

AASHTO PRACTITIONER'S HANDBOOK

02

August 2016

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>



Center for Environmental Excellence by AASHTO



American Association of State Highway and Transportation Officials

Copyright © 2016, Center for Environmental Excellence by AASHTO (American Association of State Highway and Transportation Officials). All Rights Reserved. This book, or parts thereof, may not be reproduced in any form without written permission of the publisher. Printed in the United States of America.

This material is based upon work supported by the Federal Highway Administration under Cooperative Agreement No. DTFH61-07-H-00019. Any opinions, findings, and conclusions or recommendations expressed in this publication are those of the Author(s) and do not necessarily reflect the view of the Federal Highway Administration.

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.

required to be issued as a single document unless the lead agency makes a determination that issuing a combined document is impracticable.¹⁵ Under U.S. DOT guidance, one of the issues to consider in making this practicability determination is the degree of controversy surrounding the project.¹⁶ For example, the opportunity to review comments submitted after the Final EIS may be helpful in resolving concerns and/or more thoroughly documenting the agency's consideration of opposing viewpoints prior to reaching its decision.

Inviting and Responding to Comments on a Final EIS. When the Final EIS and ROD are not issued as a single document, there must be at least a 30-day waiting period between the Final EIS and ROD. While the lead agency is not required to invite comments during this period, the agency has the discretion to request comments and to set a deadline for those comments; if no deadline is established, comments can be submitted on the Final EIS at any time prior to the ROD.¹⁷ One reason to set a deadline for submitting Final EIS comments is to provide a clear cut-off date by which any such comments must be submitted. Under 23 USC 139, a comment period on a Final EIS must be no more than 30 days, unless the lead agency, project sponsor, and all participating agencies agree on a different comment period, or the comment period is extended by the lead agency "for good cause."¹⁸

Inviting and Responding to Comments on an EA. The CEQ regulations do not require a comment period on an EA, but the FHWA/FTA regulations in 23 CFR 771 do require that an EA be made available for a minimum of 30 days before a FONSI is issued.¹⁹ In addition, FHWA and FTA are allowed to use the environmental review process in 23 USC 139 for a project involving an EA. Under that process, the comment deadline for any document other than a Draft EIS must be no more than 30 days, unless (1) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies or (2) the deadline is extended by the lead agency for good cause. Thus, if the Section 139 process is followed for an EA, the comment period on the EA will normally be 30 days.

Synchronizing NEPA Comment Periods with Comment Periods under Other Laws. Comment periods in the NEPA process can overlap with comment periods required under other Federal, state, or local laws. For example, the Section 4(f) regulations require a 45-day period for the U.S. Department of the Interior to review a draft Section 4(f) evaluation. This Section 4(f) comment period often occurs in parallel with the Draft EIS comment period. The Section 404 permitting process also includes a comment period, normally between 15 and 30 days. If the project sponsor is able to submit the Section 404 permit application before publication of the Draft EIS, the U.S. Army Corps of Engineers can issue its public notice so that the comment period on the permit application runs in parallel with the comment period on the Draft EIS.

Key Issues to Consider

Preparing for the Comment Period

- What work that can be done in advance of the comment period to facilitate the development of responses?
- What technology will be used to compile comments and responses and make them available to members of the project team?
- Who will be directly responsible for drafting responses? What review process will be used to ensure that responses are accurate and complete?
- Does the Federal lead agency have any special preferences or requirements regarding the review process, response format, level of detail, etc.?
- Is there a need for legal counsel review of responses? If so, when will that occur?
- Does the schedule allow sufficient time for development and review of responses to comments?
- Are there steps that can be taken up front to address stakeholder concerns proactively, thereby reducing the total volume of comments that will need to be addressed?

¹⁵ 23 USC 139(n).

¹⁶ See U.S. DOT, "Final Guidance on MAP-21 Section 1319 Accelerated Decisionmaking in Environmental Reviews" (Oct. 2014).

¹⁷ 40 CFR 1503.1(b).

¹⁸ 23 USC 139(g)(2)(B).

¹⁹ 23 CFR 771.119(d)-(h).

Inviting Comments on a Draft EIS

- How long will the comment period be? Are any special findings required (e.g., for a comment period on a Draft EIS that exceeds 60 days)?
- What methods will be used to communicate the comment deadline (and any extensions) to the public?
- What options will be offered to the public for submitting comments (e.g., via email, web, etc.)?

Reviewing and Categorizing Comments

- What categories will be used for grouping the comments?
- Who will be responsible for the initial review and categorization of comments?
- Will the content of the comment letters be transferred to a database or spreadsheet for sorting? If so, what information will be included in the spreadsheet?
- Who will maintain the clean, unaltered original version of each comment?

Developing Responses to Comments

- Will all responses be developed by a single team, or will the work be divided among multiple teams based on subject area?
- What process will be used to ensure consistency in responses developed by different team members?
- What process will be used to ensure that changes described in responses are actually made in the main body of the NEPA document?
- Are there any responses that require legal review? If so, when will that occur?

Formats for Presenting Comments and Responses

- Will responses be organized by topic or will each comment letter be addressed separately?
- How will individual commenters identify the location of their comments and the responses to their comments?

Responding to Comments on a Final EIS

- Will the Final EIS and ROD be issued as a single document? (If so, there will be no opportunity for comments on the Final EIS.)
- If the Final EIS and ROD will be issued separately, what information will be communicated to the public about the opportunity to comment on the Final EIS? Will a deadline for Final EIS comments be established?

Responding to Comments on an EA

- Will there be a public comment period on the EA? (Normally, a comment period is provided.)
- How long will the comment period be?
- How will comments regarding “significant impacts” be addressed?

Responding to Comments that Raise Legal Issues

- Do any of the comments claim that the NEPA document is legally deficient? If so, what team will be responsible for handling those comments?

Deciding Whether to Prepare a Supplemental NEPA Document

- Do any of the comments claim that a Supplemental EIS (or Supplemental EA) is needed? If so, is additional work needed to assess those issues before responses are prepared?

Practical Tips

The tips in this section are intended to help produce high-quality responses as effectively and efficiently as possible. As stated in Practitioner's Handbook 15, *Preparing High-Quality NEPA Documents for Transportation Projects*, high-quality responses to comments generally have the following characteristics:

- Readers can readily ascertain the overall range of issues raised in the comments and understand how those issues have been addressed.
- Individual commenters can readily locate their own comments and the responses to their comments.
- Responses to similar comments are consistent with one another.
- The main body of the NEPA document is consistent with the responses.
- Specific, substantive comments receive specific, substantive responses.

1 | Preparing for the Comment Period

Assembling the Response Team. Responding to comments can be an intense, time-consuming effort, especially when the project schedule leaves little time to develop responses prior to publication of the Final EIS. One way to help expedite the development of responses is to identify a core team responsible for coordinating the development of responses and have the team begin working together on logistical issues even before the comment period begins.

Developing Comment Categories. Based on the public outreach that occurs prior to publication of the Draft EIS or EA, it may be possible to anticipate the types of issues that may be raised in the comments. Using this information, the response team can prepare an initial list of comment categories, which can be used to track comments as they are received and to assign those comments to appropriate members of the project team. The categories can be updated or refined as needed when comments are actually received.

Addressing Technology and Work-Flow Issues. For projects with a high volume of comments, agencies often use a comment database or spreadsheet to compile comments and assemble draft responses. If a database will be used, it should be set up and tested before the comment period begins. In addition, the response team should map out the process steps that will be followed when comment letters are received—from initial intake through development and review of the response. Having a well-defined plan will help to avoid missteps or confusion when the comment letters actually arrive. It will also help to highlight any schedule concerns, such as the need to lengthen the schedule to allow sufficient time to prepare responses.

Determining Criteria for Elevated Review. Among the many comments received on a typical NEPA document, there may be some that require elevated review within the project team due to the sensitivity or complexity of the issues raised. For example, comments that directly question the legal sufficiency of the document generally warrant review by the agency's legal counsel. The project team should develop criteria for identifying comments that require elevated review and determine the process for promptly circulating those comments to the relevant team members.

Identifying Any Lead Agency Preferences. Project team members with responsibility for developing the responses to comments should reach out to the lead agency in advance of the comment period to determine if the lead agency has any specific preferences that will need to be followed. For example, the Federal agency may have a preference regarding the format used for presenting the comments and responses in the Final EIS or may request that certain types of comments be provided to the agency's legal counsel for review.

Synchronization with Comment Periods under Other Laws. Consider whether the NEPA comment period will occur in parallel with comment periods under other Federal laws, such as Section 404 or Section 4(f), or comment periods under state or local laws. If multiple comment periods will occur simultaneously, develop a schedule showing the overlap of each period. In general, while it is not always possible, it is a good practice for comment periods to conclude on the same date, which reduces the potential for confusion on the part of the public.

Proactive Outreach to Stakeholders. Comments on a NEPA document sometimes raise issues or concerns that could have easily been addressed in advance through better public outreach. For example, property owners may use the comment process to ask questions or raise concerns about the right-of-way acquisition process. By anticipating those concerns and addressing them effectively in advance, the project team may be able to reduce the total volume of comments received, making the process as a whole more efficient.

2 | Inviting Comments on a Draft EIS

Announcing the Deadline for Comments. The deadline for submitting Draft EIS comments should be announced at the time the Draft EIS is released.²⁰ 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 Draft EIS. It is helpful to announce the deadline not only in the Federal Register notice and the Draft EIS, but also in other ways—e.g., on the project web site, in public hearing brochures, and on social media.

Reducing the Potential for an Extension. The lead agency has the ability to extend a comment period on a Draft EIS beyond 60 days “for good cause.” While extensions are warranted in some cases, extensions also can delay the project schedule. The best way to avoid the need for an extension is to set a realistic comment deadline in the first place, taking into account holidays and other constraints, and make sure that all relevant information and documentation is readily and easily accessible from the very outset of the comment period. Examples of effective practices include:

- Coordinating with other agencies in advance regarding the time period for comments, taking into account any concerns that they may have—e.g., the need for additional time due to holidays, vacations, or workload.
- Ensuring that documents posted to the project web site are accurate and complete, and promptly addressing any reports of corrupted or missing files.
- Providing an opportunity for the public to request assistance in downloading documents from the project web site (e.g., a “help desk”) and promptly resolving technical issues.
- Allowing readers to download individual chapters or appendices of the Draft EIS from the project web site, so that they can easily obtain portions of the document that are of greatest interest to them.

Instructions for Submitting Comments. One way to streamline the comment review process is to encourage commenters to submit comments electronically, either by e-mail or through a web-based form, which makes it more efficient to transfer those comments into a database. While commenters should be allowed to submit comments in various formats, including the traditional method of mailing a letter or submitting a paper comment card, agencies can encourage electronic submittals through active public involvement efforts and by making electronic submittals as easy to use as possible.

Personally Identifiable Information. Commenters often include their names and street addresses and, in some cases, also include their telephone numbers and email addresses. This information is useful to the agency because it helps to provide context for the comment and makes it possible to contact the commenter individually if needed. But commenters may not fully appreciate that copies of their comments will be included in the Final EIS, and also may be disclosed through FOIA requests or as part of an administrative record in litigation. To avoid misunderstandings, it is beneficial to include a clear statement on the project website and in other public involvement materials, informing the public that any comments submitted are public-record documents and therefore may be disclosed publicly. In addition, the agency could redact personally identifiable information (e.g., phone numbers, e-mail addresses) from comment letters that are published as part of the Draft EIS.

3 | Receiving and Categorizing Comments

Compiling Comments. Comments on the Draft EIS typically include not only letters mailed to the project team, but also handwritten comments submitted on comment cards at public hearings, oral testimony contained in transcripts of the public hearings, and comments submitted electronically via e-mail or the project web site. 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, each comment letter (or e-mail, etc.) should be reviewed to identify the substantive comments. 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 on the comment letter. 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. 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.

²⁰ 40 CFR 1502.11(f) (requires the cover page to the Draft EIS to include the “date by which comments must be received”).

Summarizing Comments. Preparing comment summaries can help to streamline the process for responding to comments on the Draft EIS. This approach is most helpful when the comments are voluminous and/or when many comments raise overlapping issues. Summaries can help 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. Keep in mind that the preparation of comment summaries introduces the potential for errors: when a comment is summarized, the summary might omit important details, or even change the meaning of the comment. Therefore, if summaries are used, the process should include a quality-control step to compare the final comment summaries against the original comments.

Identifying Responses Requiring Elevated Review. The initial review process should identify comments that require elevation within the project team for review by senior-level team members, agency executives, or legal counsel. For example, if a comment is accompanied by a lengthy technical report that criticizes the methodology used for an environmental analysis, the comment should be elevated for review by technical experts familiar with that methodology. Similarly, if the comment includes legal arguments related to the adequacy of the environmental analysis or compliance with regulations, the comment should be elevated for legal counsel review.

Identifying Responses Requiring Additional Technical Work. The initial review should identify comments that require additional technical work by the project team—for example, additional traffic modeling, consideration of design changes or new alternatives, or development of additional avoidance, minimization, or mitigation measures. The earlier these tasks are identified, the greater the opportunity to provide thorough responses to the Draft EIS 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 should not be made on the original document (and if made, they should not obscure the text of the document itself). Once the originals have been scanned or copied, the originals themselves should be maintained in a secure location in paper or electronic form.

4 | Developing the Responses to Comments

Preparing high-quality responses to comments on a Draft EIS is a team effort, and the size of the team is often quite large when the comments are voluminous. The tips in this section are intended to help the team develop responses that effectively address big-picture issues while also responding to specific concerns raised in individual comment letters.

Coding Comments by Topic. Regardless of the format used to present the responses in the Final EIS, it is essential for the project team to have a clear understanding of the full range of issues raised in the comments, and to be able to identify all of the comments that raise the same issue. Especially when comments are voluminous, the best way to achieve this overall understanding of the comments is to develop a master list of topics and then code each comment based on the topic or topics addressed in that comment. Often, the master list of topics is based on the chapter and section headings used in the Draft EIS. If that approach is used, consider adding additional topics for cross-cutting issues that do not correlate directly with a single section or sub-section in the Draft EIS—for example, comments regarding a methodology issue that affects multiple sections of the Draft EIS.

Developing Standard Responses to Common Issues. Once the topics list is developed, standard responses can be developed to common issues raised in the comments. Drafting an initial set of standard responses helps to promote consistency in responses to individual comments and avoids duplication of effort. Standard responses also can be included in the main body of the Final EIS as a way of summarizing the agencies' position on issues commonly raised in the comments. Keep in mind, however, that developing standard responses is just a first step. Additional work will almost always be needed to ensure that the responses address each of the specific issues and concerns raised in individual comment letters.

Coordinating the Review Team. Dividing the work among a large team is essential when comments are voluminous, and especially when the comments raise technical issues that require input from specialists within the project team. But when work is divided in this way, coordination is critical to ensure that team members are consistent in the content, tone, and level of detail of their responses. Effective practices include:

- designating a project manager responsible for coordinating the development of the responses to comments;
- distributing guidelines and templates to all team members for use in developing responses;
- holding regular coordination meetings/conference calls with all team members to discuss cross-cutting issues; and
- establishing a centralized editorial review team that reviews and edits all responses.

Responding to Comments that Require Additional Analysis. Some comments raise complex issues that cannot be addressed simply by drafting a response. For example, a commenter may raise concerns about the adequacy of methodologies used in the

Draft EIS, which in turn may require development of a technical memorandum responding to those concerns. The project team should identify these comments and elevate them for higher-level review. If a technical memorandum is developed in response to a comment, the response to the comment should summarize the technical memorandum, and the memorandum should be included in the project file (and possibly in an appendix to the Final EIS).

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.

5 | Checking Responses for Accuracy and Responsiveness

Accuracy and responsiveness are the touchstones of high-quality responses to comments. Achieving a consistently high level of quality requires close attention to quality control at all stages of development. Responses that simply repeat the same analysis that is being questioned in the comment, or that provide generalities in response to specific concerns, are likely to fall short of readers' expectations. The following questions highlight some of the important issues for practitioners to consider when conducting a quality review of the responses to comments.

Does the Response Directly Address the Comment? There is sometimes a tendency in preparing responses to gloss over the difficult issues raised in the comments, especially when the comments are convoluted or argumentative in tone, or where the comments raise extremely technical issues. In addition, many comments that relate to a single topic raise several distinct points regarding that topic. The response should distinctly address each of those points. Often, bullet points or numbered paragraphs are effective ways to list and address distinct points raised in a comment. The review process should include checks to ensure that responses directly address each of the issues raised in each comment.

Are the Responses Consistent with One Another? Even if similar comments have been grouped together or summarized, there usually will be a significant overlap among many of the responses. This overlap may result in conflicting responses (or at least different responses) being given to different comments. A comment database 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.

Is the Main Body of the Final EIS Consistent with the Responses? Responses to comments on the Draft EIS typically include commitments to include certain information in the main body of the Final EIS. 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 Final EIS. It is essential to ensure that, for each such commitment, the information is actually included in the relevant section of the Final EIS. On a related note, it is also helpful in the response to point out the section or sub-section of the Final EIS where the information can be found.

Are All Issues in the Comment Letters Addressed? Techniques used to facilitate the preparation of responses often involve extracting individual comments from the comment letters, then grouping them by topic and then responding to all comments within a given topic. Often, this is done by entering the text of individual comments into a database or spreadsheet. While this approach has many advantages, it also involves an inherent risk that important topics within a comment letter will be omitted from the master database or spreadsheet, or the context for an individual comment will be lost. Therefore, when this type of approach is used, it is critical to include a process for checking the original comment letters to ensure that all of the comments in each letter were actually entered into the database and addressed. These checks should be done at multiple points during the preparation of the Final EIS.

6 | Formats for Comments and Responses

The CEQ regulations require comments to be addressed "individually and collectively."²¹ While this standard does not require a particular format, it does suggest that agencies should use a format that allows the reader to see the broad themes in the comments, and the lead agency's response to those themes, while also responding to the specific issues and concerns raised by individual commenters. The tips in this section describe some common practices for responding to comments both individually and collectively. For additional suggestions, refer to Practitioner's Handbook 15, *Preparing High-Quality NEPA Documents for Transportation Projects*, as well as the examples accompanying that Handbook on the Center for Environmental Excellence web site.

²¹ 40 CFR 1503.4(a).

Summary Responses. For both readability and legal defensibility, it is helpful to include summary responses that address the major issues raised in the comments. These summary responses typically are included in the main body of the Final EIS (or FONSI or ROD). The summary responses give the reader a simple, easy-to-digest explanation of the major issues raised in the comments and how those issues have been addressed. For example, if hundreds of commenters objected to the elimination of a particular alternative in the screening process, the summary response would describe the alternative, summarize the comments raised, and explain the agency's reasons for eliminating that alternative.

Responses to Individual Comments. Broadly speaking, there are two distinct approaches that can be used for the formats of responses to individual comments: (1) grouping the comments by comment letter, and (2) grouping the comments by topic. Each approach has its pros and cons:

Responses Grouped by Commenter. This format provides a separate response for each commenter, often in a side-by-side format with the comment and the response on facing pages. This format makes it easy to see all of the comments made by a commenter, along with the responses to all of those comments. 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. In general, this format works best when the total volume of comments is moderate or low. This format also works well for agency comments, because often it is important for an agency to be able to see all of the responses to its comment letter in one place.

Responses Grouped by Topic. This format involves breaking up each comment letter into a series of individual comments and then grouping those comments by topic. Often, especially if the comments are voluminous, comments on a single topic will be summarized, rather than presenting the full text of each comment. When this approach is used, it is common for the subject-matter groupings to follow the organization of the Final EIS—i.e., Purpose and Need, Alternatives, etc. The advantage of this format is that it allows the reader to see all of the comments on a single topic in one place, which can be helpful both for agency reviewers and for the general public. If comments are summarized, close attention must be paid to ensure that the summaries do not mis-state the comments or omit important details.

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, and C-13."

7 | Responding to Comments on a Final EIS

When the Final EIS and ROD are issued as separate documents, there is an opportunity for comments on the Final EIS. The following additional points should be considered when responding to comments on a Final EIS:

- Final EIS comments should be included in the ROD. If only a handful of comments are received, they can be addressed in the main body of the ROD. But in most cases, the responses to comments should be included in a separate document as an appendix to the ROD. The comments themselves are normally included in an appendix to the ROD.
- Responses to Final EIS comments should, where relevant, cross reference responses to Draft EIS comments that raise similar issues. If the Final EIS comment raises the identical issue, it is sufficient to cross reference the response to the Draft EIS comment without repeating the response in full.
- But remember that a Final EIS comment cannot always be addressed simply by repeating or cross-referencing a response to a Draft EIS comment on a similar issue. In many cases, the Final EIS comment raises a somewhat different aspect of that issue, or presents new information, or specifically claims that the Draft EIS comment was inadequate in some way. Make sure that any unique aspects of the Final EIS comment are directly addressed.

8 | Responding to Comments on an EA

An EA is normally made available for public comment before a FONSI is issued. The FONSI itself should include the comments on the EA along with responses to those comments. As with a ROD, the comments and responses normally are included in an appendix, unless only a small number of comments are received. When responding to comments on an EA, pay special attention to comments relating to the "significance" of the project's environmental impacts, as well as comments that specifically claim that an EIS should have been prepared. Responses should take care to explain why the impacts are not significant, and should avoid inadvertently using the word "significant" to describe the impacts (unless, of course, the impacts are significant, in which case an EIS should be prepared).

9 | Responding to Comments that Raise Legal Issues

Comments that specifically raise legal issues—for example, comments that assert a violation of law, argue that a methodology was flawed, claim that a supplemental EIS or EA is needed, or refer to the possibility of litigation—should be referred to legal counsel for review. In addition, legal counsel review may be warranted for comments that raise issues involving compliance with specific laws that are frequently raised in litigation (e.g., Section 4(f)), even if the comment does not specifically claim that a violation has occurred.

10 | Deciding Whether Supplementation Is Needed

Responding to comments often involves presenting new information in responses to questions or concerns raised by commenters. Presenting additional information in responses to comments does not automatically require a supplemental EIS or EA.²² Nonetheless, there are times when supplementation is required in order to respond adequately to comments. As stated in the FHWA and FTA regulations, supplementation is required if the new information or changed circumstances would result in “significant environmental impacts that were not evaluated in the EIS.”²³ In addition, if a response involves analyzing a wholly new alternative (not just a variation of an existing alternative), supplementation may be needed.²⁴ If the Federal agency is uncertain about whether supplementation is required, a re-evaluation should be prepared.²⁵

Reference Materials

Statutes, regulations, and guidance documents cited in this Handbook are available on the Center for Environmental Excellence by AASHTO web site, <http://environment.transportation.org>.

Statutes and Regulations

- 40 CFR 1500 (Council on Environmental Quality NEPA regulations)
- 23 USC 139 (environmental review process for highway, transit, and rail projects)
- 23 CFR 771 (FHWA and FTA environmental review regulations)

Guidance

- CEQ, “Forty Most Asked Questions Concerning CEQ’s NEPA Regulations” (March 16, 1981)
- CEQ, “Improving the Process for Preparing Efficient and Timely Environmental Reviews under NEPA” (March 6, 2012)
- Bureau of Land Management, “National Environmental Policy Act Handbook” (H-1790-1) (Jan. 2008)
- FHWA, USACE, et al., “Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects: 2015 Red Book” (Sept. 2015)
- U.S. DOT, “Final Guidance on MAP-21 Section 1319 Accelerated Decisionmaking in Environmental Reviews” (Oct. 2014)

²² See *City of Olmsted Falls, Ohio v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002) (supplementation is required only if the new information presents a “seriously different picture of the environmental landscape”).

²³ 23 CFR 771.130.

²⁴ See CEQ, “Forty Most Asked Questions Concerning CEQ’s NEPA Regulations” (March 16, 1981) Question 29 (recommending preparation of a supplemental EIS if a commenter “points out an alternative is not a variation of the proposal or of any alternative discussed in the draft impact statement, and is a reasonable alternative that warrants serious agency response”).

²⁵ 23 CFR 771.129.

ADDITIONAL RESOURCES

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

- 1 Maintaining a Project File and Preparing an Administrative Record for a NEPA Study
- 2 Responding to Comments on an Environmental Impact Statement
- 3 Managing the NEPA Process for Toll Lanes and Toll Roads
- 4 Tracking Compliance with Environmental Commitments/Use of Environmental Monitors
- 5 Utilizing Community Advisory Committees for NEPA Studies
- 6 Consulting Under Section 106 of the National Historic Preservation Act
- 7 Defining the Purpose and Need and Determining the Range of Alternatives for Transportation Projects
- 8 Developing and Implementing an Environmental Management System in a State Department of Transportation
- 9 Using the SAFETEA-LU Environmental Review Process (23 USC § 139)
- 10 Using the Transportation Planning Process to Support the NEPA Process
- 11 Complying with Section 4(f) of the U.S. DOT Act
- 12 Assessing Indirect Effects and Cumulative Impacts Under NEPA
- 13 Developing and Implementing a Stormwater Management Program in a Transportation Agency
- 14 Applying the Section 404(b)(1) Guidelines in Transportation Project Decision-Making
- 15 Complying with Section 7 of the Endangered Species Act

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

Comments on the Practitioner's Handbooks may be submitted to:
Center for Environmental Excellence by AASHTO
444 North Capitol Street, NW, Suite 249 Washington, DC 20001
Telephone: 202-624-5800
E-mail: environment@aaashto.org
Web site: <http://environment.transportation.org>

