

AASHTO PRACTITIONER'S HANDBOOK

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RESPONDING TO COMMENTS ON AN ENVIRONMENTAL IMPACT STATEMENT

This Handbook provides information for developing responses to comments on an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). It also covers the issues associated with responding to comments on an Environmental Assessment (EA).

Issues covered in this Handbook include:

- Preparing for the comment period
- Inviting comments on a Draft EIS
- Reviewing and categorizing comments
- Developing responses to comments
- Checking responses for accuracy and responsiveness
- Formats for presenting comments and responses
- Responding to comments on a Final EIS
- Responding to comments on an EA
- Responding to comments raising legal issues
- Deciding whether to prepare a supplemental NEPA document

The Practitioner's Handbooks are produced by the Center for Environmental Excellence by AASHTO. The Handbooks provide practical advice on a range of environmental issues that arise during the planning, development, and operation of transportation projects.

The Handbooks are primarily intended for use by project managers and others who are responsible for coordinating compliance with a wide range of regulatory requirements. With their needs in mind, each Handbook includes:

- key issues to consider;
- a background briefing;
- practical tips for achieving compliance; and
- a list of reference materials.

In addition, key regulations, guidance materials, and sample documents for each Handbook are posted on the Center's web site at <http://environment.transportation.org>



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Overview



This Handbook provides recommendations for reviewing and responding to comments on an environmental impact statement (EIS) for a transportation project in accordance with the National Environmental Policy Act (NEPA). It also provides advice on responding to comments on an environmental assessment (EA).

Comments on an EIS typically are received from Federal and state regulatory agencies, local governments, stakeholder groups, and individuals. Comments may identify potential gaps or inconsistencies in the EIS; raise concerns about the fairness of the study process; point to specific regulatory requirements that must be considered; or raise other concerns about compliance with NEPA or other laws. And, of course, many comments also present strong opinions for or against the project. For controversial projects, the most numerous comments are often those submitted by individuals or groups who oppose the project.

Giving all of the comments proper consideration requires a careful, well-organized effort by the project team. This effort typically involves drafting responses to hundreds or even thousands of individual comments. In addition, it is often necessary to make changes to the EIS itself and, in some cases, it is even necessary to prepare a supplemental EIS in order to respond adequately to the issues raised in the comments. This Handbook is intended to provide an overall framework for undertaking these important tasks.

Topics covered in this Handbook include:

- Preparing for the comment period
- Inviting comments on a Draft EIS
- Reviewing and categorizing comments
- Developing responses to comments
- Checking responses for accuracy and responsiveness
- Formats for presenting comments and responses
- Responding to comments on a Final EIS
- Responding to comments on an EA
- Responding to comments that raise legal issues
- Deciding whether to prepare a supplemental NEPA document

Background Briefing

This section briefly summarizes key requirements and guidance regarding Federal agencies' obligation to respond to comments on NEPA documents for transportation projects.¹ In addition to summarizing requirements in the Council on Environmental Quality (CEQ) regulations, this section addresses the requirements of 23 USC 139, which applies to certain projects approved by Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and Federal Railroad Administration (FRA).² This section also briefly addresses public comment and agency review requirements under other laws, such as Section 404 of the Clean Water Act and Section 4(f) of the U.S. Department of Transportation (U.S. DOT) Act.

¹ In this Handbook, any references to the "Federal lead agency" include a state acting in the role of the Federal lead agency pursuant to a NEPA assignment program under 23 USC 326 or 327.

² All highway, transit, and multimodal projects for which an EIS is prepared must follow the environmental review process defined in 23 USC 139. Railroad projects requiring an EIS must comply with Section 139 "to the greatest extent feasible." See 23 USC 139(b); 49 USC 24201(a).

Requirement for Draft EIS Comment Period. The CEQ regulations require a Federal agency preparing an EIS to provide an opportunity for comment on the Draft EIS and respond to those comments in the Final EIS. The CEQ regulations state that the comment period for the Draft EIS normally should be at least 45 days.³ Section 139 also sets an upper limit: the comment period must be no more than 60 days, unless (1) the lead agency, project sponsor, and all participating agencies agree on a longer period, or (2) the comment period is extended by the lead agency for good cause.

Notice of Availability in the Federal Register. The official time period for comments on a Draft EIS runs from the date of publication of a Notice of Availability for the Draft EIS in the Federal Register. The U.S. Environmental Protection Agency (EPA) will not submit the notice to the Federal Register until the NEPA document has been filed with the EPA and has been made available to other interested agencies and the public. Once the EPA submits the notice, there is a time lag of several days before the notice is actually published. Therefore, the NEPA document often is available to other agencies and the public for several days, and sometimes a full week, before the official beginning of the comment period.

Agencies' Duty to Comment. The CEQ regulations require all agencies with jurisdiction by law or special expertise to provide comments on a Draft EIS on issues within their jurisdiction, expertise, or authority.⁴ The regulations also require cooperating agencies, when commenting on a Draft EIS, to specify any additional information they need to fulfill other requirements, including Federal permits or other approvals; if the cooperating agency expresses objections to the project, it must specify mitigation measures that would allow the project to be approved.⁵ Echoing the CEQ regulations, Section 139 requires all participating agencies to provide comments on areas within their special expertise or jurisdiction.⁶

Responding to "Substantive" Comments. The CEQ recommends that agencies respond to all "substantive" comments on a Draft EIS.⁷ The term "substantive" has not been defined by CEQ, nor has it been defined by FHWA, FTA, or FRA in their regulations or guidance. Dictionaries define this term to mean "having practical importance, value, or effect" or "involving matters of major or practical importance to all concerned."⁸ In a NEPA context, this term generally has been interpreted to include a comment that addresses some specific aspect of the project or the NEPA document, rather than simply expressing a preference for or against the project. For example, two Federal agencies outside U.S. DOT have defined it as follows:

- **BLM:** "Substantive comments do one or more of the following: question, with reasonable basis, the accuracy of information in the EIS or EA; question, with reasonable basis, the adequacy of, methodology for, or assumptions used for the environmental analysis; present new information relevant to the analysis; present reasonable alternatives other than those analyzed in the EIS or EA; cause changes or revisions in one or more of the alternatives."⁹
- **Forest Service:** "Comments are considered substantive when they are within the scope of the proposal, are specific to the proposal, have a direct relationship to the proposal, and include supporting reasons for the responsible official to consider."¹⁰

The CEQ regulations also require that all substantive comments be attached to the Final EIS, except that summaries may be attached if the substantive comments are "exceptionally voluminous."¹¹

Summary Responses. When the comments are especially voluminous, the CEQ regulations allow for similar comments to be grouped together or summarized and addressed in a single response.¹²

Level of Detail in Responses. The CEQ recommends that agencies provide "a reasonable and proportionate response" to comments.¹³ For example, the CEQ notes that a brief response is appropriate if a commenter simply asserts that the agency's methodology was inadequate, but a more thorough response should be provided if the commenter supports its comment with specific reasons why the commenter believes the methodology to have been inadequate.¹⁴

Issuing a Combined Final EIS and ROD. For transportation projects subject to 23 USC 139, the Final EIS and ROD are

³ 40 CFR 1506.10(c). The 45-day period is determined based on calendar days (including weekends), not business days.

⁴ 40 CFR 1503.2.

⁵ 40 CFR 1503.3(c), 1503.3(d).

⁶ 23 USC 139(d)(9).

⁷ CEQ, "Forty Most Asked Questions Concerning CEQ's NEPA Regulations" (March 16, 1981), Question 14d; see also 40 CFR 1503.4(b).

⁸ See <http://www.dictionary.com/browse/substantive> and <http://www.merriam-webster.com/dictionary/substantive>.

⁹ Bureau of Land Management, *NEPA Handbook* (Jan. 2008), p. 66.

¹⁰ 36 CFR 219.62.

¹¹ 40 CFR 1503.4(b).

¹² 40 CFR 1503.4(a); CEQ, "Forty Most Asked Questions Concerning CEQ's NEPA Regulations" (March 16, 1981), Questions 25a, 29a.

¹³ CEQ, "Improving the Process for Preparing Efficient and Timely Environmental Reviews under NEPA" (March 6, 2012), p. 13.

¹⁴ CEQ, "Forty Most Asked Questions Concerning CEQ's NEPA Regulations" (March 16, 1981), Question 29a.