purpose environmental laws or state mini-NEPA laws.[234] However, if the FAA learns that the airport sponsor "is about to take an action within the [FAA]'s jurisdiction that would…limit the choice of reasonable alternatives, the responsible FAA official shall promptly notify the applicant that the FAA will take appropriate action to insure that the objectives and procedures of NEPA are achieved."[235] In other words, after it has proposed development requiring an EIS, the airport sponsor has an obligation to allow the FAA to consider as broad a range of alternatives as possible, until the FAA has documented its preferred alternative in the EIS.

D. Mitigation Measures

i. Mitigation Discussion at the Pre-NEPA Planning Stage

Mitigation of environmental impacts is an ongoing responsibility of airport sponsors. Noise mitigation, in particular, is one of the few things (in addition to the construction and operation of airport facilities) on which public use airports are authorized to spend airport revenues.[236] Where there are existing noise concerns or incompatible land uses surrounding the airport, NEMs considered in the planning process may indicate that the airport sponsor needs to enter into a Noise Compatibility Program instead of, or in addition to, the proposed development project. The purpose of the Noise Compatibility Program will be to mitigate noise impacts of the *existing* airport layout; additional measures to mitigate the impact of the new development should be considered in the NEPA process rather than the Noise Compatibility Program.[237]

Because mitigation is an ongoing responsibility, there are few stated requirements for the airport sponsor to specifically consider mitigation measures when planning a new development project, before the NEPA process begins. However, if the proposed development project is expected to impact a specially protected environmental resource, then the airport sponsor will probably eventually be required by the relevant special-purpose law to demonstrate that the airport sponsor has taken steps to minimize the environmental impact of the project. Therefore, the airport sponsor is directed to "[c]onsider conceptual mitigation in project design to reduce unavoidable environmental effects" when it knows that its proposed project will impact a specially protected environmental resource.[238]

Generally speaking, to qualify for a Categorical Exclusion from NEPA, the proposed development project should not require mitigation measures to reduce its environmental impact below the FAA's significance thresholds. However, special-purpose environmental laws may have stricter mitigation requirements than NEPA, requiring the airport sponsor to "minimize" impacts to specially protected environmental resources. If the proposed development project may impact a specially protected environmental resource, then the FAA or the airport sponsor is required to consult with the outside agency with jurisdiction over the resource or special-purpose law to discuss the airport sponsor's conceptual mitigation measures.[239] Even if the impacts are not expected to exceed the FAA's significance thresholds under NEPA, the FAA cannot issue a Categorical Exclusion for the proposed development project unless the outside agency concurs with the mitigation measures, and the FAA must require that the airport sponsor implement the mitigation measures by making them a condition of FAA approval.[240] If the outside agency is not convinced that the mitigation measures will satisfy the requirements of the special-purpose law, a Categorical Exclusion is not allowed and an EA or EIS or both must be prepared.

[233] Nat'l Mitigation Banking Ass'n v. U.S. Army Corps of Eng'rs, No. 06-CV-2820, 2007 U.S. Dist. LEXIS 10528, at *82 (N.D. Ill. Feb. 14, 2007) ("Requiring the Corps to consider other alternatives would only waste the Corps's time, because alternatives rejected by the FAA could never be selected.").

[234] FAA Order 1050.1E, § 522b (2006).

[235] FAA Order 1050.1E, § 522b (2006).

[236] 49 U.S.C. § 47107(b) (2012); *see also* FAA Airport Sponsor Grant Assurance 25 (2012).

[237] FAA Order 5050.4B, § 706.g(3) (2006).

[238] FAA Order 5050.4B, § 201.b(1)(c) (2006).

[239] FAA Order 5050.4B, § 606.b(3) (2006).

[240] *Id.*

ii. Mitigation Discussion in the Environmental Assessment

As a general rule, if the airport sponsor's EA indicates that its proposed project will have significant environmental impacts, a FONSI cannot be issued and the FAA will have to prepare an EIS before it can approve the project. However, this is not the case if the airport sponsor's EA proposes mitigation measures that will reduce the environmental impacts below the FAA's significance thresholds for any given impact category.[241] In that case, the FAA may issue a "mitigated FONSI," where FAA approval is conditioned upon the airport sponsor actually implementing the proposed mitigation measures.

NEPA is a procedural statute and generally does not impose substantive mitigation requirements. For example, just because a FONSI is issued, there is no requirement in NEPA that the project actually have no significant environmental impact. Likewise, the EA is only required to *discuss* possible mitigation measures; NEPA does not specifically require those mitigation measures to be implemented. However, the airport sponsor should recognize that mitigation measures in the FAA's FONSI may be substantive, particularly if the FAA's opinion is that the proposed development project would have significant environmental impacts if the mitigation measures are not implemented. In that case, the FONSI is said to be "conditional" upon the mitigation measures, and the FONSI can be annulled if the airport sponsor fails to implement the mitigation requirements.[242] If that is the case, an airport sponsor should not be confused by the FAA's "unconditional approval" of an ALP resulting from a conditional FONSI. The "unconditional approval" of the ALP merely signifies that the FAA's environmental review is complete and that the airport sponsor may begin development,[243] subject to any mitigation requirements in the FONSI. The FAA will typically include the required mitigation measures from the conditional FONSI in its "unconditional approval" letter to the airport sponsor.[244] The FAA may also include those mitigation requirements as special grant assurances, so that failure to comply with the mitigation requirements could cause the airport sponsor to forfeit its grant funds for the project.[245] If the airport sponsor wants to change any mitigation requirements that are conditions of the FONSI, the changes must be approved by the FAA, only after determining that the changes will not result in significant environmental impacts.[246]

The EA is also to discuss potential mitigation measures that are not conditions of the FONSI. In particular, when the proposed action will implicate special-purpose environmental laws, those laws may have requirements to "minimize" impacts to specially protected environmental resources. This requirement to "minimize" environmental impacts is typically stricter than the airport sponsor's obligation under NEPA to discuss mitigation measures in the EA. If a specially protected environmental resource will be impacted, the FAA may issue a FONSI on the basis of the EA's discussion of mitigation measures, with the understanding that the airport sponsor will develop a more detailed mitigation plan to satisfy the requirements of the special-purpose environmental law, in consultation with an outside agency with jurisdiction over the resource or special-purpose law. For example, when a proposed airport development project will impact wetlands, the EA "must contain a description of proposed mitigations, with the understanding that a detailed mitigation plan must be developed to the satisfaction of the [special-purpose] permitting agency in consultation with those agencies having an interest in the affected wetland."[247] Since the detailed mitigation plan is to be developed after the FONSI is issued, the implication is that mitigation measures discussed in the EA for specially protected environmental resources are subject to change, and the FONSI is not conditioned on implementation of those mitigation measures.

This issue was examined in *Association of Citizens to Protect and Preserve the Environment of the Oak Grove Community v. FAA*.[248] In that case, the airport sponsor's proposed runway extension project would impact 18 acres of protected wetlands.[249] In its EA, the airport sponsor proposed to mitigate the impact by creating 24 acres of new

[241] FAA Order 1050.1E, § 405g(4) (2004); *see also* FAA Order 1050.1E, App. A, § 14.2a (2004).

[242] FAA Order 5050.4B, § 808.b (2006).

[243] FAA Order 5050.4B, § 202.c(2) (2006).

[244] FAA Order 5050.4B, § 808 (2006).

[245] FAA Order 5050.4B, § 808.b (2006).

[246] FAA Order 1050.1E, § 405g (2004).

[247] FAA Order 1050.1E, App. A, § 18.2f (2004).

[248] 287 F. App'x 764 (11th Cir. 2008).

[249] Appellant's Brief at 17, Ass'n of Citizens to Protect and Pres. the Env't of the Oak Grove Cmty. v. FAA, No. 07-15675, 287 F. App'x. 764 (11th Cir. 2008).

wetlands in the vicinity of the airport.[250] The FAA issued a FONSI, which approved the runway extension, and said that the airport sponsor would prepare a detailed mitigation plan "that will compensate for the impacts associated with the project" and that the airport sponsor was "required to finalize their wetland mitigation plan prior to the start of construction."[251] The airport sponsor received grant funds from the FAA based on the FONSI.[252] The airport sponsor later obtained a permit from the U.S. Army Corps of Engineers to dredge and fill the wetlands, with the understanding that the airport sponsor would use some of its FAA grant funds to purchase 20 wetlands credits from a wetlands mitigation bank.[253] The U.S. Court of Appeals for the 11th Circuit declined to annul the FONSI based on the airport sponsor's change in mitigation measures, because "the FAA did not condition issuance of the FONSI on the [airport sponsor]'s fulfillment of those measures."[254] Because approval of the FONSI was not conditioned on the airport sponsor's implementation of the specific wetlands mitigation measures discussed in the EA, the airport sponsor was not even required to submit the change in mitigation measures to the FAA for approval.[255]

iii. Mitigation Discussion in the Environmental Impact Statement

The FAA must prepare an EIS if the airport sponsor's proposed development project will have significant environmental impacts that cannot be satisfactorily mitigated to insignificant levels. Like the EA, the EIS is required to *discuss* potential mitigation measures. NEPA itself does not specifically require the mitigation measures discussed in the EIS to actually be implemented. In the EIS, the FAA may discuss potential mitigation measures that are outside of the jurisdiction and control of either the FAA or the airport sponsor, so that the FAA effectively cannot require such mitigation measures to actually be implemented.

However, the airport sponsor should distinguish between potential mitigation measures that are merely discussed in the EIS, and those that are made a part of the FAA's preferred alternative. Ideally, the FAA's proposed mitigation measures will first be published in a Draft EIS that is subject to review and comment from other agencies and the public (as well as the airport sponsor).[256] As mentioned previously, the preferred alternative in the FAA's EIS will typically be very similar to the airport sponsor's proposed project, with only modest modifications to address public comments or to mitigate environmental impacts.[257] When the mitigation measures are expressly made part of the preferred alternative that is approved by the FAA in its ROD, there is a substantive requirement on the airport sponsor to implement those mitigation measures. Therefore, before a substantive mitigation requirement appears in the Final EIS, the FAA "must consult the airport sponsor, if in response to a comment, FAA is considering asking the sponsor to commit to change the…proposed mitigation measures."[258] The airport sponsor must recognize the difference between potential mitigation measures that are merely discussed in the EIS (which may be outside of the jurisdiction of the FAA or the airport sponsor), and the mitigation measures that are incorporated into the FAA's preferred alternative. "Sponsor awareness of and concurrence with potential mitigation concepts within its authority is crucial."[259]

The EIS may also discuss potential mitigation measures that are not incorporated into the FAA's preferred alternative. In particular, when the proposed action will implicate special-purpose environmental laws, those laws may have requirements to "minimize" impacts to specially protected environmental resources. The requirement to "minimize" environmental impacts is stricter than the FAA's obligation under NEPA to discuss potential mitigation measures. In that case, in addition to the FAA's ROD, the airport sponsor may also have to obtain a permit from the outside agency with jurisdiction over the specially protected environmental resource. That agency may impose its own substantive mitigation requirements on the airport sponsor, as a condition of the permit. These mitigation requirements may

[250] *Id.* at 17–18.

[251] *Id.* at 18.

[252] *Id.*

[253] *Id.* at 18–19.

[254] 287 F. App'x 764, 766 (11th Cir. 2008).

[255] *Id.* at 767.

[256] Davis Mountains Trans-Pecos Heritage Ass'n v. FAA, 116 F. App'x 3, 14–15 (5th Cir. 2004).

[257] *See, e.g.*, Mass. Port Auth. v. City of Boston, No. 012731BLS2, 17 Mass. L. Rep. 125, 2003 Mass. Super. LEXIS 429, at *19–20 (Nov. 18, 2003) (approving all components of the airport sponsor's airport development project subject to the airport sponsor's "obligation to implement certain mitigation measures").

[258] FAA Order 5050.4B, § 1200.a (2006).

[259] FAA Order 5050.4B, § 911.a(2) (2006).

be more stringent than the potential mitigation measures discussed by the FAA in its EIS.[260]

III. AIRPORT SPONSORS' LOGISTICAL ROLE

Section II addressed the substantive content of an environmental review document required by NEPA, and the relative roles and responsibilities of the airport sponsor and the FAA to prepare that content at different stages of the environmental review process. This section deals with the more practical and logistical issues encountered during the NEPA process, such as coordination of other parties involved in the process (e.g., environmental consultants, non-FAA government agencies, and the public). Special attention is paid to when public hearings are required under NEPA, when NEPA documents must be made available to the public, and when related environmental documents might otherwise become public record.

The airport sponsor's legal obligation to provide participation opportunities for the public (or other government agencies) will be project-specific. It will depend very much on the scope of the proposed development project, as well as the existence of any specially protected environmental resources in the vicinity of the project, and the history of development and environmental concerns at that airport. Therefore, the airport sponsor (and its legal counsel) will not want to rely solely on "standard procedures" used by the airport sponsor's engineering consultant. This section will provide a reference for navigating the process of drafting NEPA documents, exchanging preliminary drafts with government agencies when required, receiving public comment on drafts when required, and protecting preliminary drafts from public disclosure when possible or when necessary to advance the project.

A. Early Consultation with FAA—NEPA Scheduling

Once an airport sponsor has identified the development project it will propose, it should immediately begin considering how much funding it will need from the FAA to complete the project, and when it will need funding. Any required NEPA process will have to be finalized by April 30 of the fiscal year preceding the fiscal year in which the airport sponsor hopes to receive the funding.[261] The FAA must have any final NEPA documents in its possession by that date to determine which development projects it will approve for funding in the following fiscal year.

If the project is likely to require an EA, the airport sponsor is responsible for developing a schedule that will allow the airport sponsor to obtain FAA approval of the EA by April 30.[262] The airport sponsor's first call should be to the FAA, to discuss typical schedules for similar projects. The FAA might also advise the airport sponsor whether the proposed development project is unrealistic, given the FAA's likely budget for development projects.[263] If the airport sponsor needs to adjust the project due to funding limitations, it is best to know that before significant environmental planning begins.

To develop the EA schedule, the airport sponsor will need to consult not just with the FAA, but also with any other agency that may have jurisdiction due to special-purpose laws or specially protected environmental resources. Preparing the EA schedule will give the airport sponsor an idea of when the project could realistically begin.

If the project is likely to require an EIS, the airport sponsor may request an EIS preparation schedule from the FAA.[264] Upon receiving such a request, the FAA will begin consulting with all necessary outside agencies to develop a schedule that is as realistic as possible (with the understanding that environmental controversies can arise later that would cause the schedule to be revised).[265]

Once the FAA has developed an EIS schedule, it is monitored closely throughout the NEPA process. If the FAA becomes aware that the schedule will have to be adjusted, the FAA must notify the sponsor.[266] If the project will be subject to streamlined environmental review (e.g., because it will

[260] *See, e.g.*, Nat'l Mitigation Banking Ass'n v. U.S. Army Corps of Eng'rs, No. 06-CV-2820, 2007 U.S. Dist. LEXIS 10528, at *85–87 (N.D. Ill. Feb. 14, 2007) (upholding a mitigation plan required by the Corps of Engineers under the Clean Water Act, which differed from the "conceptual mitigation plan" in the FAA's EIS, because the Corps considered the EIS mitigation plan to be inadequate).

[261] FAA Order 5050.4B, § 301.b (2006).

[262] FAA Order 5050.4B, § 301.b(2) (2006).

[263] *See, e.g.*, City of Tempe, Ariz. v. FAA, 239 F. Supp. 2d 55, 57 n.2 (D.D.C. 2003) (describing how the FAA worked with the airport sponsor to revise its budget for a runway project to $66 million, down from the airport sponsor's original vision of a "more substantial" $120 million project).

[264] FAA Order 5050.4B, §§ 902.b, 904.d (2006).

[265] FAA Order 5050.4B, § 902.b (2006).

[266] FAA Order 5050.4B, § 1201.c (2006).

expand capacity at a congested airport or relates to aviation safety or security), then the failure of any participant (the FAA, the airport sponsor, or an outside agency) to meet a schedule milestone must be reported to Congress.[267]

Contacting the FAA to establish a schedule for the environmental review sets the NEPA process in motion. There will be much more consultation between the FAA and the airport sponsor to follow for any successful environmental review process (one that results in timely FAA approval of a development project that satisfies the airport sponsor's purpose and need). The relative roles and responsibilities of the FAA and airport sponsor to shepherd the NEPA process are described in the following sections.

B. Coordination with Consultants

Because the content of a NEPA document, described in Section II, requires specialized technical knowledge, the airport sponsor and FAA often rely on outside consultants or contractors to prepare the documents or to perform certain studies in preparation of the documents. This section addresses the roles and responsibilities of the airport sponsor and FAA in forming these contractual relationships at different stages of the environmental review process.

i. Pre-NEPA Planning Consultants

Airport sponsors may hire consultants to provide planning services, which are defined by the FAA to include preparation of an Airport Master Plan or Noise Compatibility Program.[268] If the airport sponsor intends to use AIP grant funds to pay for the planning consultant, the airport sponsor is required to employ competitive bidding and qualifications-based selection methods to hire the consultant.[269] The selection process is to be based on a scope of services identified by the airport sponsor and advertised to potential bidders.[270] The FAA provides a draft scope of services that can be used or modified by airport sponsors to solicit consultants for planning services such as updating the ALP to reflect planned developments.[271]

ii. Environmental Assessment Consultants

If the airport sponsor's proposed development project cannot be categorically excluded from NEPA, an EA will usually need to be prepared. As the applicant for federal funding, it is in the best interests of both the airport sponsor and the FAA for the airport sponsor to prepare the EA "or hire qualified environmental contractors to prepare those documents."[272] The FAA will typically have no shortage of applicants for funding, so it is more efficient for each applicant to perform the technical analysis required for an EA,[273] which will later form the basis for the FAA's decision to either approve the project or require additional study. The airport sponsor in turn will typically assign the responsibility of EA preparation to a "qualified environmental consultant"[274] experienced with navigating the NEPA process and performing the various studies required to analyze environmental impacts in each impact category.

During EA preparation, the EA consultant's activities are coordinated with and directed by the airport sponsor; the FAA does not typically exercise control or oversight over the EA consultant.[275] However, before the FAA can approve the project (e.g., issue a FONSI), the FAA is required to independently evaluate the EA prepared by the airport sponsor's consultant, and take responsibility for its content.[276]

Although the EA consultant will typically be selected by the airport sponsor (often a consultant with whom the airport sponsor has an existing relationship), the airport sponsor should consult with the FAA if it expects the proposed development project to have significant environmental impacts that cannot be mitigated below the FAA's significance thresholds. In that case, the FAA (not

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[267] FAA Order 5050.4B, § 1505.k (2006).

[268] FAA Advisory Circular 150/5100-14D, § 1-4.a, App. A (2005).

[269] 49 U.S.C. § 47107(a)(17) (2012).

[270] FAA Advisory Circular 150/5100-14D, §§ 2-3, 2-6, 2-7, 2-8 (2005).

[271] FAA Advisory Circular 150/5100-14D, App. E, Example 2 (2005).

[272] FAA Order 5050.4B, § 201.b(3) (2006).

[273] *See, e.g.*, Giuliano v. State, No. X01UWYCV014002704S, 2007 Conn. Super. LEXIS 3467, at *3 (Dec. 20, 2007)

> (Depending on its workload, the FAA typically completes the type of environmental assessment required for the proposed change of runway departure procedures internally. However, in this case, the FAA advised [the airport sponsor] that the process would be expedited by the retention by [the airport sponsor] of third-party consultants.).

[274] FAA Order 5050.4B, § 703 (2006).

[275] *See, e.g.*, City of Oxford, Ga. v. FAA, 428 F.3d 1346, 1356 (11th Cir. 2005) (upholding an EA prepared by the airport sponsor's consultant, where the FAA did not exercise oversight over the consultant but evaluated and signed the EA, taking responsibility for it).

[276] Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1131 (9th Cir. 2011).

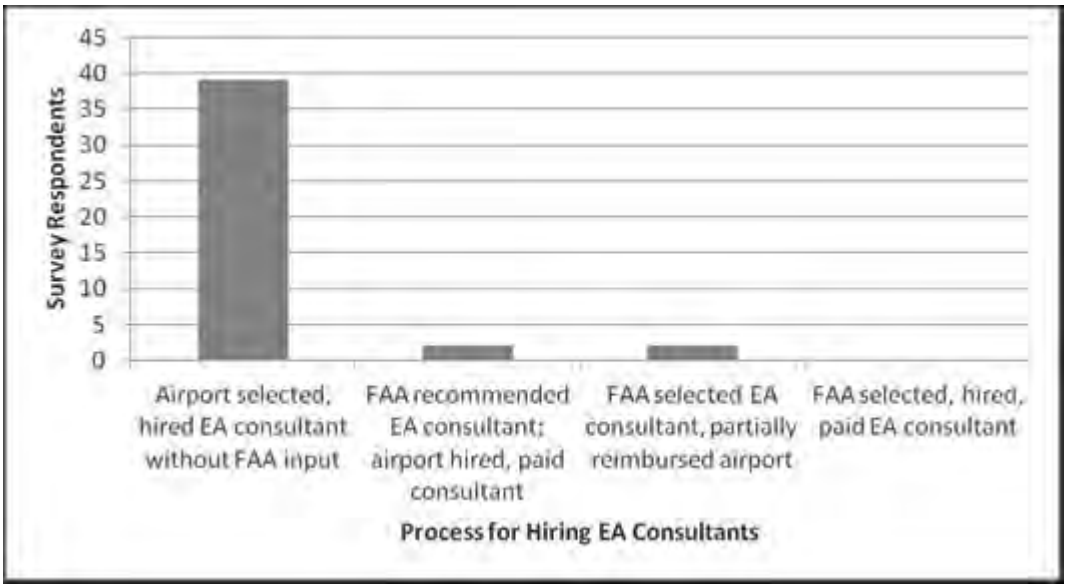

Figure 7. Experience of Survey Respondents with Selecting EA Consultants.

the airport sponsor) should select the consultant that the airport sponsor will hire to prepare an EA.[277] This is because the project is likely to eventually require an EIS, which will have to be prepared by the FAA (or a contractor directed by the FAA) before the FAA can approve the project. It will be more efficient in that case to have the EA prepared by the same consultant who will be involved with the FAA later during EIS preparation.

The airport sponsors who responded to the survey conducted for this digest generally indicated that they do not consult the FAA before hiring EA consultants. As shown in Figure 7, of the survey respondents who reported hiring EA consultants, almost all of them (39 out of 43, or 91 percent) selected and hired the EA consultant without seeking FAA input. Only in a few cases did the FAA recommend or select an EA consultant for the airport sponsor. Clearly, the airport sponsor must be prepared to accept the responsibility of selecting and hiring an EA consultant (without financial assistance from the FAA) when a proposed development cannot be categorically excluded from NEPA.

iii. Environmental Impact Statement Contractors

If the airport sponsor's proposed development project will have significant environmental impacts that cannot be satisfactorily mitigated, it is the FAA's responsibility to prepare an EIS before the FAA can approve the project.[278] As with the EA, the EIS is typically prepared by an environmental consultant rather than the FAA itself. Also, as with the EA, the FAA promotes a "third-party contracting" approach where the EIS contractor actually has a contract with the airport sponsor, not the FAA.[279] However, despite the contractual relationship, the EIS contractor "is responsible for assisting the FAA"—not the airport sponsor—"in preparing an EIS that meets the requirements of the NEPA regulations."[280] The third-party contracting process is therefore more complex than at the EA stage.

The third-party contracting process is "purely voluntary"[281]—the airport sponsor could opt to have the FAA prepare the EIS internally. However, since the development is proposed by the airport sponsor (not the FAA), it is typically in the airport sponsor's interest to use the third-party contracting process to advance the project toward final FAA approval. Where the airport sponsor opts to use the third-party contracting process, it typically begins by issuing a request for qualifications (RFQ) or request for proposals (RFP) seeking qualified environmental consultants to pre-

[277] FAA Order 5050.4B, § 703 (2006).

[278] 42 U.S.C. § 4332(C) (2012).

[279] FAA Order 1050.1E, App. B, § 2b (2004).

[280] *Id.*

[281] *Id.*

pare the EIS.[282] The airport sponsor should include the proposed scope of work, as well as the airport sponsor's selection criteria, in any RFQ or RFP for an EIS contractor.[283] The proposed scope of work must be prepared by the FAA, not the airport sponsor.[284] The selection criteria may be prepared by the airport sponsor, but the FAA must concur with the criteria.[285]

Based on the responses to the RFQ or RFP, and the airport sponsor's selection criteria, the airport sponsor will typically prepare a "short list" of its preferred EIS contractors.[286] The short list will typically include three to five contractors.[287] The airport sponsor may conduct interviews of the contractors on its list, but the airport sponsor must invite the FAA to participate in the interviews.[288] After any such interviews have been conducted, the airport sponsor will submit the short list to the FAA, and the airport sponsor may indicate its preference or ranking of the contractors.[289] However, the FAA ultimately must select the EIS contractor,[290] and the FAA is not obligated to base its selection on the airport sponsor's preference or ranking.[291] The FAA may even consider environmental consultants who are not on the airport sponsor's list of preferred EIS contractors.[292] The FAA will provide the airport sponsor a list of potential EIS contractors ranked according to the FAA's preference.[293] If the airport sponsor wishes to proceed with EIS preparation at that time, the airport sponsor must begin negotiating the cost of EIS preparation with the FAA's preferred EIS contractor.[294] The FAA cannot participate in those negotiations, but the FAA may consider whether the negotiated cost is reasonable before the airport sponsor enters into a contract with the EIS contractor.[295]

The survey conducted for this digest indicates that, in practice, the airport sponsor's preferred consultant is often hired to be the EIS contractor. Of the airport sponsors who reported hiring an EIS contractor, a slim majority (four of seven, or 57 percent) reported that the FAA selected the EIS contractor from the airport sponsor's "short list." However, a sizeable minority (three of seven, or 43 percent) reported that the airport sponsor selected and hired the EIS contractor without any FAA involvement. Under NEPA, the EIS is to be prepared by the federal agency (or a contractor working on its behalf) and not the grant recipient; therefore, the FAA should have selected the EIS contractor in all cases. However, these survey responses are consistent with previous surveys in which airport sponsors have "responded as if they [rather than the FAA] were preparing EISs."[296]

Airport sponsors must ensure that the EIS contractor executes a "disclosure statement…specifying that they have no financial or other interest in the outcome of the project."[297] The statement signed by the EIS contractor should either be "prepared by" the FAA, or the FAA should "furnish guidance and participate in the preparation and shall independently evaluate the [disclosure] statement prior to its approval and take responsibility for its scope and contents."[298] The disclosure statement is particularly important where the FAA selects the airport sponsor's preferred EIS contractor, to refute any later challenge that the EIS is biased or not impartial. This is illustrated by *Communities Against Runway Expansion, Inc. v. FAA*[299] (hereinafter, *CARE*), which involved a conflict-of-interest challenge against an EIS contractor. In that case, the FAA selected the original EIS contractor in December 1993.[300] Later, the airport sponsor's preferred consultant became a member of the EIS contractor's "consultant team."[301] In October 1996, the FAA's minutes of a meeting with the airport sponsor reflected that the airport sponsor announced that its preferred consultant was "the new" EIS contractor.[302] It was unclear

[282] FAA Order 1050.1E, App. B, § 2c (2004).

[283] FAA AC 150/5100-14D, § 2-7 (2005).

[284] FAA AC 150/5100-14D, § 2-10.a (2005).

[285] FAA AC 150/5100-14D, § 2-10.b (2005).

[286] FAA Order 5050.4B, § 1003.a(1) (2006).

[287] FAA AC 150/5100-14D, § 2-8.g (2005).

[288] FAA AC 150/1500-14D, § 2-10.c (2005).

[289] FAA AC 150/1500-14D, § 2-10.d (2005); FAA Order 1050.1E, App. B, § 2c (2004).

[290] Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 202 (D.C. Cir. 2002).

[291] FAA AC 150/1500-14D, § 2-10.d (2005); FAA Order 1050.1E, App. B, § 2c (2004).

[292] FAA Order 5050.4B, § 1003.a(2) (2006).

[293] FAA AC 150/1500-14D, § 2-10.f (2005).

[294] *Id.*

[295] FAA AC 150/1500-14D, § 2-10.g (2005).

[296] ANDREWS ET AL., *supra* note 79, at 4.

[297] 40 C.F.R. § 1506.5(c) (2012).

[298] *Id.*

[299] 355 F.3d 678 (D.C. Cir. 2004).

[300] *Id.* at 686.

[301] *Id.*

[302] *Id.*

what, if any, role was played by the FAA in naming the airport sponsor's preferred consultant as the new EIS contractor. However, the U.S. Court of Appeals for the D.C. Circuit upheld the EIS, concluding that even if "the FAA did not properly discharge its obligations" in selecting the EIS contractor, there was no evidence that the EIS was biased.[303] In reaching this conclusion, the D.C. Circuit relied heavily on the fact that the ultimate EIS contractor "executed a disclosure statement specifying that it had no financial or other interest in the outcome of the project," and the disclosure statement identified the other projects performed for the airport sponsor by the EIS contractor.[304]

When the airport sponsor enters into a contract with the EIS contractor, it should also enter into a memorandum of understanding (MOU) with both the EIS contractor and the FAA.[305] The MOU will state that the EIS contractor's activities are to be directed by the FAA (not the airport sponsor),[306] and that the airport sponsor (not the FAA) is obligated to pay the EIS contractor.[307] Although the airport sponsor directly pays the EIS contractor, the FAA typically reimburses the airport sponsor for most of that expense.[308] For example, the FAA may include the cost of EIS preparation in the AIP grant funds that the FAA ultimately provides the airport sponsor to construct the project.[309]

However, airport sponsors responding to the survey conducted for this digest indicated a less than universal adoption of the MOU requirement. Of the survey respondents with EIS experience, only half (four of eight) reported entering into an MOU with the FAA and the EIS contractor for preparation of an EIS. These airport sponsors report that the MOU is an unusual arrangement, and that it can be frustrating for the airport sponsor because the airport sponsor is unable to control the activities of the EIS contractor. One survey respondent wrote that it is "[d]ifficult for airport sponsor organization to understand that the FAA is really the project manager and the [airport sponsor] is just a vehicle for payment." Specific potential problem areas identified by the survey respondents included the following:

- Difficulty reaching agreement with the FAA as to the scope of the EIS (number and type of environmental impact studies required) and the EIS contractor's level of effort.
- Ineffective communication between the airport sponsor and the EIS contractor, due to the EIS contractor's understanding that the EIS contractor is not to be unduly influenced by the airport sponsor.
- The airport sponsor's perception that the EIS contractor lacks the airport sponsor's sense of urgency, since the airport sponsor cannot direct the activities of the EIS contractor.
- No local presence (e.g., local office, local employees) of the EIS contractor, particularly where the FAA selects an EIS contractor that was not recommended by the airport sponsor.
- The EIS contractor's tendency to use out-of-region consultants with whom the EIS contractor may have an existing relationship, instead of relying upon local subject-area experts, consultants, or subcontractors with whom the airport sponsor may have an existing relationship.

Clearly, the best solution to these problems is early communication with the FAA, as it is the FAA who is to prepare the EIS contractor's scope of work, to approve the reasonableness of the EIS contractor's level of effort, and to direct the activities of the EIS contractor. The latter two issues cited by survey respondents (related to local presence and use of local consultants) are best handled when the airport sponsor is negotiating its EIS contractor selection criteria with the FAA. Certainly, the use of local consultants should have a favorable impact on the cost of EIS preparation, and cost will almost always be an important component of the selection criteria. Also, local experts may have more familiarity with specially protected environmental resources in the airport vicinity that could be impacted by the proposed development, and may have been involved in past impact studies and mitigation measures related to protecting those resources. The airport sponsor should advise the FAA of any such specific advantages of using local consultants familiar with the airport site.

In addition to the EIS contractor, the airport sponsor and FAA may work with other consultants during EIS preparation. As seen in the *CARE* case above, the airport sponsor may independently fund its own preferred consultant to

[303] *Id.*

[304] *Id.* at 687.

[305] FAA Order 5050.4B, § 201.b(6) (2006).

[306] FAA Order 5050.4B, § 1003.c(3) (2006).

[307] FAA Order 5050.4B, § 1003.c(4) (2006).

[308] FAA Order 5050.4B, § 1003.a(3) (2006).

[309] FAA Order 1050.1E, App. B, § 2d (2004).

participate in meetings with the EIS contractor.[310] The airport sponsor may also hire an independent consultant to participate in public hearings regarding the EIS, to help explain the EIS contractor's technical analysis to the interested public.[311] The airport sponsor may also provide funds to the FAA (including AIP grant funds that the airport sponsor received from the FAA) for the FAA to hire additional consultants or staff to expedite processing of the EIS.[312] The FAA may independently hire a consultant who was not involved in EIS preparation to evaluate the work of the EIS contractor or the analyses contained within the EIS.[313] In particular, where an airport sponsor has prepared an EIS or equivalent EIR to satisfy the requirements of a state mini-NEPA law, the FAA is likely to hire its own consultant to independently review the work of the airport sponsor's consultant before the FAA issues an EIS under NEPA.[314] The EIS contractor may hire subcontractors with expertise in special-purpose environmental laws to handle portions of the EIS. The airport sponsor should make itself aware of all the parties participating in preparation of an EIS, and be aware of the chain of command (i.e., who directs the activities of each consultant).

C. Exchange of Preliminary Environmental Reviews

Airport sponsors are obligated to involve the public in the environmental review process. As discussed in subsection D herein, the airport sponsor, FAA, or both are generally required to publish (or make publicly available) final NEPA documents such as EAs and EIS's. In some cases, Draft EAs and Draft EIS's must also be made public and can potentially be the subject of public hearings. By the same token, it is often not in the interest of the airport sponsor for preliminary or incomplete drafts, studies, and communications about specific impact categories to be made public. Such preliminary or incomplete findings could create the impression that a proposed development project will have a significant adverse environmental impact, when a fair reading of the complete or final study would suggest otherwise. For example, the airport sponsor, the FAA, or another agency participating in a coordinated environmental review may have concerns early in the NEPA process that the airport sponsor's proposed development project will have certain adverse environmental impacts. In most cases, these early concerns are alleviated either when the prescribed environmental impact analysis for that impact category suggests that impacts will be below significance thresholds, or upon determining that the impact can be mitigated below significance thresholds. Likewise, early in the environmental review process, a broad range of potential alternatives may be considered and even advocated by a party participating in the environmental review, before being discarded as unreasonable (e.g., because it does not satisfy the purpose and need). Also, certain environmental concerns or potential alternatives might never be vocalized if there is concern that the discussion would later be disclosed publicly. Airport sponsors would often like to be able to protect from public disclosure such preliminary, incomplete, internal communications involving potential impacts and alternatives that might later be determined to be insignificant or unreasonable, respectively.

Sometimes the desire to protect preliminary opinions and communications from public disclosure conflicts with statutes and public policy favoring transparent government. Federal agencies such as the FAA are subject to the Freedom of Information Act (FOIA).[315] Under FOIA, federal agencies receiving a request for public records that "reasonably describes such records…shall make the records promptly available to any person."[316] Public airport sponsors and state agencies participating in environmental review are typically subject to similar requirements under state law. These public records laws cover a broad range of records, and are not limited to final decisions of the agency and the documents supporting those decisions (such as EAs and EIS's). For example, upon receiving a public records request, "an agency shall make reasonable efforts to search for the records in electronic form or for-

[310] Communities Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 686 (D.C. Cir. 2004).

[311] *See, e.g.*, Mass. Port Auth. v. City of Boston, No. 012731BLS2, 17 Mass. L. Rep. 125, 2003 Mass. Super. LEXIS 429, at *17 (Nov. 18, 2003).

[312] FAA Order 1050.1E, App. D, § 7.a (2004). A previous ACRP study concluded that airport sponsors can expedite the EIS process by funding an FAA environmental specialist position dedicated to environmental review of the airport sponsor's proposed project. ANDREWS ET AL., *supra* note 79, at 25.

[313] *See, e.g.*, Cmtys. Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 682 (D.C. Cir. 2004).

[314] *See, e.g.*, Mass. Port Auth. v. City of Boston, No. 012731BLS2, 17 Mass. L. Rep. 125, 2003 Mass. Super. LEXIS 429, at *37 n.36 (Nov. 18, 2003).

[315] 5 U.S.C. § 552 (2006).

[316] 5 U.S.C. § 552(a)(3)(A) (2006).

mat,"[317] such as emails or draft documents stored on the computers used by agency employees. This search will often reveal preliminary communications or concerns that were later discarded as insignificant or unreasonable, but which can create the appearance of controversy or disagreement regarding the final agency decision. Opponents of airport development projects might use these records to challenge the conclusions in an EA or EIS, and delay the project. However, the motivation of the requestor (e.g., the requestor opposes the proposed development project) is irrelevant to the question of whether the records must be disclosed.[318]

Therefore, it is important for the airport sponsor and the FAA to be aware of exceptions to FOIA, where certain records need not be disclosed and may be withheld. Perhaps most importantly for NEPA purposes, FOIA does not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[319] These exceptions are construed narrowly, with any doubts resolved in favor of public disclosure.[320] Internal memoranda and other preliminary work products (including data collections and summary reports) prepared by the FAA's employees and its agents (e.g., consultants), and not shared outside the FAA, are typically protected from disclosure under the *intra-agency* communications exception to FOIA.[321] Information prepared by other federal agencies working in coordination with the FAA, such as the Corps of Engineers cooperating in a streamlined environmental review, could typically be protected from disclosure under the *inter-agency* communications exception to FOIA.[322]

However, it is not clear that there is any such legal protection for information transmitted between the FAA and airport sponsors. For one reason, the *inter-agency* communication exception only protects communications between the FAA and other agencies of the Federal Government,[323] and airport sponsors generally are not federal agencies. Also, communications between the FAA and the airport sponsor probably do not qualify for the *intra-agency* communication as consultant communications, despite the alignment of interests between the FAA and the airport sponsor. It is also important for airport sponsors to recognize that state public records laws often do not include inter-agency or intra-agency exceptions, so "internal" communications involving the airport staff, its consultants, and other agencies participating in a coordinated environmental review may not be protected from disclosure.[324]

As a general rule, communications between and documents transmitted between the FAA and the airport sponsor are not protected from public disclosure. In *Department of the Interior v. Klamath Water Users Protective Association*,[325] the U.S. Supreme Court determined that communications from Native American tribes to the Department of the Interior must be disclosed in response to a FOIA request, despite the "trust obligation" and "fiduciary relationship" between the tribes and the agency. The Court determined that the tribes did not qualify as consultants for purposes of the intra-agency communications exception because the tribes were advocates for their own interests (in that case, water rights), which may come at the expense of other citizens. Likewise, although the interests of airport sponsors are often aligned with the interests of the FAA when both support development at the airport, the airport sponsor is ultimately subject to regulation by the FAA and is not truly an independent consultant. Where the airport sponsor has received AIP development grant funds, the funds have probably come at the expense of some other airport with its own worthwhile proposed development. By analogy to the *Klamath* case, information shared between the airport sponsor and the FAA regarding environmental review of the airport sponsor's proposed development project is probably subject to FOIA disclosure, even where NEPA and related special-purpose laws do not mandate disclosure.

[317] 5 U.S.C. § 552(a)(3)(C) (2006).

[318] United Techs. Corp. by Pratt & Whitney v. FAA, 102 F.3d 688, 691 (2d Cir. 1996).

[319] 5 U.S.C. § 552(b)(5) (2006).

[320] Town of Winthrop v. FAA, 328 F. App'x 1, 4 (1st Cir. 2009).

[321] *See, e.g.*, Van Aire Skyport Corp. v. FAA, 733 F. Supp. 316, 321 (D. Colo. 1990) ("Documents that reflect the mental processes of the government are deliberative, and can be withheld from production. Nonfinal drafts, by their very nature, are typically predecisional and deliberative materials because they reflect a tentative view and are subject to later revision.").

[322] 5 U.S.C. § 552(b)(5) (2006).

[323] 5 U.S.C. §§ 551(l), 552(f) (2006).

[324] *See, e.g.*, People *ex rel.* Birkett v. City of Chicago, 184 Ill. 2d 521, 528–34, 705 N. E. 2d 48, 51 (1998) (declining to allow airport sponsor to withhold inter-agency and intra-agency communications regarding airport development plans under state public records law).

[325] 532 U.S. 1, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001).

The airport sponsor and FAA should always keep in mind that correspondence between them may have to be disclosed, regardless of whether such disclosure is required by NEPA.

i. Public Disclosure of Preliminary Environmental Assessments and Related Documents

As will be discussed in Section III.D.i, an EA (and sometimes a Draft EA) must be made publicly available, and may be subjected to public review and comment. However, the FAA requires the airport sponsor to file a Preliminary Draft EA with the FAA for internal review before any EA is made publicly available.[326] The FAA's internal review may include review for both technical correctness and legal adequacy.[327] If the FAA's internal review identifies deficiencies in the Preliminary Draft EA, the FAA will ask the airport sponsor to revise the Preliminary Draft EA and resubmit it to the FAA for internal review.[328] The EA that is ultimately made publicly available under NEPA will address the FAA's comments on the Preliminary Draft EA, and will contain all revisions required by the FAA.

NEPA itself does not require disclosure of the Preliminary Draft EA submitted by the airport sponsor to the FAA for internal review, and failure to disclose it will not invalidate the NEPA review.[329] However, this internal review version of the Preliminary Draft EA is probably subject to disclosure under FOIA or state public records law, since it is submitted by the airport sponsor to the FAA. NEPA itself does not require public disclosure of communications between the FAA, the airport sponsor, and other agencies participating in a coordinated environmental review, regarding internal concerns about or deficiencies in the Preliminary Draft EA.[330] Likewise, internal FAA communications regarding the internal review are probably protected by the intra-agency exception to FOIA, and communications between the FAA and cooperating federal agencies regarding the Preliminary Draft EA are probably protected from disclosure under the inter-agency exception to FOIA. Furthermore, the internal review for legal adequacy is probably attorney-client privileged. However, under *Klamath*, communications from the FAA to the airport sponsor regarding deficiencies in the Preliminary Draft EA are probably not protected from disclosure under a FOIA request to the FAA, or under a state-law public records request to the airport sponsor.

The survey conducted for this digest did not reveal any widespread concerns over public disclosure of Preliminary Draft EAs. Of airport sponsors with EA experience, a sizeable majority (27 of 44, or 61 percent) never experienced a public records request for Preliminary Draft EAs. However, a significant number (13 of 44, or 30 percent) "usually" or "always" treat those documents as public records, and make them available upon request; only a few reported that they attempt to prevent disclosure of the Preliminary Draft EA. If challenged, it is likely that the airport sponsor or FAA would be required to produce the Preliminary Draft EA and any comments from the FAA in response, since those documents do not appear to qualify for any FOIA exception.

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[326] FAA Order 5050.4B, § 404.a(4)(a) (2006).

[327] FAA Order 1050.1E, § 404e (2004).

[328] FAA Order 5050.4B, § 707.c (2006).

[329] *See, e.g.*, Giulano v. State Dep't of Transp., No. X01UWYCV014002704S, 2007 Conn. Super. LEXIS 3467, at *39 (Dec. 20, 2007) (holding that neither the preparation of a Preliminary Draft EA by a consultant for an airport sponsor nor the "presentment" of the Preliminary Draft EA to the FAA for internal review are subject to the "notice and comment" requirements of NEPA or state mini-NEPA law).

[330] *See, e.g.*, City of Oxford, Ga. v. FAA, 428 F.3d 1346, 1357 (11th Cir. 2005) ("Petitioner seems to operate under the erroneous view that the FAA was required to provide it with all significant written correspondences between the FAA and the" cooperating state agency or airport sponsor.).

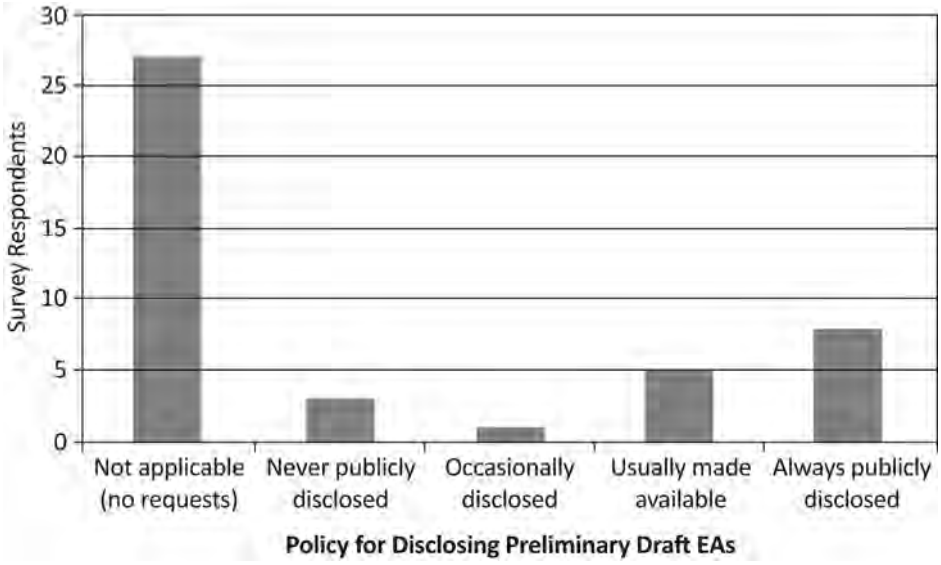

Figure 8. Experience of Survey Respondents with Public Records Requests for Preliminary NEPA Documents.

ii. Public Disclosure of Preliminary Environmental Impact Statements and Related Documents

As will be discussed in Section III.D.iii, a Draft EIS must be made publicly available and subjected to public review and comment. However, the FAA requires the EIS contractor to file a Preliminary Draft EIS with the FAA for internal review, before any Draft EIS is made publicly available.[331] The FAA's internal review may include review for both technical correctness and legal adequacy.[332] NEPA does not require public disclosure of either the Preliminary Draft EIS, internal FAA communications regarding review of the Preliminary Draft EIS, or communications between the FAA and the EIS contractor regarding concerns about or deficiencies in the Preliminary Draft EIS.[333] Also, because the EIS contractor's work is to be directed solely by the FAA, the Preliminary Draft EIS (unlike the Draft EA prepared by the airport sponsor) and communications between the FAA and the EIS contractor regarding the Preliminary Draft EIS can probably be protected from public disclosure under the intra-agency exception to FOIA.[334] For this reason, even when opponents of airport development projects obtain copies of the Preliminary Draft EIS intended for internal FAA review, courts tend to disregard those documents.[335]

The survey conducted for this digest did not reveal any concerns related to public disclosure of Preliminary Draft EIS's. Of the survey respondents with EIS experience, most (six out of eight, or 75 percent) were unaware of any public records requests for Preliminary Draft EIS's. However, two survey respondents reported that the public is usually able to obtain the Preliminary Draft EIS upon request.

The intra-agency exception will not operate to prevent disclosure of communications and envi-

[331] FAA Order 5050.4B, § 1100 (2006).

[332] FAA Order 1050.1E, § 508a (2004).

[333] *See, e.g.*, Cmtys. Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 688 (D.C. Cir. 2004) (Airport development opponent "cites no provision of NEPA or its implementing regulations, the APA, or any FAA regulation requiring the disclosure of an EIS contractor's draft work product.").

[334] *See, e.g.*, Town of Winthrop v. FAA, 535 F.3d 1, 14–15 (1st Cir. 2008) (declining to require the FAA to produce documents that the FAA claims "pertain to internal deliberative processes and were properly exempted from disclosure under FOIA," including correspondence between the FAA and the EIS contractor).

[335] *See, e.g.*, Mass. Port Auth. v. City of Boston, No. 012731BLS2, 17 Mass. L. Rep. 125, 2003 Mass. Super. LEXIS 429, at *37 n.36 (Nov. 18, 2003) (attaching no evidentiary weight to an EIS contractor's earlier revisions of a Preliminary Draft EIS that predated the Draft EIS that was made available for public review and comment).

ronmental impact data obtained from outside sources (aside from other federal agencies, in which case the documents may be protected under the inter-agency exception). Courts have allowed opponents of airport development to obtain such documents under FOIA even after ruling that there was no NEPA requirement to disclose those documents created in preparation of an EIS.[336] So, for example, where the FAA is required (by statute or its own procedures) to coordinate with the public or with nonfederal agencies (e.g., to address a particular impact category), those communications probably must be disclosed in response to a FOIA request. Likewise, where the FAA claims that its communications with the EIS contractor are protected from disclosure under the intra-agency exception, but the EIS contractor has corresponded (on behalf of the FAA) with the public or with state agencies in the process of preparing the EIS, any FOIA protection has probably been waived and that correspondence must be disclosed in response to a FOIA request.[337]

Most importantly for the airport sponsor, under *Klamath*, correspondence between the airport sponsor and either the FAA or the EIS contractor probably must be disclosed in response to a request under FOIA or state public records law. This is important to recognize, since the airport sponsor will typically participate in meetings and studies with the FAA and the EIS contractor, particularly in situations where the airport sponsor is required to prepare an EIS or equivalent EIR under a state mini-NEPA law or is a participant in the FAA's coordinated environmental review process.[338] In those situations, there is typically no inter-agency or intra-agency exception that would prevent the disclosure of documents (such as Preliminary Draft EIS's) that are shared between the airport sponsor and FAA. Courts will lean toward requiring the FAA to disclose any communications with the airport sponsor related to EIS preparation, including data gathered by the airport sponsor and provided to the FAA (or the EIS contractor) to support the EIS.[339] Generally, however, disclosure of such preliminary documents under FOIA has no legal implications under NEPA.[340] As long as the requirements of NEPA are followed (including the opportunity for public review and comment on the Draft EIS), the FAA's decision to approve an EIS would only be subject to challenge if the preliminary documents disclosed under FOIA demonstrate that the EIS materially misrepresented the environmental impact analysis.

Where the FAA has approved an EIS, but the airport sponsor has taken no major steps within 3 years after FAA approval to implement the approved project, the airport sponsor may no longer assume the FAA's approval is still valid.[341] In that event, if the airport sponsor still wishes to pursue the proposed development, the FAA must perform another internal review to determine whether the EIS is still valid, or whether there are significant changes (such as new environmental impact data that contradicts the assumptions or conclusions of the EIS) that would require the EIS to be supplemented.[342] This internal review of an EIS that was previously approved, like the internal review of the Preliminary Draft EIS, need not be publicly disclosed under NEPA.[343] However, keep in mind that, under *Klamath*, communications between the FAA and the airport sponsor, including requests for and transmission of new environmental impact data to support the FAA's internal review, may be subject to disclosure under FOIA.

D. Publication

Section III.C discussed whether certain environmental review documents, particularly preliminary draft NEPA reports, are public records that must be produced when requested. A related but different question is what is the legal respon-

[336] *See, e.g.*, St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 624 (7th Cir. 2007); St. John's United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887, 906 (N.D. Ill. 2005).

[337] *See, e.g.*, Kroposki v. FAA, No. 08-CV-01519, 2009 U.S. Dist. LEXIS 76084, at *11 (Aug. 26, 2009) (dismissing FOIA claims against FAA for environmental review documents in the possession of contractors, only because plaintiff failed to allege facts suggesting that he exhausted administrative remedies).

[338] Cmtys. Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 687 (D.C. Cir. 2004).

[339] *See* St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 624 (7th Cir. 2007); St. John's United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887, 906 (N.D. Ill. 2005).

[340] *See, e.g.*, Kroposki v. FAA, No. 08-CV-01519, 2009 U.S. Dist. LEXIS 76084, at *8 n.4 (Aug. 26, 2009) (declining to reopen the public comment period on an EIS based on FOIA documents provided by the FAA after the close of the public comment period).

[341] FAA Order 5050.4B, § 1401.c (2006); FAA Order 1050.1E, § 514b (2004).

[342] FAA Order 5050.4B, § 1401.d (2006); FAA Order 1050.1E, § 515c (2004).

[343] *Id.*; *see also* Town of Winthrop v. FAA, 535 F.3d 1, 8 (1st Cir. 2008) ("The written reevaluation determining whether it is necessary to prepare an SEIS need not, however, be made public.").

sibility of the airport sponsor and FAA to publicly disclose NEPA reports (and drafts) after they are no longer preliminary? Both NEPA and FAA regulations require opportunities for public review and comment at certain points in the environmental review process, which carries a greater obligation than merely producing public records upon request—the document must be published and public comment must be solicited. This section examines the airport sponsor's role in that process.

i. Publication of Planning Documents

"[T]he FAA does not control or direct the actions and decisions of" airport sponsors in the pre-NEPA planning phase.[344] Before the airport sponsor invokes NEPA by requesting FAA funding for a new development project or FAA approval of a revised ALP, there is generally no federal requirement for public disclosure of airport development planning. However, development planning documents may be subject to public disclosure under state open records laws. Also, airport sponsors may find it of strategic benefit to make planning documents (both draft and final) available to the surrounding community and interested public.[345]

Where the airport sponsor takes part in FAA-funded planning activities, however, there typically are federal requirements for public disclosure and public participation. For example, if the airport sponsor prepares a NEM, the airport sponsor must allow "the public to review and comment during the development of the map."[346] When the airport sponsor submits the final NEM to the FAA, the airport sponsor must certify that it has afforded "interested persons" adequate opportunity to comment on the draft NEM, including the planning data (e.g., airport operations forecasts) on which it was based.[347] The NEM may be used in the development of an updated ALP showing proposed developments at the airport. To the extent the proposed developments implicate NEPA, environmental review of the proposed developments is subject to publication as described in the following sections.

ii. Publication of Environmental Assessments

After the FAA has internally reviewed the airport sponsor's Preliminary Draft EA, the airport sponsor must prepare a Draft EA that has been revised to address the FAA's comments and concerns.[348] If the proposed development involves a new airport, a new runway, or a major runway extension, the airport sponsor must make this revised Draft EA available to the public for 30 days.[349] (Recall, however, that an EIS is normally required for projects involving a new commercial service airport or a new runway at an existing commercial service airport located in a metropolitan statistical area.[350] In those cases, the FAA may bypass the EA process for such projects and begin preparing an EIS, in which case there will be no Draft EA to publish.) It is the airport sponsor's obligation to publish a notice "in an area-wide or local newspaper having general circulation" specifying the locations and times when the Draft EA will be available for public review.[351] The presumption is that the airport sponsor will make hard copies of the Draft EA available in a physical location, although it will typically be more convenient for both the airport sponsor and the interested public for the airport sponsor to also make the Draft EA available electronically.

Certain special-purpose environmental laws also have public review requirements, so the airport sponsor should consider whether the proposed development project will impact those specially protected resources (namely, historic sites, wetlands, and floodplains).[352] If so, a single 30-day public review period generally satisfies all of the applicable environmental review laws, as long as proper public notice is given. Therefore, the airport sponsor should coordinate with the FAA to ensure that the airport sponsor's notice of Draft EA availability, and any similar notice that the FAA is required to make under a federal special-purpose law, are made simultaneously, so that the 30-day public review period for the Draft EA only occurs once.

Upon conclusion of the 30-day public review period, the airport sponsor will typically hold a public hearing (as described in Section III.E.ii *infra*). After that, it is the airport sponsor's responsibility to revise the EA to respond to any "substantive public concerns" raised concerning the Draft EA during the public review process.[353] To respond to some comments, the airport sponsor

[344] City of Bridgeton v. FAA, 212 F.3d 448, 454 (8th Cir. 2000).

[345] ANDREWS ET AL., *supra* note 79, at 14, 24.

[346] 14 C.F.R. § 150.21(b) (2012).

[347] *Id.*

[348] FAA Order 5050.4B, §§ 404.a(4)(a), 708.a (2006).

[349] *Id.*

[350] FAA Order 5050.4B § 903.b (2006).

[351] FAA Order 5050.4B, § 404.a (2006).

[352] FAA Order 5050.4B, §§ 403.b, 708.b (2006).

[353] FAA Order 5050.4B, § 709 (2006).

(or its EA consultant) may have to perform additional environmental impact analyses for certain impact categories.[354] The Final EA should incorporate these subsequent studies that respond to public comments on the Draft EA. Generally speaking, there is no requirement for these supplemental environmental analyses in the Final EA to be subjected to public review and comment, even though they would have been subject to public review and comment if they had been included in the Draft EA.[355] However, the airport sponsor should consider whether the supplemental environmental analyses represent a significant change from the conclusions of the Draft EA (e.g., resulting in a new proposed alternative). If so, the airport sponsor should consult with the FAA to determine whether a Supplemental Draft EA should be issued and subjected to an additional 30-day public review and comment period before the airport sponsor submits its Final EA to the FAA.[356]

If the Final EA concludes that there will be significant environmental impacts that cannot be satisfactorily mitigated, then an EIS will have to be performed before the FAA can approve the proposed development. However, if the airport sponsor's Final EA concludes that there will not be significant environmental impacts, and if the FAA concurs, then the FAA will issue a FONSI. (At this point, the preliminary Draft EA will already have been through the FAA's internal review, and the Final EA will reflect revisions to address the FAA's comments and concerns, so it is likely that the FAA will concur with the conclusion in the Final EA.) When the FONSI is issued, it is the FAA's obligation to make the Final EA and FONSI publicly available, to announce a location (typically an FAA office) where the Final EA and FONSI can be reviewed, and to provide copies (preferably electronic) of the Final EA and FONSI to anyone who requests them.[357] Although this is the FAA's obligation under NEPA, the FAA considers it "most effective" for the airport sponsor to assist by publishing the announcement in "media serving the project impact area," such as local newspapers and the airport Web site.[358] The airport sponsor's notice must mention the FAA.

Unlike publication of the Draft EA, in which the public has a 30-day review and comment period, publication of the Final EA and FONSI typically signifies the final decision of the FAA. In limited circumstances, however, the FAA will make a proposed FONSI/EA available for a 30-day public review period before issuing a final ROD.[359] As mentioned previously, certain special-purpose environmental laws require a 30-day public review and comment period, so the FAA may have to make the proposed FONSI/EA publicly available if the proposed development will impact specially protected environmental resources (i.e., historic sites, wetlands, or floodplains) and the airport sponsor did not previously make the Draft EA publicly available (e.g., because the proposed development does not involve a new airport, new runway, or major runway extension).[360] Also, a 30-day public review and comment period is required for a proposed FONSI/EA if the FAA plans to issue a FONSI for an action that would ordinarily require an EIS, or for an action that is without precedent.[361] In most cases, however, there is no general requirement for the airport sponsor's Final EA and the FAA's FONSI to be subjected to public review and comment prior to final publication.

iii. Publication of Environmental Impact Statements

After the FAA has internally reviewed a Preliminary Draft EIS, the EIS contractor must prepare a Draft EIS that has been revised to address the FAA's comments and concerns.[362] The FAA is always required to make this revised Draft EIS available to the public for 45 days.[363] This occurs by the FAA filing five copies of the Draft EIS with the Environmental Protection Agency (EPA).[364] It

[354] *See, e.g.*, Grand Canyon Trust v. FAA, 290 F.3d 339, 340 (D.C. Cir. 2002) ("In response to comments on a draft environmental assessment, the FAA conducted a Supplemental Noise Analysis on the potential noise impacts of the replacement airport.").

[355] *See, e.g.*, California v. U.S. Dep't of Transp., 260 F. Supp. 2d 969, 978 (N.D. Cal. 2003) (overturning the FAA's FONSI and requiring an EIS in part because environmental analyses subsequent to the Draft EA were not subjected to public review and comment).

[356] *See, e.g.*, Town of Cave Creek, Ariz. v. FAA, 325 F.3d 320, 325 (D.C. Cir. 2003) (describing a Supplemental Draft EA with an additional public review and comment period, where the Supplemental Draft EA analyzed a new alternative not discussed in the Draft EA).

[357] FAA Order 5050.4B, § 807.a (2006).

[358] FAA Order 5050.4B, § 807.b (2006).

[359] FAA Order 5050.4B, §§ 804.b, 804.c (2006).

[360] FAA Order 5050.4B, § 804.b(3) (2006).

[361] FAA Order 5050.4B, §§ 804.b(1), 805.a (2006).

[362] FAA Order 5050.4B, § 1100 (2006).

[363] FAA Order 5050.4B, § 1102 (2006).

[364] FAA Order 5050.4B, § 1101.b(1)(d)(2) (2006).

is then the EPA's responsibility to publish a notice of public availability in the *Federal Register*, although the FAA is encouraged to also publish a notice of availability in "local newspapers" and "other local media" in the area affected by the proposed development project.[365] The airport sponsor may need to handle coordination with the local media, especially coordination of the publication date (so that the local notice appears on the same date as the *Federal Register* notice, so that the end date of the 45-day review period can be accurately determined).[366] The FAA will typically make the Draft EIS available to the public electronically.[367]

Unlike the Draft EA, which is prepared by the airport sponsor's EA consultant, the Draft EIS is prepared by the EIS contractor who takes direction solely from the FAA. Therefore, the FAA must specifically request comments *from the airport sponsor* (in addition to the public) regarding the Draft EIS during the 45-day review period.[368] Upon completion of the review period, the FAA (or the EIS contractor) must revise the EIS to respond to any "substantive comments" received concerning the Draft EIS, whether those comments come from the airport sponsor, the public, or another government agency.[369]

To adequately respond to comments on the Draft EIS, the FAA (or the EIS contractor) may have to perform additional studies of environmental impacts, consider additional alternatives, or consider additional mitigation measures. Depending on the scope of the additional study or revisions that will be required to address the comments, the FAA may opt to prepare a Supplemental Draft EIS for public review and comment.[370] If the additional analysis adequately responds to the comments without changing the conclusions or preferred alternative from the Draft EIS, then supplementation is probably not necessary and the FAA would probably proceed directly to the Final EIS (which must report the comments and the study performed in response).[371] Likewise, if the FAA is able to address the comments on the Draft EIS by making minor adjustments to its preferred alternative, the FAA may opt to proceed directly to publishing a Final EIS with those modifications.[372] There are no FAA guidelines or formal NEPA requirements explaining when a Supplemental Draft EIS should be prepared and submitted for public review. However, courts consider it not "ideal" for significant deviations from the Draft EIS (such as a new preferred alternative or proposals for significant new mitigation measures) to appear for the first time in a Final EIS.[373] Preferably, such analysis would be subjected to public review and comment in a Draft EIS or Supplemental Draft EIS.

Once the FAA (or the EIS contractor) has addressed all substantive comments received on the Draft EIS (or Supplemental Draft EIS), it prepares the Final EIS for a 30-day public review "wait period."[374] The FAA is to "simultaneously"[375] distribute one copy of the Final EIS to everyone who provided substantive comments on the Draft EIS[376] (including the airport sponsor), five copies to the EPA,[377] and a number of copies to other fed-

[365] 40 C.F.R. § 1506.6(b) (2012); FAA Order 5050.4B, § 1101.b(3)(a) (2006).

[366] FAA Order 5050.4B, § 1101.b(3)(b) (2006).

[367] FAA Order 5050.4B, § 1101.b(2) (2006).

[368] FAA Order 5050.4B, § 1101.a(4) (2006).

[369] FAA Order 5050.4B, § 1101.a (2006); *see also* 40 C.F.R. § 1503.4 (2012).

[370] *See, e.g.*, Cmtys. Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 682 (D.C. Cir. 2004) ("In response to public concerns, the FAA opted to prepare a Supplemental Draft EIS ('SDEIS') to address certain issues.").

[371] The FAA is to perform whatever additional analysis is necessary to adequately respond to substantive comments from the airport sponsor, the public, and other agencies. Where the other agencies have an obligation to prepare an EIS of their own (or to "adopt" the FAA's EIS as cooperating agencies in a streamlined environmental review), those agencies may also perform their own analysis to ensure that their concerns are addressed. If the agency ultimately adopts the FAA's Final EIS, this additional analysis performed subsequent to the FAA's Final EIS might never appear in a Draft EIS and would conceivably escape the NEPA public review and comment process. *See, e.g.*, Davis Mountains Trans-Pecos Heritage Ass'n v. FAA, 117 F. App'x 3, 18 n.64 (5th Cir. 2004) ("[I]n order for a cooperating agency to adopt the lead agency's EIS, the NEPA process actually requires the cooperating agency to do some independent study *after* the final EIS has been prepared.").

[372] *See, e.g.*, Village of Bensenville v. FAA, 457 F.3d 52, 59 (D.C. Cir. 2006) ("[I]n the final EIS, the FAA proposed to conclude that [its preferred alternative from the Draft EIS], as modified to [address public comments], was the least restrictive means of achieving the federal government's compelling interest in increasing capacity and reducing delay.").

[373] Davis Mountains Trans-Pecos Heritage Ass'n v. FAA, 116 F. App'x 3, 14–15 (5th Cir. 2004).

[374] FAA Order 5050.4B, § 1303 (2006).

[375] FAA Order 5050.4B, § 1211.a (2006).

[376] FAA Order 5050.4B, § 1211.d (2006).

[377] FAA Order 5050.4B, § 1211.f (2006); *see also* 40 C.F.R. § 1506.9 (2012).

eral agencies.[378] Upon receipt of the FAA's Final EIS, the EPA will publish a notice of availability of the Final EIS in the *Federal Register*.[379] Likewise, the FAA is to announce the availability of the Final EIS in local newspapers and other local media. As with the Draft EIS, the airport sponsor should probably coordinate the publication with the local media to synchronize the timing of that notice with the *Federal Register* notice, which will be used to start the 30-day "wait period." The FAA is required to make the Final EIS "available to the public at publicly accessible locations."[380] The presumption is that the FAA will make hard copies of the Final EIS available in a physical location, although (as with the Final EA) it will typically be more convenient if the airport sponsor assists by also making the Final EIS available electronically (e.g., on the airport Web site).

Unlike the Draft EIS, the FAA is not required to solicit comments from the public, other agencies, or the airport sponsor regarding the Final EIS.[381] Also unlike the Draft EIS, the FAA is not required to respond to comments received during the 30-day "wait period" regarding the Final EIS.[382] Upon conclusion of the 30-day "wait period"[383] (but no sooner than 90 days after the Draft EIS was first made public),[384] the FAA will prepare a final ROD approving or not approving the Final EIS.[385] Unlike the Final EIS, NEPA does not require the ROD to be made publicly available. However, the FAA typically publishes a notice of availability of the ROD in the *Federal Register*.[386]

E. Public Hearings

The FAA states that it is generally the responsibility of the airport sponsor to "[p]rovide opportunities for public participation, and a public hearing, if one is appropriate," regarding proposed development at an airport.[387] Before the FAA will approve an airport sponsor's funding request for a new airport, a new runway, or a major runway extension, the airport sponsor must certify to the FAA that "an opportunity for a public hearing was given to consider the economic, social, and environmental effects of the location and the location's consistency with the objectives of any planning that the community has carried out."[388] In addition to the FAA's statutory public hearing requirements, NEPA requires public hearings to take place "whenever appropriate."[389] The airport sponsor should thus keep in mind that the "public hearing" requirement is fluid, and the number of public hearings to be held depends upon the controversial nature of the project, the degree of public interest in the project, and the persuasiveness of requests for public hearings.[390]

The FAA defines "public hearing" as "a gathering under the direction of a designated hearing officer for the purpose of allowing interested parties to speak and hear about issues of concern to interested parties."[391] This definition leaves the airport sponsor a great deal of flexibility in how public hearings are to be conducted. In declining to define the term more specifically, the FAA explained that "public hearing" is a "term of art" under NEPA and that "the most important aspects of a traditional, formal hearing are that a designated hearing officer controls the gathering and there is an accurate record of the major public concerns stated during the gathering."[392] This section explores how the airport sponsor and FAA will satisfy those requirements at different stages in the environmental review.

i. Public Hearings on Pre-NEPA Planning Documents

The FAA does not control the pre-NEPA development planning process, and there are generally no federal requirements for public hearings prior to the airport sponsor invoking NEPA by requesting FAA approval or funding for a development project. However, state open meetings laws may require certain development planning meetings of the airport sponsor to be open to the public.

Where the airport sponsor accepts FAA funding for certain planning activities, FAA regulations may call for public hearings. For example, if the

[378] FAA Order 5050.4B, § 1211.g (2006).

[379] FAA Order 5050.4B, § 1211.f (2006).

[380] FAA Order 5050.4B, § 1211.i (2006).

[381] *See* FAA Order 5050.4B, § 1211.b (2006) ("An agency *may* request comments on an FEIS.") (emphasis added); *see also* 40 C.F.R. § 1503.1(b) (2012).

[382] *See* FAA Order 5050.4B, § 1211.a (2006) (noting that the FAA "may choose to circulate" revisions to the Final EIS in response to comments).

[383] FAA Order 5050.4B, § 1300 (2006).

[384] FAA Order 5050.4B, § 1101.b(1)(d)(2) (2006).

[385] FAA Order 5050.4B, § 1301 (2006).

[386] FAA Order 5050.4B, § 1304 (2006).

[387] FAA Order 5050.4B, § 201.b(4) (2006).

[388] 49 U.S.C. § 47106(c)(A)(i) (2012).

[389] 40 C.F.R. § 1506.6(c) (2012).

[390] FAA Order 5050.4B, § 403.a (2006); FAA Order 1050.1E, § 209a (2004).

[391] FAA Order 5050.4B, § 403.a (2006).

[392] 71 Fed. Reg. 29014, 29032 (2006).

airport sponsor prepares a Noise Compatibility Program to address the noise impact of the existing airport layout, the airport sponsor must "provide notice and the opportunity for a public hearing" prior to submitting the Noise Compatibility Program to the FAA for approval.[393] The submission to the FAA must summarize the comments received at the public hearing, as well as all written submissions received, and the airport sponsor's response to those comments from the public.[394] The Noise Compatibility Program should address noise impacts of the existing airport layout rather than proposed developments; proposed new developments should generally be considered in the NEPA process rather than the Noise Compatibility Program.[395] However, Noise Compatibility Programs may identify development projects that could better distribute noise impacts. NEPA documents for such proposed development projects have been upheld, despite the airport sponsor's failure to hold public hearings on the NEPA documents, where the proposal resulted from a Noise Compatibility Program that was subject to extensive public involvement and opportunity to comment.[396]

ii. Public Hearings on the Environmental Assessment

If the airport sponsor is preparing an EA involving a new airport, a new runway, or a major runway extension, it must provide an opportunity for a public hearing on the Draft EA (as revised by the airport sponsor to address any FAA concerns on the Preliminary Draft EA).[397] (Recall, however, that an EIS is normally required for projects involving a new commercial service airport or a new runway at an existing commercial service airport located in a metropolitan statistical area.[398] In those cases, the FAA may bypass the EA process for such projects and begin preparing an EIS, in which case there will be no Draft EA and the public hearing will take place during EIS preparation, as described in the following section.) When the airport sponsor prepares a Draft EA for a project requiring a public hearing, at the time the Draft EA is made available to the public, the airport sponsor must publish a notice of opportunity for public hearing "in an area-wide or local newspaper having general circulation."[399] This notice must provide 15 days in which anyone receiving the notice may request a public hearing.[400] Upon receiving such request (or upon determining that a public hearing should be held), the airport sponsor then must publish a notice of hearing in the same newspaper at least 30 days prior to the hearing, stating the time and location of the hearing, as well as "a list of potentially affected environmental resources" drawn from the Draft EA.[401] If multiple requests for public hearing are received, the airport sponsor should consider whether multiple public hearings are required (taking into account the controversial nature of the project, the degree of public interest in the project, and the variety of concerns cited in the requests for public hearings).[402] If a public hearing is required, the airport sponsor cannot prepare the Final EA before the public hearing is held.[403]

The survey conducted for this digest indicated a wide range of experience with holding public hearings on Draft EAs. As illustrated in Figure 9, of the airport sponsors with EA experience, a sizeable minority (17 out of 44, or 39 percent) never held a public hearing on a Draft EA from 2004 to the present. One survey respondent reported holding 28 public hearings on Draft EAs in that timeframe. Half of the survey respondents with EA experience (22 out of 44) held between one and four public hearings on Draft EAs.

[393] 14 C.F.R. § 150.23(d) (2012).

[394] 14 C.F.R. § 150.23(e)(7) (2012).

[395] FAA Order 5050.4B, § 706.g(3) (2006).

[396] *See* Heide v. Molnau, FAA Docket Nos. 16-04-11, 16-05-05, 16-05-15 (Jul. 7, 2006).

[397] FAA Order 5050.4B, §§ 404.a(4)(a), 708.a (2006).

[398] FAA Order 5050.4B § 903.b (2006).

[399] FAA Order 5050.4B, § 404.a (2006).

[400] FAA Order 5050.4B, § 404.a(5) (2006).

[401] FAA Order 5050.4B, § 406.b (2006).

[402] *See, e.g.*, Town of Cave Creek, Ariz. v. FAA, 325 F.3d 320, 325 (D.C. Cir. 2003) ("In April 2001, the FAA circulated the DEA for public comment and held four public workshops to explain the project, answer questions, and accept written comments on the DEA.").

[403] FAA Order 5050.4B, § 709 (2006).

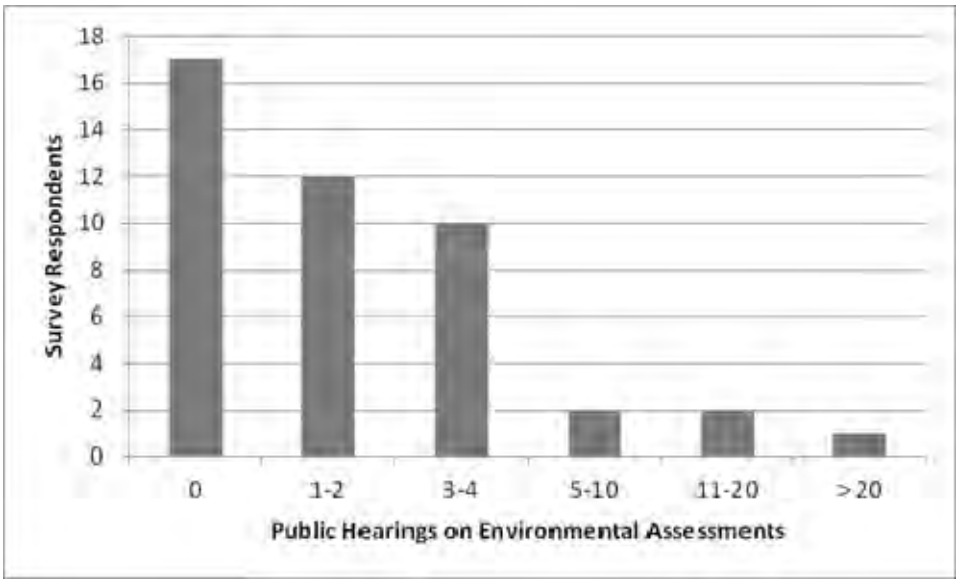

Figure 9. Experience of Survey Respondents with Public Hearings on Draft NEPA Documents.

The public hearing must afford the public an opportunity to "speak and hear" about the proposed development and environmental issues of concern. Therefore, the public hearing will typically involve a presentation (by the FAA, the airport sponsor, or the EA consultant) about the project and any issues of concern that are discussed in the Draft EA.[404] Thereafter, members of the public should be allowed to provide oral testimony, ask questions, and obtain real-time feedback (if possible) from the FAA, the airport sponsor, or the EA consultant.[405] The airport sponsor must arrange for a transcript of these proceedings to be made.[406] The airport sponsor must also provide 10 days after the public hearing in which members of the public can submit additional written comments.[407]

Public hearings on Draft EAs may generate numerous comments for the airport sponsor.[408] The airport sponsor must consolidate all "substantive comments obtained during hearing" and forward those comments to the FAA.[409] The Final EA must "include a detailed summary of issues raised during the public hearing and responses to those issues."[410] The response may include further analysis of environmental impacts or alternatives; however, discussions of environmental impacts, alternatives, and other issues in the EA (unlike the EIS) are to be "brief."[411] The airport sponsor "is under no obligation to respond individually to each and every concern raised during the comment period" on a Draft EA.[412] In response to the survey conducted for this digest, the overwhelming majority of airport sponsors with EA experience (36 out of 44, or 82 percent) reported that they never had to revise an EA to address comments raised during a public hearing. If the airport sponsor does perform additional analysis to respond to comments raised during a public hear-

[404] *See, e.g.*, Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1130, 1142 ("Twice during the meeting, the [airport sponsor] made a presentation providing an overview of the project and summarizing the results of the DEA…Twice during the two-hour meeting, the FAA made a presentation about the project and the EA.").

[405] *Id.* at 1142 ("The members of the public were invited to talk to project team members, who were available to answer their questions and get their feedback. The members of the public were also invited to visit the oral testimony area to provide their feedback.").

[406] FAA Order 5050.4B, § 406.c (2006).

[407] FAA Order 5050.4B, § 406.b(4) (2006).

[408] *See, e.g.*, C.A.R.E. Now, Inc. v. FAA, 844 F.2d 1569, 1571 (11th Cir. 1988) (describing a public hearing on a Draft EA for a runway extension that was attended by 2,000 citizens who submitted 3,500 comments).

[409] FAA Order 5050.4B, Chart 2 (2006).

[410] FAA Order 5050.4B, § 406.d (2006).

[411] 40 C.F.R. § 1508.9(b) (2012).

[412] Safeguarding the Historic Hansom Area's Irreplaceable Res., Inc. v. FAA, 651 F.3d 202, 212 (1st Cir. 2011).

ing, there is generally no requirement to hold additional public hearings to present the results of that analysis. It is in the FAA's discretion whether to require the airport sponsor to hold additional public hearings.[413]

If the public hearing on the Draft EA is adequately conducted (i.e., proper notice, designation of a "hearing officer," opportunity for the public to "speak and hear,"[414] and adequate documentation of the proceedings), the record of the public hearing can be invaluable later in upholding a FONSI. Courts have upheld FONSIs against such challenges as failure to adequately consider cumulative impacts or all possible alternatives, where the public failed to raise those concerns during the public hearing.[415] However, the public's failure to raise "obvious" environmental concerns during the public hearing does not absolve the airport sponsor from addressing those concerns in the EA, especially where the airport sponsor has "independent knowledge of a reasonable possibility" that such environmental concerns exist.[416]

Even where the FAA does not require a public hearing on the Draft EA (e.g., for projects not involving a new airport, new runway, or major runway extension), the proposed development project may implicate special-purpose laws that require "public participation" (i.e., if the proposed development is expected to impact historic sites, wetlands, or floodplains).[417] For other special-purpose laws that do not have public participation requirements, another government agency with jurisdiction over the specially protected environmental resource may nevertheless request that the airport sponsor hold a public hearing.[418] In these situations, the FAA recommends using the same public hearing approach described above[419] (i.e., providing notice of opportunity for public hearing, making the Draft EA available for 30 days beforehand, providing an opportunity for the public or government agency to "speak and hear" about the proposed project, and making a record of the proceedings). Where public hearings are required under both special-purpose environmental laws and the FAA's NEPA regulations, the special-purpose public hearing is typically conducted first.[420] Then, all comments received from the public or government agency at the special-purpose public hearing should be made available by the airport sponsor at the NEPA public hearing on the Draft EA.[421]

iii. Environmental Impact Statement

The EIS is prepared by the FAA (or the EIS contractor working under the direction of the FAA) and not the airport sponsor. Nevertheless, as this digest has made clear, the airport sponsor plays an important role in preparation of the EIS. If the EIS concerns "a new airport, new runway, or major runway extension for which an airport sponsor intends to seek AIP funding," the Final EIS must include a "certification from the airport sponsor that it has provided an opportunity for a public hearing…to consider economic, social, and environmental effects" of the project.[422] This does not necessarily require the airport sponsor to provide a public hearing to consider the Draft EIS. For example, if the airport sponsor previously prepared an EA for the proposed development project before the FAA began preparing the EIS, then the public hearing on the Draft EA (described in the previous section) would technically satisfy this requirement. Ultimately, it is up to the discretion of the FAA whether to require an additional public hearing on the Draft EIS. In response to the survey conducted for this digest, of the airport sponsors with EIS experience, most (5 out of 8, or 63 percent) reported that public hearings had been held on Draft EIS's for proposed development projects at their airports.

Where public participation is also required under special-purpose environmental laws under the jurisdiction of other government agencies, the FAA encourages joint public hearings on the Draft EIS, to the extent possible, if that will "satisfy the

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[413] *See, e.g.*, City of Oxford, Ga. v. FAA, 428 F.3d 1346, 1357 (11th Cir. 2005) ("The FAA properly exercised its discretion in concluding that no further meetings would be useful.").

[414] FAA Order 5050.4B, § 403.a (2006).

[415] *See, e.g.*, Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1136 (9th Cir. 2011) (holding that the petitioner "waived" its argument that reasonable alternatives were not considered, where the petitioner's public hearing comments "failed to alert the agencies to the argument that the range of alternatives to the project actually discussed in the EA was not reasonable.").

[416] *Id.* at 1134.

[417] FAA Order 5050.4B, § 403.b (2006).

[418] FAA Order 5050.4B, § 403.a (2006).

[419] FAA Order 5050.4B, § 404.b (2006).

[420] *See, e.g.*, City of Oxford, Ga. v. FAA, 428 F.3d 1346, 1350 (11th Cir. 2005) (describing a "special interest" meeting regarding historic resources held "on the heels" of publication of the Draft EA, 1 week before the NEPA public hearing).

[421] FAA Order 5050.4B, § 403.b (2006).

[422] FAA Order 5050.4B, § 1203.b(1) (2006).

NEPA requirements for each Federal agency involved in a proposed action."[423] Likewise, a joint public hearing may be held to satisfy both the FAA's NEPA requirements and the airport sponsor's requirements under a state mini-NEPA law.[424] If a public hearing is required (either by the FAA or to satisfy the public participation requirement of some special-purpose environmental law) prior to publication of the Final EIS, the FAA will provide notice of opportunity for public hearing in the same announcement in which it provides notice of availability of the Draft EIS.[425] Unlike the notice of availability, the notice of opportunity for public hearing need not be published in the *Federal Register* unless the proposed development has "national implications."[426] If the FAA receives a request for public hearing, the airport sponsor is required to publish a notice of the public hearing in local media at least 30 days in advance of the public hearing.[427] The notice must state the time and location of the hearing, as well as "a list of potentially affected environmental resources" drawn from the Draft EIS.[428]

Like the Final EA, the Final EIS "should include a detailed summary of issues raised during the public hearing and responses to those issues."[429] The FAA is to provide the airport sponsor a copy of the transcript of the public hearing.[430] However, because the EIS is prepared by the FAA (or the EIS contractor under the FAA's direction), the airport sponsor has no formal role to play in summarizing the public comments or responding to them.[431] However, it is clearly in the airport sponsor's interest to work closely with the public and help respond to concerns raised during public hearings.[432] In response to the survey conducted for this digest, of the airport sponsors with EIS experience, a small minority (2 out of 8, or 25 percent) reported that an EIS had been revised to address comments raised during public hearings.

After the FAA (or the EIS contractor) revises the EIS to reflect public comments, it makes the Final EIS available for a 30-day "wait period" before the FAA publishes its ROD, approving or not approving the project. There is no requirement for a public hearing on the Final EIS. However, where the project is "a new airport, new runway, or major runway extension," the Final EIS must include the airport sponsor's certification that the opportunity for public hearing was provided at some point during the NEPA review process. Also, the Final EIS must include the airport sponsor's certification either that its management board "has voting representation from the communities in which the project is located," or that the airport sponsor "has advised the communities that they have the right to petition the Secretary [of Transportation] about [the] proposed project."[433] However, courts have upheld RODs where there was no such certification from the airport sponsor, as long as the Final EIS documents "the extensive participation of local communities in the environmental review process."[434] Therefore, it is in the airport sponsor's interests to make a good faith effort (in coordination with the FAA) to provide opportunities for public hearing on the EIS.

F. Coordination of Outside Agencies

The airport sponsor is to take on the responsibility "as needed" to coordinate the activities of other federal, state, and local agencies during the environmental review process.[435] In the survey conducted for this digest, the most common concern raised by airport sponsors was the role of "outside" (i.e., non-FAA) agencies. The two most commonly cited issues were:

• *Conflicts between federal agencies with different mandates*. This problem seems to arise most

[423] FAA Order 5050.4B, § 9.j (2006).

[424] *See, e.g.*, Mass. Port Auth. v. City of Boston, No. 012731BLS2, 17 Mass. L. Rep. 125, 2003 Mass. Super. LEXIS 429, at *16 (Nov. 18, 2003) ("[T]he FAA held two public hearings on the draft EIS/EIR.").

[425] FAA Order 5050.4B, § 1101.b(1)(d); FAA Order 1050.1E, § 508c(3) (2004).

[426] FAA Order 1050.1E, § 209c (2004).

[427] FAA Order 5050.4B, Chart 3 (2006).

[428] FAA Order 5050.4B, § 406.b (2006).

[429] FAA Order 5050.4B, § 406.d (2006).

[430] FAA Order 5050.4B, § 406.c (2006).

[431] *See, e.g.*, FAA Order 1050.1E, § 508g (2004) (requiring the FAA to consider "comments made during public hearings" on the Draft EIS, and to revise the EIS to reflect "issues raised through the community involvement and public hearing process.").

[432] *See, e.g.*, Mass. Port Auth. v. City of Boston, No. 012731BLS2, 17 Mass. L. Rep. 125, 2003 Mass. Super. LEXIS 429, at *16–17 (Nov. 18, 2003) (describing the airport sponsor's efforts to work with the public before, during, and after public hearings on the Draft EIS).

[433] 49 U.S.C. § 47106(c)(A)(ii) (2012); FAA Order 5050.4B, § 1203.b(2) (2006).

[434] Communities Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 690 (D.C. Cir. 2004).

[435] FAA Order 5050.4B, § 201.b(5) (2006).

often in the context of wetlands mitigation. A number of survey respondents indicated that the U.S. Army Corps of Engineers prefers that the airport sponsor mitigate wetlands impacts on the airport site, but the U.S. Fish and Wildlife Service (USFWS) prefers to mitigate wetlands impacts off-site because wetlands tend to attract wildlife. Survey respondents indicate that this conflict is usually resolved in favor of USFWS, probably due to the safety concerns associated with wildlife on the airport site.

• *Conflicts between federal and state agencies with common mandates*. Examples cited by survey respondents include state agencies with jurisdiction over wetlands or stormwater under state environmental laws (overlapping the jurisdiction of the Corps of Engineers) or state agencies with jurisdiction over wildlife under state environmental laws (overlapping the jurisdiction of USFWS). The conflict most often arises when the state special-purpose agency becomes involved late in the environmental review process and requests changes (e.g., consideration of additional alternatives or mitigation measures) that were not requested by the analogous federal special-purpose agency. Environmental requirements may differ widely from state to state, and airport sponsors should be mindful that FAA guidance deals primarily with federal requirements. Timely identification and engagement of relevant state agencies is generally the airport sponsor's responsibility.

The following section addresses the airport sponsor's coordination of these "outside" (i.e., non-FAA) government agencies (both federal and state) at different stages in the environmental review process.

i. Outside Agencies and the Environmental Assessment

The airport sponsor is generally responsible for preparing an EA. As mentioned in SectionII.B.iii, the analysis of environmental impacts in the EA will consider impacts to environmental resources protected by special-purpose laws. Typically, non-FAA government agencies will have jurisdiction over those resources or those special-purpose laws. In that case, the EA is required to include proof that the airport sponsor (or its EA consultant) consulted with the relevant government agency to ensure that requirements of the special-purpose law will be satisfied.[436] This consultation should alert the airport sponsor as to whether a permit is required from the outside agency under the relevant special-purpose laws. The airport sponsor will be primarily responsible for obtaining any such permit. The FAA recommends integrating the permit application into the NEPA process, rather than waiting to apply for necessary permits after the FAA has approved the EA.[437]

In some cases, the outside government agency will make recommendations (e.g., for alternatives to avoid the specially protected environmental resource, or measures to mitigate the impact to the specially protected resource). In some cases, the airport sponsor does not accept the recommendations of the outside agency. If the conflict between the airport sponsor and the outside agency cannot be resolved before the airport sponsor submits the Draft EA to the FAA for internal review, the airport sponsor is required to document the outside agency's recommendation and the airport sponsor's "written rationale for rejecting the recommendations or solutions." The FAA must forward the airport sponsor's rationale to the outside agency, and allow 15 days for the outside agency to comment before the FAA can allow the airport sponsor to finalize the EA.[438]

Once the airport sponsor finalizes the EA, the FAA is required to make the Final EA available to any federal agency with jurisdiction over the proposed action due to a special-purpose law or other specially protected environmental resource. (The airport sponsor may have a similar obligation under state special-purpose law to make the EA available to a state agency with jurisdiction.) The outside agencies must be allowed to review the Final EA for 30 days before the FAA can issue a FONSI.[439] If outside agencies raise serious concerns that they consider to be inadequately addressed in the EA, the proposed development project may be so controversial that the FAA cannot issue a FONSI, and an EIS will have to be prepared.[440] In some cases, the FAA is prohibited from issuing a FONSI if the airport sponsor certi-

[436] FAA Order 5050.4B, § 706.f(2)(b) (2006).

[437] FAA Order 1050.1E, App. A, § 18.1b (2004).

[438] FAA Order 5050.4B, § 707.d (2006).

[439] FAA Order 5050.4B, § 804.a (2006).

[440] *See, e.g.*, California v. U.S. Dep't of Transp., 260 F. Supp. 2d 969, 973–74 (N.D. Cal. 2003) ("[T]he volume of comments from and the serious concerns raised by federal and state agencies specifically charged with protecting the environment support a finding that an EIS was required in this case. Given the controversy surrounding the airport project, defendants unreasonably failed to prepare an EIS.").

fies that the proposed development project "conforms" to special-purpose environmental laws, but the outside agency with jurisdiction over the special-purpose law disagrees with the airport sponsor's conformity determination.[441] To avoid elevating the proposed development project to require an EIS, the airport sponsor should work with the outside agency to get concurrence on the airport sponsor's conformity determination prior to finalizing the EA.

In response to the survey conducted for this diget, some airport sponsors expressed frustration with what they perceived as the outside agencies making "unreasonable demands" and raising environmental concerns that go beyond their special-purpose jurisdiction and expertise. Some survey respondents expressed frustration that the FAA seems to make significant concessions to these outside agencies, requiring the airport sponsor to address alternatives or mitigation measures proposed by the outside agencies. However, this additional analysis effort at the EA stage to satisfy the outside agency can have long-term benefits for the airport sponsor, especially if it means that the FAA can issue a FONSI rather than prepare an EIS.

ii. Outside Agencies and the Environmental Impact Statement

If the proposed development project will have significant environmental impacts that cannot be satisfactorily mitigated, an EIS must be prepared by any federal agency who is taking "major federal action." This certainly includes the FAA (who will be approving and likely funding the project), and may also include other federal agencies who have jurisdiction over specially protected environmental resources or special-purpose laws. To avoid parallel EIS's and duplication of effort, the FAA encourages intra-agency coordination for airport development projects,[442] preferably resulting in a single EIS adopted by all cooperating agencies. All federal agencies and the airport sponsor are to participate in a single "coordinated environmental review process for airport capacity enhancement projects at congested airports, aviation safety projects, and aviation security projects."[443] State agencies (other than airport sponsors) are also encouraged to participate in the streamlined environmental review process, where the proposed development project falls within the jurisdiction of the state agency (e.g., under a state special-purpose environmental law).[444] The FAA is responsible for identifying agencies who will have an interest in the proposed development project and inviting them to participate.[445] The FAA is the lead agency in this streamlined environmental review process, and all participating agencies (possibly including the airport sponsor) "shall give substantial deference" to the FAA's decisions and directives.[446]

The coordinated environmental review process may be set forth in an inter-agency agreement or memorandum of understanding between the FAA, other participating federal or state agencies, "and, if applicable, the airport sponsor."[447] This agreement should clarify the responsibilities and expertise of the FAA, the outside agencies, and "if applicable, the airport sponsor."[448] The airport sponsor is not necessarily a participant in the EIS preparation process and thus will not necessarily be a party to this agreement.[449] The FAA "encourages airport sponsors to be signatories to the MOU" for projects subject to streamlined environmental review (e.g., high-priority airport development projects or aviation safety/security projects).[450]

An MOU would be particularly useful on projects not subject to streamlined environmental review where cooperating federal agencies are not required by statute to defer to the FAA's lead, or when state environmental agencies are participating in the coordinated review on a voluntary basis. This may be easier said than accomplished, since the role and responsibility of each participating agency (and possibly the airport sponsor) must be negotiated and formalized in an MOU. The airport sponsor may play a role in negotiating the terms of the MOU between the FAA and other agencies. One survey respondent expressed frustration over trying to negotiate an MOU between

[441] FAA Order 1050.1E, App. A, § 3.4a(2) (2004).

[442] FAA Order 5050.4B, § 1100.b (2006); FAA Order 1050.1E, § 213 (2004).

[443] 49 U.S.C. § 47171 (2012); *see also* FAA Order 1050.1E, App. D, § 6.c (2004).

[444] 49 U.S.C. § 47171(e) (2012).

[445] FAA Order 5050.4B, § 910.c (2006).

[446] FAA Order 1050.1E, App. D, § 6.g (2004).

[447] FAA Order 1050.1E, App. D, § 6.e (2004).

[448] FAA Order 5050.4B, § 1003.c(3) (2006).

[449] *See, e.g.*, Nat'l Mitigation Banking Ass'n v. U.S. Army Corps of Eng'rs, No. 06-CV-2820, 2007 U.S. Dist. LEXIS 10528, at *10–11 (N.D. Ill. Feb. 14, 2007) (describing an inter-agency coordination agreement for EIS preparation entered into by the FAA, U.S. Army Corps of Engineers, and state environmental agency).

[450] FAA Order 5050.4B, § 1505.e(2) (2006).

the FAA and a state environmental agency for a master plan update that was subject to both NEPA and a state mini-NEPA law:

> The ADO [FAA Airport District Office] had never done an MOU on a combined NEPA and State "NEPA-Like" document. We [the airport sponsor] had to obtain samples from other airports and write multiple drafts over a period of almost a year before the FAA would sign the MOU. We lost much valuable time because the ADO and Regional FAA office simply had no experience in how to draft such an MOU. It was very frustrating.

Upon completion of the Draft EIS, regardless of whether it was prepared in a coordinated or streamlined process, the FAA must specifically request comments from the airport sponsor, any federal agency "having jurisdiction by law or special expertise," and "appropriate" state and local agencies.[451] The FAA must revise the EIS to respond to any "substantive comments" received concerning the Draft EIS, whether those comments come from the airport sponsor or an outside agency.[452] Once the FAA (or the EIS contractor) has addressed all substantive comments received on the Draft EIS, it prepares the Final EIS for a 30-day public review "wait period."[453] The FAA is to distribute one copy of the Final EIS to every outside agency (or airport sponsor) who provided substantive comments on the Draft EIS,[454] five copies to the EPA,[455] and a number of copies to other federal agencies.[456] Unlike the Draft EIS, the FAA is not required to solicit comments from outside agencies (or the airport sponsor) regarding the Final EIS.[457] Also unlike the Draft EIS, the FAA is generally not required to respond to comments received during the 30-day "wait period" regarding the Final EIS.[458] Upon conclusion of the 30-day "wait period," the FAA will prepare a final ROD approving or not approving the Final EIS.[459]

It should be apparent that the airport sponsor's role in coordinating outside agencies is more pronounced during preparation of the EA (in which the airport sponsor has the lead preparation role) than during preparation of the EIS. At the EIS stage, the airport sponsor and outside agencies both tend to be in the role of (at best) participants in a coordinated review process conducted by the FAA, or (at worst) excluded from the substantive environmental review process and relegated to the role of "commenter."

IV. CONCLUSION

NEPA and related environmental laws impose significant requirements on federal agencies such as the FAA to evaluate the environmental impact of its actions (such as approving funds for airport development projects). Because airport development projects are typically proposed by the airport sponsor rather than the FAA, the FAA has shifted much of that responsibility to the airport sponsor, to the extent it is legally allowed to do so, particularly for proposed development projects that will not require an EIS. Since most airport development projects will not require an EIS, the airport sponsor (or its EA consultant) is usually responsible for performing most of the environmental analysis required by NEPA or required by non-FAA agencies under special-purpose environmental laws. The airport sponsor may also have similar environmental review responsibilities under state "mini-NEPA" laws and state special-purpose environmental laws.

Any AIP-funded development project will involve some level of environmental review (which may simply be a determination that the project's anticipated environmental impacts are so insignificant as to qualify for a Categorical Exclusion from NEPA). However, the airport sponsor's consideration of the three components of an environmental review (environmental impacts, alternatives, and mitigation measures) begins long before AIP funds are devoted to a project. In the planning stage, when the airport sponsor first identifies its needs and considers development solutions, it formulates a preliminary statement of "purpose and need" that shapes the analysis of impacts, alternatives, and mitigation. The purpose and need may be refined as a project advances through the NEPA process (to reflect additional planning data and environmental data), and certainly the environmental review will have an increased level of detail as the airport sponsor moves from requesting a Categorical Exclusion, to preparing an EA, to assisting the FAA in prepara-

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[451] FAA Order 5050.4B, § 1101.a (2006).

[452] FAA Order 5050.4B, § 1101.a (2006); *see also* 40 C.F.R. § 1503.4 (2012).

[453] FAA Order 5050.4B, § 1303 (2006).

[454] FAA Order 5050.4B, § 1211.d (2006).

[455] FAA Order 5050.4B, § 1211.f (2006); *see also* 40 C.F.R. § 1506.9 (2012).

[456] FAA Order 5050.4B, § 1211.g (2006).

[457] *See* FAA Order 5050.4B, § 1211.b (2006) ("An agency *may* request comments on an FEIS.") (emphasis added); *see also* 40 C.F.R. § 1503.1(b) (2012).

[458] *See* FAA Order 5050.4B, § 1211.a (2006) (noting that the FAA "may choose to circulate" revisions to the Final EIS in response to comments).

[459] FAA Order 5050.4B, § 1301 (2006).

tion of an EIS. Section II *supra* provides guidance for the level of detail required, depending on where the airport sponsor is in the NEPA process. Technical consultants will play an integral role in developing the required documentation. Section III.B *supra* provides guidance for overseeing technical consultants, with the guidance tailored to where the airport sponsor is in the NEPA process. For example, certain tasks (e.g., EIS preparation) must be performed by the federal government and cannot be performed by the airport sponsor. Therefore, an EIS contractor is to work on behalf of the FAA, whereas an EA consultant works on behalf of the airport sponsor. These and other nuances are addressed in Section III.B.

Since the airport sponsor is typically responsible for shepherding the NEPA process, it needs to be aware of all procedural requirements for public participation, including when the airport sponsor must make environmental studies available for public review, and when it must hold public hearings. Section III.E *supra* addresses the FAA criteria for public hearings and when they must be held, depending on the type of environmental review and whether special-purpose environmental laws are implicated. Requirements for the airport sponsor (or FAA) to publish environmental review documents—to make them available for public review—vary depending on the scope of the project, its anticipated environmental impact, whether it implicates special-purpose environmental laws, and the status of the review (i.e., whether it is "draft" or "final"). These publication requirements are addressed in Section III.D *supra*, and must be satisfied regardless of whether anyone has requested the documents. A related but different question is what to do when the public requests environmental review documents (e.g., preliminary drafts) that are not required to be published under NEPA or special-purpose laws. Whether preliminary drafts are public records often depends on whether the documents were communicated between the airport sponsor and the FAA (which may depend on whether the technical consultant is working on behalf of the airport sponsor or on behalf of the FAA). These and other nuances are addressed in Section III.C.

Most importantly, the airport sponsor must keep in mind that, regardless of who takes the lead role in environmental review, the airport sponsor will always ultimately have to get the FAA's approval for any significant airport development project. Therefore, effective coordination of the process with the FAA is important at all stages of development planning and environmental review. Consultation with the FAA should begin when the airport sponsor first identifies a proposed development project to address its preliminary formulation of "purpose and need." The FAA may be able to suggest modifications (e.g., to the statement of purpose and need), alternatives to the proposed development project, or mitigation measures that will make the project more likely to withstand environmental review. For example, the FAA may be able to suggest changes that will make the project less likely to require an EIS (e.g., by introducing mitigation measures to reduce environmental impacts below significance thresholds) or more likely to qualify for streamlined environmental review (e.g., by reframing the purpose and need to focus on aviation safety or security).

V. NEPA QUESTIONNAIRE

A copy of the survey questionnaire that was used in performance of this study follows. The survey was delivered to the 400 airport sponsors who received the largest amounts of airport development grant funds from the FAA between 2004 and 2011.

APPENDIX A—QUESTIONNAIRE

NATIONAL ACADEMY OF SCIENCES
TRANSPORTATION RESEARCH BOARD
AIRPORT COOPERATIVE RESEARCH PROGRAM (ACRP)
PROJECT 11-01, STUDY TOPIC 04-06: The Role of the Airport Sponsor in Airport Planning and Environmental Reviews of Proposed Development Projects Under the National Environmental Policy Act (NEPA) and State Mini-NEPA Laws

The Transportation Research Board has retained a consultant to explore the legal issues faced by airport sponsors in fulfilling requirements under the National Environmental Policy Act ("NEPA"), related "special purpose" federal environmental laws, and analogous state mini-NEPA statutes in selected jurisdictions.

The purpose of this survey is to elicit information from airport sponsors to develop an industry-wide perspective on the role of the airport sponsor in the environmental review process coordinated by the Federal Aviation Administration ("FAA"). Your participation will help prepare other airport sponsors and AIP grant recipients for the environmental review process. We also hope to identify areas in which the environmental review process can be improved.

Please have this survey completed by the individual in your organization who is primarily responsible for NEPA matters. Please base the survey responses only on environmental review activities conducted since 1 January 2004. Contact information to return completed surveys is at the end of the document. Thank you in advance for your cooperation with this survey.

I. BACKGROUND

A. Identification

i. Please provide the name and address of your **airport or organization**.

_____
_____
_____

ii. Please provide the name, telephone number, and email address of an appropriate **contact person** who is primarily responsible for **NEPA compliance** and related **environmental review** issues at your airport or organization.

_____
_____
_____

B. Environmental Review Experience (since 1 January 2004)

i. Since 1 January 2004, approximately how many times has your airport or organization requested that the FAA **categorically exclude** a proposed action from environmental review? _____

ii. Since 1 January 2004, approximately how many times has your airport or organization (or a consultant working on your behalf) performed an **Environmental Assessment ("EA")** for a proposed action? _____

iii. Approximately how many of those EAs have resulted in a **Finding of No Significant Impact ("FONSI")** by the FAA? _____

iv. Since 1 January 2004, approximately how many times has an **Environmental Impact Statement ("EIS")** been prepared your airport or organization? _____

II. PURPOSE AND NEED

A. Environmental Assessments (since 1 January 2004). (Please answer all that apply)

i. How frequently does your airport or organization **consult** with the FAA to help develop a statement of Purpose and Need to include in a **Draft EA** for a proposed project?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

ii. How frequently does the **FAA** recommend that your airport or organization **change** its statement of Purpose and Need after the FAA's internal review of a **Draft EA**?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

iii. How frequently does your airport or organization **revise** its statement of Purpose and Need in an EA based on comments received from the **public or non-FAA government agencies**?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

iv. How frequently does the FAA issue a **FONSI** with a **different** statement of Purpose and Need than that included in your airport's **Final EA**?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

B. Environmental Impact Statements (since 1 January 2004). (Please answer all that apply)

i. How frequently does the FAA **consult** with your airport or organization regarding the FAA's statement of Purpose and Need prior to or during the FAA's draft of an **EIS** for a project?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

ii. How frequently has the FAA issued an **EIS** with a **different** statement of Purpose and Need than that included in your airport's **Final EA** for the same project?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

iii. How frequently has the FAA **revised** its statement of Purpose and Need in its **Final EIS** based on comments received from the **public or other government agencies** regarding a Draft EIS for a proposed development at your airport?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

C. If your responses above indicate that your airport or the FAA made changes to the statement of **Purpose and Need** at any time *after* developing a Draft EA, please **describe the changes** in the Purpose and Need, and whether it changed the proposed project:

_____
_____
_____
_____
_____

III. ALTERNATIVES

A. Environmental Assessments (since 1 January 2004). (Please answer all that apply)

i. How frequently does your airport or organization **consult** with the FAA to help develop Alternatives to include in a **Draft EA** for a proposed project?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

ii. How frequently does the FAA recommend that your airport or organization consider **additional** Alternatives after the FAA's internal review of a **Draft EA**?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

iii. How frequently has your airport or organization **revised** its EA to consider additional Alternatives based on comments received from the **public or non-FAA government agencies**?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

iv. How frequently has the FAA issued a **FONSI** with a **different Preferred Alternative** than that included in your airport's **Final EA**?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

B. Environmental Impact Statements (since 1 January 2004). (Please answer all that apply)

i. How frequently has the FAA issued a **Draft EIS** that considers **additional** Alternatives not included in your airport's **Final EA** for the same project?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

ii. How frequently has the FAA considered **additional** Alternatives in its **EIS** based on comments received from the **public or other government agencies**?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

iii. How frequently has the FAA issued a **Final EIS or Record of Decision ("ROD")** that selects a **different Preferred Alternative** than that in your airport's **Final EA**?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

C. If your responses above indicate that your airport or the FAA has considered additional **Alternatives** at any time after developing a Draft EA, please **describe the additional Alternatives** considered, and whether it changed the **Preferred Alternative**:

_____
_____
_____
_____
_____

IV. PUBLIC HEARINGS (Please answer all that apply)

A. Since 1 January 2004 approximately how many times has your airport participated in a **public hearing on a Draft EA** prepared by (or on behalf of) your airport? _____

B. How frequently has the FAA required your airport or organization to **revise its EA** to address substantive comments made during a **public hearing**?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

C. Since 1 January 2004, approximately how many times has there been a **public hearing** to consider a **Draft EIS** for a proposed activity at your airport? _____

D. How frequently has the FAA **revised its EIS** for a development project at your airport to address substantive comments made during a **public hearing**?

N/A	Never	Occasionally	Half the Time	Usually	Always
○	○	○	○	○	○

V. CONSULTANTS (Please answer all that apply)

A. Since 1 January 2004 approximately how many times has a **consultant** prepared an **Environmental Assessment** for a development project at your airport? _____

B. Which response below best describes the arrangements for **hiring the EA consultant**?

- ○ The airport selected and hired the consultant without FAA input.
- ○ The FAA recommended the consultant, but the airport hired and paid the consultant.
- ○ The FAA selected the consultant, and partially reimbursed the airport for the consultant.
- ○ The FAA selected, hired, and paid the consultant directly.

C. Since 1 January 2004, approximately how many times has a **contractor** prepared an **Environmental Impact Statement** for a development project at your airport? _____

D. Which response below best describes the arrangements for **selecting the EIS contractor**?

- ○ The airport selected the contractor without FAA involvement.
- ○ The FAA selected the contractor from a short list recommended by the airport.
- ○ The FAA selected its own preferred contractor, who was not recommended by the airport.

E. Which response below best describes the arrangements for **paying the EIS contractor**?

- ○ The airport contracted directly with the contractor without FAA involvement.
- ○ The FAA, airport, and contractor entered into a Memorandum of Understanding, with the airport directly paying most contractor expenses, without reimbursement from the FAA.
- ○ The FAA, airport, and contractor entered into a Memorandum of Understanding, with the FAA paying or reimbursing the airport sponsor for most contractor expenses.
- ○ The FAA contracted directly with the contractor without airport involvement.

F. If your airport has entered into a **Memorandum of Understanding** with the FAA and an EIS contractor, please describe any challenges presented by that contractual arrangement:

_____
_____
_____
_____
_____

VI. PUBLIC DISCLOSURE

A. Which response below best describes the approach taken in response to public requests for **disclosure of a Draft EA** (or internal documents pertaining to a Draft EA) submitted by your airport (or its consultant) to the FAA for **internal review**?

- ○ Not applicable (no requests for public disclosure of a Draft EA during FAA internal review).
- ○ The airport treats the Draft EA (and related documents) as exempt from public disclosure, and we never publicly disclose the documents, until after FAA internal review.
- ○ The airport takes steps to prevent disclosure of the Draft EA (and related documents), but there are instances where the public has obtained the documents from the airport or FAA before the FAA's internal review is complete (*i.e.*, before a public hearing).
- ○ The public usually is able to obtain the Draft EA (and related documents) upon request while the FAA's internal review is ongoing.
- ○ The Draft EA (and related documents) are published or publicly disclosed at the time they are submitted to the FAA for internal review.

B. Which response below best describes the approach taken in response to public requests for **disclosure of a Preliminary Draft EIS** prepared by the FAA (or its contractor) regarding a proposed development activity at your airport?

- ○ Not applicable (no known requests for public disclosure of a PDEIS).
- ○ The FAA treats the PDEIS (and related documents) as exempt from public disclosure, and never publicly discloses the documents.
- ○ The FAA takes steps to prevent disclosure of the PDEIS (and related documents), but there are instances where the public has obtained the documents from the airport or FAA.
- ○ The public usually is able to obtain the PDEIS (and related documents) upon request.
- ○ The PDEIS (and related documents) are published or publicly disclosed by the FAA at the time they are distributed for internal FAA review.

VII. GENERAL COMMENTS

A. Are there specific areas of environmental review where, in your opinion, the roles of the **airport sponsor or the FAA** are unclear or not well defined? _____ Explain:

_____
_____
_____
_____
_____

B. Are there specific areas of environmental review where, in your opinion, the roles of **other government agencies** are unclear or not well defined? _____ Explain:

_____
_____
_____
_____
_____

C. Are there specific areas of environmental review where, in your opinion, the roles of the airport sponsor or the FAA under NEPA conflict with the roles of the airport sponsor or other government agencies under **other environmental laws** (including special purpose laws and state mini-NEPA statutes)? _____ Explain:

_____
_____
_____
_____
_____

D. May we contact you directly for further information regarding any of your responses above? _____

E. Do you desire that we keep your responses confidential and NOT identify your airport in the final report? _____

Please mail, email, or fax completed surveys no later than **15 October 2012** to the attention of:

Timothy R. Wyatt
Conner Gwyn Schenck PLLC
P.O. Box 20744
Greensboro, NC 27420

Fax: (336) 691-9259

Email: twyatt@cgspllc.com

If you would prefer to receive this survey by email as an electronic fill-in document, please request an electronic copy from Mr. Wyatt at twyatt@cgspllc.com.

ACKNOWLEDGMENTS

This study was performed under the overall guidance of the ACRP Project Committee 11-01. The Committee was chaired by TIMOTHY KARASKIEWICZ, General Mitchell International Airport, Milwaukee, Wisconsin. Members are THOMAS W. ANDERSON, Metropolitan Airports Commission, Minneapolis, Minnesota; MARCO B. KUNZ, Salt Lake City Department of Airports, Salt Lake City, Utah; MARJORIE PERRY, Tucson Airport Authority, Tucson, Arizona; E. LEE THOMSON, Clark County, Las Vegas, Nevada; and KATHLEEN YODICE, Yodice Associates, Aircraft Owners and Pilots Association, Washington, DC.

DAPHNE A. FULLER provides liaison with the Federal Aviation Administration, FRANK SANMARTIN provides liaison with the Federal Aviation Administration, MONICA HARGROVE KEMP provides liaison with the Airports Council International-North America, and MARCI A. GREENBERGER represents the ACRP staff.

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500 Fifth Street, NW
Washington, DC 20001

ISBN 978-0-309-28386-1

Subscriber Categories: Aviation • Environment • Law

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