

AASHTO PRACTITIONER'S GUIDES

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RESPONDING TO COMMENTS ON AN ENVIRONMENTAL IMPACT STATEMENT

IN THIS GUIDE:

Responding to comments on an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) is a complex challenge. This guidance provides information for developing responses to comments on both a Draft EIS and Final EIS, and covers the issues associated with responding to comments on an Environmental Assessment (EA).

Key issues to consider during the comment-response process:

- Inviting comments
- Receiving and sorting comments
- Reviewing and responding to comments
- Responding to FEIS comments

Practical tips for responders:

- Inviting comments
- Receiving and sorting comments
- Developing responses to comments
- Ensuring accuracy and consistency
- Formats for presenting DEIS comments and responses in the FEIS

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

The Guides 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 Guide includes:

- key issues to consider;
- a background briefing;
- practical tips for achieving compliance.

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

This Guide was prepared by Akin Gump Strauss Hauer & Feld LLP with the assistance of Parsons Brinckerhoff and with input from several state departments of transportation (DOTs) and the Federal Highway Administration (FHWA). The views expressed in this Guide are solely those of the authors and do not constitute official guidance or policy of any agency. This Guide should not be used as a substitute for reviewing applicable Federal, State, or local laws, regulations, guidance documents, or agreements, nor should it be used as a substitute for obtaining the advice of legal counsel where needed. The Guide does not constitute legal advice and should not be used as such.

AASHTO Center for Environmental Excellence



American Association of State Highway and Transportation Officials

Overview



This Guide provides recommendations for reviewing and responding to comments on an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). It focuses primarily on the development of responses to comments on a Draft EIS (DEIS). Since agencies often receive comments on the Final (FEIS) as well, this Guide also discusses the development of responses to comments on the FEIS. In addition, the Guide briefly covers the issues associated with 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 involves, at a minimum, the drafting of responses to comments, which can be a significant logistical challenge in its own right. In addition, it is often necessary to make changes to the EIS itself, which may involve substantial additional technical work. In some cases, it is even necessary to prepare a Supplemental EIS (SEIS) in order to respond adequately to the issues raised in the comments. This Guide is intended to provide an overall framework for undertaking these important tasks.

Key Issues to Consider

Inviting Comments

- How long will the comment period be? Does your schedule allow the flexibility to extend the comment period if necessary?
- How will the comment deadline be communicated to the public?
- Will you accept electronic comments (e.g., e-mails, via website)?
- What information, if any, will you require commenters to provide (e.g., name, address, e-mail)?

Receiving and Sorting Comments

- What is the intake process?
- Will the content of the comment letters be transferred to a database or spreadsheet for sorting? If so, what specific software will be used?
- If comments are converted into a database, how will you correlate individual comments in the database back to the actual comment letters?
- How will comments be categorized into topic areas? Who needs to be involved in setting up the topic areas?
- Who will maintain the clean, unaltered originals of each comment?

Reviewing and Responding to Comments

- Will all comments be reviewed by a single team, or will they be divided among multiple teams based on subject area?
- How will you ensure consistency in responses?
- How will you ensure consistency between the responses to DEIS comments and the text in the main body of the FEIS?
- Have you considered the need for legal sufficiency review of the responses to comments? How much time will this take and when will it occur in the process?

Responding to FEIS Comments

- Will you establish a comment period for the FEIS and invite comments?
- If comments are received on the FEIS, will they be addressed in the record of decision (ROD) itself or in some other way?
- Does your schedule take into account the potential need to consider and address comments on the FEIS?

Background Briefing

Requirement to Allow and Address Comments. Section 1503 of the Council on Environmental Quality (CEQ) regulations requires a federal agency preparing an EIS to provide an opportunity for comment on the Draft EIS (DEIS) and respond to those comments in the final EIS (FEIS).

Length of Comment Period on DEIS. Under the CEQ regulations, the comment period on a DEIS must be at least 45 days after publication of a notice of availability of the DEIS in the *Federal Register*. The CEQ regulations themselves do not establish a maximum time period. However, under Section 6002 of SAFETEA-LU, the period for comments on a DEIS for a highway or transit project must be no more than 60 days, unless (1) the lead agency, project sponsor, and all participating agencies agree on a different comment period, or (2) the comment period is extended by the lead agency (U.S. DOT) “for good cause.”¹ (A discussion of comments on the FEIS is included in this section.)

Initiating the Comment Period. As noted above, the DEIS comment period formally begins with publication of the notice of availability of the DEIS in the *Federal Register*. This notice is actually submitted to the *Federal Register* by the U.S. Environmental Protection Agency (EPA), which typically submits them in batches on a weekly basis. Under its procedures, EPA will not submit the notice to the *Federal Register* until the DEIS has been filed with the EPA and the DEIS has been made available to all other interested agencies and the public. Once the EPA submits the notice to the *Federal Register*, there is a time lag of several days before the notice is actually published. Project managers should consult with their FHWA Division Offices and/or EPA regarding the procedures for submittal of the notices of availability.²

Extending the Comment Period. Requests to extend the comment period are frequently received, particularly for larger and more complex projects. The decision about whether to extend the comment period rests with the lead agency, which is typically FHWA for a highway project. The requirements of Section 6002 of SAFETEA-LU should be considered when deciding whether to extend a comment period.

Substantive vs. Non-Substantive Comments. The general rule under the CEQ regulations is that an FEIS must respond to all “substantive” comments on a DEIS. The CEQ regulations and guidance do not define the term “substantive,” nor is there any definition of this term in FHWA or FTA regulations or guidance. The National Park Service issued guidance stating that a comment is considered substantive if it raises specific issues or concerns regarding the project or the study process, but not if it merely expresses support for or opposition to the project or a particular alternative.³ FHWA generally follows a similar approach when determining which comments are substantive.

Individual vs. Group Responses. Section 1503.4 of the CEQ regulations state that comments should be assessed and considered “individually and collectively.” It also states that all substantive comments should be attached to the FEIS, except that summaries may be attached if the substantive comments are “exceptionally voluminous.” These regulations allow for similar comments to be grouped together and addressed in a single response.

¹ SAFETEA-LU is the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users, which was enacted in August 2005. Section 6002 of SAFETEA-LU establishes an environmental review process for projects that require preparation of an EIS. A copy of Section 6002 is available on the Center’s website at <http://environment.transportation.org/center/>.

² The EPA guidance for submitting a notice of availability for a DEIS is available on Center’s website, <http://environment.transportation.org/center/>.

³ The National Park Service’s NEPA guidance states that substantive comments “(a) question, with reasonable basis, the accuracy of information in the EIS; (b) question, with reasonable basis, the adequacy of environmental analysis; (c) present reasonable alternatives other than those presented in the EIS; [or] (d) cause changes or revisions in the proposal.” The NPS guidance also states that “[c]omments in favor of or against the proposed action or alternatives, or comments that only agree or disagree with NPS policy, are not considered substantive.” See NPS Director’s Order 12, Conservation Planning, Environmental Impact Analysis and Decision Making, Section 4.6, “Environmental Impact Statements – The Final EIS” (Jan. 8, 2001). A copy of this order is available on the Center’s website at <http://environment.transportation.org/center/>.

Format for Comments and Responses in FEIS. There is no prescribed format for presenting comments and responses in the FEIS. Typically, if the comments are voluminous, the comments and responses will be presented in a separate volume (or volumes) of the FEIS. (For specific suggestions regarding potential formats, see the “*Practical Tips*” section below.)

Letter Responses. The responses provided in the FEIS serve as the federal agency’s official response to all comments received on the DEIS. Because responses are provided in the FEIS, it is not necessary to send an individual response letter to each commenter. If an agency decides to send individual response letters, it is important to ensure that the responses given in the letters are fully consistent with the responses given in the FEIS.

Receiving Electronic Comments. For some projects, an opportunity is provided for comments to be submitted electronically—for example, by providing a comment form on the project website. There is no regulatory requirement to provide this option, but it has been used in some cases as a means of providing an additional opportunity for public involvement.

Whether to Request Comments on the FEIS. The CEQ regulations do not specifically require a period for comments on the FEIS. However, Section 1501.8 of the CEQ regulations states that the lead agency “may” set time limits for “review of any comments on the final environmental impact statement.” In addition, Section 1503.1(b) states that an agency “may request comments on a final environmental impact statement before the decision is finally made” and also states that “other agencies or persons may make comments before the final decision [ROD] unless a different time is provided under Sec. 1506.10.” Based on these regulations, the lead agency may request comments and set a deadline for commenting on the FEIS; if such a deadline is set, the agency must consider comments received by the deadline; if a deadline is not set, the agency must consider comments received at any time up until a ROD is issued.

Length of Comment Period on FEIS. The CEQ regulations do not specifically establish a minimum time period for comments on an FEIS, but they do require at least 30 days between the FEIS and the ROD. Thus, as a practical matter, there is a period of at least 30 days within which agencies and the public may submit comments on an FEIS. Under SAFETEA-LU, this minimum may also be a maximum: under that law, the comment period on an FEIS must be no more than 30 days, unless (1) the lead agency, project sponsor, and all participating agencies agree on a different comment period, or (2) the comment period is extended by the lead agency (U.S. DOT) “for good cause.”

Practical Tips

1 | Inviting Comments

Determining the Length of the Comment Period. As noted above, the comment period on a DEIS must be at least 45 days, but (for projects subject to Section 6002 of SAFETEA-LU) it should generally be no longer than 60 days. It is important to consider the requirements of Section 6002 if a deadline will be established that is longer than 60 days.

Announcing Deadline for Comments. The deadline for submitting DEIS comments generally should be announced at the time the DEIS is released. Announcing the comment deadline—the actual date, not just the number of days—at this time will help to ensure that the comment deadline is widely disseminated through media coverage of the DEIS. The comment deadline should also be prominently displayed in the DEIS, on the project website, and in public hearing brochures and handouts. It is also helpful to include the date of the comment deadline in the *Federal Register* notice announcing the availability of the DEIS.

Reducing the Potential for an Extension. Requests for extensions are often based on the timing of the release of the DEIS, difficulty obtaining access to the DEIS, or the overall size of the DEIS. To reduce the potential for such concerns, it may be helpful to:

- Establish a comment period that is longer than the required 45-day minimum if the project involves complex issues or there are other reasons to extend the period;
- Coordinate with other agencies in advance regarding the time period for comments, taking into accounts any concerns that they may have—e.g., the need for additional time due to holidays, vacations, or workload;
- Maintain accurate records of the distribution of the DEIS, including the mailing list, the date on which materials were sent out, the method of transmittal (e.g., U.S. mail), and the type of document transmitted (hard copy vs. CD-ROM);
- Ensure that documents posted to the project website are accurate and complete, and promptly address any reports of corrupted or missing files;
- Provide an opportunity for the public to request assistance in downloading documents from the project website;

- Enable readers to download portions of the DEIS, such as individual chapters or appendices, from the project website;
- Promptly resolve any complaints received regarding the availability of the DEIS, including technical difficulties with the project website;
- Make hard copies readily available, in sufficient numbers, at public libraries and similar locations in the project area;
- Make the entire DEIS (including appendices) available on CD-ROM;
- Provide an opportunity to purchase all or portions of the document in hard-copy format—for example, by allowing copies to be printed at a commercial copy shop.

Deciding Whether to Grant an Extension. Regardless of the length of the comment period, it is likely that some requests for an extension will be received, particularly for larger and more complex projects. Under Section 6002 of SAFETEA-LU, there is now a presumption that the comment period will be no longer than 60 days; it can be extended beyond that limit only if (1) the lead agency, project sponsor, and participating agencies all agree to set a longer period or (2) the lead agency (FHWA) finds “good cause” for the longer period. This new requirement should be taken into account in deciding whether to grant an extension.

2 | Receiving and Sorting Comments

Compiling All Comments. The universe of comments on the DEIS typically includes not only letters mailed to the project team, but also several other types of documents, such as handwritten comments submitted on comment cards at public hearings, oral testimony contained in transcripts of the public hearings, and (in some cases) comments submitted electronically via e-mail or the project website. All comments, regardless of format, should be compiled and made available to the team responsible for reviewing and responding to the comments.

Identifying Substantive Comments. Once the comments are received, it is necessary to review each comment letter (or e-mail, etc.) and identify the substantive comments that each document contains. Some comment letters may contain no substantive comments; others may contain dozens of separate substantive comments. When substantive comments are identified, they should be bracketed, numbered, or otherwise identified. These individual substantive comments then become the focus of the process for responding to comments.

Converting Comments to a Matrix or Database. For projects involving voluminous comments, it is helpful to convert all of the comments to a single comprehensive matrix or database. While it can be time-consuming, this effort can yield considerable benefits. For example, a database can provide the capability to sort individual comments according to several criteria, such as date, commenter, topic, and keyword. Depending on the technology used, this approach may also provide the capability for full-text searching. These capabilities are valuable because they allow reviewers to see all comments on a single issue together. Specialized software is available to facilitate this effort.

Summarizing Comments. The preparation of comment summaries can help to streamline the process for responding to comments on the DEIS. This approach is most helpful when the comments on the DEIS are voluminous and/or when many of the comments raise overlapping issues. The preparation of comment summaries can be time-consuming, and introduces the potential for errors—e.g., if the summary does not fully capture the meaning of the comment. But the summaries can help greatly to distill the essential points raised in the comments, thus enabling agency reviewers and ultimately the public to understand better the issues that were raised in the comments.

Developing Initial Task List. During the initial review of the comments, it is important to begin compiling a list of additional tasks that will need to be conducted for the FEIS. The most important tasks to identify—at an early stage of the review—are tasks that could be time-consuming and thus could affect the overall project schedule. Tasks that may be needed include additional traffic modeling, development of additional avoidance or minimization alternatives, refinement of mitigation measures, and including new information in various sections of the FEIS. The earlier these tasks are identified, the greater the opportunity to provide thorough responses to the DEIS comments without delaying the project schedule.

Maintaining Clean Originals. As with all documents in the project file, it is important to maintain a clear and unaltered original version of each comment letter. Notations necessary for indexing or filing purposes—e.g., a document number—should not obscure the text of the letter itself. Once the originals have been scanned or copied, the originals themselves should be maintained in a secure location.

3 | Developing Responses to Comments

Review Teams. One effective way to prepare responses to a large volume of comments is to divide responsibility for the comments by subject matter, and assign initial responsibility for drafting the responses to review teams. For this approach to work effectively, it is highly advantageous to develop a system capable of sorting the comments by topic, such as a database. In addition, if review teams are used, there will inevitably be some overlap among the issues addressed by each team; thus, the review teams should include an oversight team with responsibility for coordinating the overall effort and resolving any inconsistencies.

Standard Responses. To avoid inconsistencies, it is useful to develop standard language that can be used for all comments that raise similar issues. However, while standard language can help avoid inconsistencies, it can also create a tendency to provide responses that don't actually address the issues raised in a comment. Therefore, while it is useful to develop standard language, it also is important to allow for selective additions or modifications to take into account differences among comments. The use of a comment database can help to ensure consistency in responses.

Responding to Agency Comments. Given the significance of resource agency comments, it is important to review their comments promptly and develop an initial assessment of the overall level of support or concern expressed by the agencies. If significant concerns have been raised, those concerns should be addressed directly through coordination with the agencies. In addition, it is particularly important for responses to agency comments to be thorough and comprehensive; they should carefully identify the issues raised and then systematically explain how those issues have been resolved.

Responding to Comments That Include Consultant/Expert Reports. In recent years, it has become increasingly common for commenters to submit their own studies as attachment to their comments. Often prepared by consultants with technical expertise, these comments may include detailed comments on technical issues; they may also present new alternatives, new data, or new analyses. Responding effectively to these comments usually will require substantial effort, including input from project staff with appropriate expertise. One possible approach is to prepare a report specifically responding to the commenter's report, and include that response in an appendix to the FEIS.

Responding to Comments from Major Stakeholders. Major stakeholders frequently submit lengthy, substantive comment letters. In some cases, the comments will raise fundamental questions about the scope of the entire study, about the fairness of the study process, and about the adequacy of the underlying technical analysis. Responding to these types of letters will require extensive technical and legal input.

Final Production. The final step in the process involves production of the administrative record for the other parties to the litigation and for the court. In some cases, if the record has been scanned, it is provided solely in electronic format on CD-ROMs. It also may be necessary to provide the record in paper format. See Section 5 of *AASHTO Practitioner's Guide 01: Maintaining a Project File and Preparing an Administrative Record for a NEPA Study* ("Submitting the Administrative Record to the Court") for further information about production of the administrative record.

4 | Ensuring Accuracy and Consistency

Ensuring Responsiveness. There is sometimes a tendency in preparing responses to gloss over the difficult issues raised in the comments. In addition, the meaning of the comment may not be immediately apparent to the team reviewing the comments. For these reasons, it is important for the review process to include multiple "checks," which help to ensure that responses are substantive to the issues raised in the comment and are accurate and well-written.

Ensuring That All Issues in Comment Letter Are Addressed. As noted above, many of the techniques used to facilitate the preparation of responses involve converting comment letters into a database or matrix that contains summaries or excerpts of the comments followed by responses to those comments. When this type of approach is used, it is important to include a process for "cross-checking" the original comment letters to ensure that all of the comments in that letter were actually entered into the database and addressed.

Ensuring Consistency Among Different Responses to Similar Issues. Even if similar comments have been grouped together or summarized, there usually will be a significant overlap among many of the responses given to the DEIS comments. This overlap may result in conflicting responses (or at least different responses) being given to different comments. A comprehensive database or matrix can help to minimize the potential for conflicting or different responses, because it allows all comments on a particular topic to be viewed together. Other techniques also can be used to achieve the same goal (for example, manually reviewing comments, if a database has not been created). Whatever method is used, the objective should be to ensure consistency in responses to similar issues.

Ensuring Consistency Between Responses to Comments and Main Body of FEIS. Responses to comments on the DEIS typically include commitments to include certain information in the FEIS. For example, if a commenter points out an error in the calculation of wetlands impacts, the response to that comment may include a commitment to include revised wetlands data in the Environmental Consequences chapter of the FEIS. It is essential to ensure that, for each such commitment, the information is actually included in the relevant section of the FEIS. On a related note, it is also helpful in the response to point out the section or sub-section of the FEIS where the information can be found.

5 | Formats for Presenting DEIS Comments and Responses in the FEIS

Commenter-by-Commenter Format. This format groups the comments and responses by commenter. This format makes it easy to see all of the comments made by a commenter, along with the responses to all of those comments. For example, if a reader is interested in seeing all of the comments made by EPA, the reader can turn to one place in the FEIS and see a complete list of EPA's comments and the responses to those comments. This format can be effective as a means of documenting responsiveness to concerns raised by review agencies. It can also be effective as a means of responding to public comments if relatively few comments are received; however, if many commenters raise similar issues, this format results in substantial duplication among the responses. Also, this format does not allow the reader to see all comments on the same subject in one place.

Subject-by-Subject Format. This format groups the comments and responses by subject. For example, all comments on the topic of Purpose and Need would be listed together, along with responses to those comments. This makes it possible for the reader to see all of the comments on a single issue in one place, which can be helpful both for agency reviewers and for the general public. But this format means that individual comments are excerpted from the comment letters, so that the reader does not see the individual comment in the context of the comment letter as a whole. When this approach is used, it is common for the subject-matter groupings to follow the organization of the FEIS—i.e., Purpose and Need, Alternatives, etc. It is also common to provide an alphabetical listing of commenters with cross-references, as described below.

Alphabetical Listing of Commenters with Cross-References. When comments are grouped by subject, it is helpful to provide a method for individual commenters to determine where their comments have been addressed. One commonly used format is to include an alphabetical list of all commenters, with each name followed by a list of the specific responses that address issues raised in that commenter's letter—e.g., "Mary Smith, Responses A-22, B-12, C-13, etc." As indicated by this example, this format requires the use of a comprehensive numbering system for all responses.

General Responses to Major Issues. When comments and responses are voluminous, or when litigation is anticipated, it is helpful to prepare a series of general responses to the major issues raised in the comments. These general responses help to ensure that major themes in the individual responses do not get lost in a mountain of detail. They also provide an opportunity to address complex issues in more depth. If general responses are provided, it is helpful to include cross-references to relevant sections of the FEIS and to supporting documents in the administrative record. The most common place to include general responses is at the beginning of the Responses to Comments chapter or volume of the FEIS.

Reference Materials

Statutes, regulations, and guidance documents cited in this Guide, along with additional materials and sample documents, are available on the AASHTO Center for Environmental Excellence website, <http://environment.transportation.org/center/>.

ADDITIONAL RESOURCES

PRACTITIONER'S GUIDES AVAILABLE FROM AASHTO CENTER FOR ENVIRONMENTAL EXCELLENCE:

- 01 Maintaining a Project File and Preparing an Administrative Record for a NEPA Study
- 02 Responding to Comments on an Environmental Impact Statement
- 03 Managing the NEPA Process for Toll Lanes and Toll Roads
- 04 Consulting Under Section 106 of the National Historic Preservation Act
- 05 Utilizing Community Advisory Committees for NEPA Studies
- 06 Tracking Compliance with Environmental Commitments/Use of Environmental Monitors

For additional Practitioner's Guides, please visit the AASHTO Center for Environmental Excellence website at: <http://environment.transportation.org>

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