

National
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**THE EIS
COMMENT-RESPONSE
PROCESS**

October 2004

U.S. Department of Energy
Environment, Safety and Health
Office of NEPA Policy and Compliance





Department of Energy

Washington, DC 20585

October 8, 2004

MEMORANDUM TO: Secretarial Officers and Heads of Field Organizations

FROM:

SUBJECT: NEPA Guidance on the EIS Comment-Response Process

I am pleased to provide the attached guidance, *The EIS Comment-Response Process*, which my staff prepared with help from your National Environmental Policy Act (NEPA) Compliance Officers (NCOs) and in consultation with the Office of the Assistant General Counsel for Environment. We expect this guidance to promote efficiency, effectiveness, and consistency in responding to public comments on draft environmental impact statements (EISs) to better support your decisionmaking on final EISs. Elements of this guidance are also helpful in responding to comments received in other parts of the NEPA process (e.g., environmental assessments).

This guidance, which DOE's NCOs identified as a priority, presents a series of recommendations to lead those involved in the preparation and review of a final EIS. The guidance addresses both the substance and the mechanics of the comment-response process and provides advice on tracking and categorizing comments, considering comments and preparing responses, and presenting responses and corresponding changes in a final EIS.

In preparing this guidance, we addressed comments that NCOs provided in coordination with your staffs on drafts that we circulated in July 2003 and June 2004 and discussed at our annual NEPA Community meetings. We are distributing the guidance to DOE's NEPA Community and will post it on our DOE NEPA Web site at www.eh.doe.gov/nepa under Guidance.

Please promote this guidance to those in your organization who prepare or assist in preparing NEPA documents. Questions regarding *The EIS Comment-Response Process* should be directed to Carolyn Osborne in the Office of NEPA Policy and Compliance at 202-586-4596 (carolyn.osborne@eh.doe.gov).

Attachment

cc: DOE NEPA Community



The EIS Comment-Response Process

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1.0 Introduction

This paper provides guidance for considering comments received on a draft environmental impact statement (EIS) and responding to such comments in a final EIS. This guidance is for those who prepare and review EISs for the U.S. Department of Energy (DOE), particularly its National Environmental Policy Act (NEPA) Document Managers and NEPA Compliance Officers. The guidance addresses both the substance and the mechanics of the process. Elements of this guidance are also helpful in responding to comments received in other parts of the NEPA process (e.g., on environmental assessments (EAs) sent to host states and tribes and to the public for pre-approval review).

Attached to this guidance are excerpts from relevant regulations, policy, and guidance issued by the Council on Environmental Quality (CEQ) and DOE (Attachments 1 and 2, respectively). Also attached are examples from comment-response sections of final EISs (Attachment 3) and a flow chart of the comment-response process (Attachment 4).

1.1 The Comment-Response Process

Under CEQ's regulations implementing NEPA (40 CFR 1503.1), an agency that publishes a draft EIS is required to:

Obtain the comments of any Federal agency with jurisdiction by law or special expertise, and

Request comments from

- Appropriate agencies at all levels of government authorized to develop and enforce environmental standards,
- Indian tribes when the effects may be on a reservation, any agency that has requested statements on actions of the kind proposed, and an applicant, if any, and
- The public, affirmatively soliciting comments from those persons or organizations that may be interested or affected.

Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA (40 CFR 1500.1(b)).

Comments received can range from statements of support for, or opposition to, an agency's proposed action to detailed critiques of the EIS's analyses and suggestions for new alternatives. Comments might identify errors of fact, highlight areas of controversy, identify omissions, or provide new information.

An agency's focus in preparing the final EIS is the consideration of and response to these comments. The comment-response process includes all steps from receipt and consideration of comments through the preparation of responses and any needed revisions to the EIS. The agency cannot complete the EIS process until it has considered and responded to these comments in the

final EIS. The comment-response process helps DOE make better-informed decisions; its purpose is not massive paperwork that responds to comments.

1.2 Purpose of this Guidance

CEQ's regulations describe a range of appropriate responses to comments – developing and considering alternatives the agency had not previously considered; modifying alternatives; supplementing, improving, or modifying analyses; making factual corrections; and explaining why a comment does not warrant further agency response (40 CFR 1503.4). CEQ does not prescribe, in either its regulations or guidance, the format for responding to comments, other than requiring an agency to assess and consider comments both individually and collectively and to attach all substantive comments (or summaries, if exceptionally voluminous) to the final EIS. DOE regulations and this guidance similarly provide for format flexibility.

The purpose of this guidance is to facilitate an *efficient and effective* comment-response process. An *efficient process* is one in which there are no wasted efforts and no wasted time.

Effectiveness is determined by the participants. In an *effective process, commentors* easily can find their comments and DOE's responses in the final EIS, in a user-friendly format. They are not overwhelmed with information but find that DOE has addressed all elements of their comments thoughtfully and respectfully. In addition, commentors gain an enhanced understanding of proposed DOE activities. *DOE* is assured that it has considered all environmental factors important to decisionmaking. DOE gains enhanced understanding of various perspectives on relevant issues. In addition, DOE builds greater credibility and trust with its stakeholders, which can increase the likelihood of successful implementation of its selected alternative.

In meeting their responsibilities under DOE Order 451.1B, National Environmental Policy Act Compliance Program, Section 5.e, NEPA Document Managers should tailor their application of this guidance to fit the individual circumstances presented by an EIS – taking into account the complexity of the issues presented and the number of comments received.

NEPA Document Managers may find it helpful to provide written direction to an EIS preparation team on the EIS-specific approach to be taken in the comment-response process (e.g., procedures for logging-in comment documents, responsibilities for preparing draft responses to comments). NEPA Document Managers also may be helped by examining final EISs of similar scope and complexity for ideas on how to conduct the process and present results. It is prudent to examine how best to manage this crucial part of the EIS process.

1.3 Terms Used in this Guidance

Administrative record – All materials (paper or electronic) that DOE will use or has used to make a decision as part of the NEPA process, compiled by the NEPA Document Manager during preparation of an EIS (or EA) and kept as part of Program or Field Office records.

Comment – A distinct statement or question about a particular topic (issue) such as:

- DOE’s purpose and need for action
- The merits of the proposed action or any of the alternatives discussed in the draft EIS
- Any aspect of potential environmental impacts arising from the proposed action or alternatives
- DOE’s use of facts, methodologies, or analyses in the EIS
- DOE’s implementation of the NEPA process
- The broad context for the proposed action, such as environmental quality, technologies, DOE credibility, or government policy
- Matters outside the scope of the EIS.

Comment document – Written version of comments submitted by a commentor (e.g., a letter, postcard, e-mail, or transcript of oral comments at a public hearing or in a telephone message). A comment document can contain any number of comments.

Comment category – The topic (e.g., the NEPA process, the affected environment section of the EIS, air quality impacts) to which a comment is addressed. The word “bin” is often used for “category.”

Comment index – An alphabetized list of commentors’ names (individuals and organizations) or comment topics with information on where to find the comment document and DOE responses to the comment(s) therein.

Commentor – Individual or organization making one or more comments.

Duplicate comment document – A comment document that is exactly the same in wording (or so similar as to be virtually the same) as another comment document. Examples are (1) a postcard or e-mail submitted as part of an organized campaign to encourage people to comment on the draft EIS, and (2) a petition through which more than one individual indicates agreement with the same comment.

Public – A term used broadly to include any and all potentially interested or affected parties, including interested or affected private citizens; state, local, and tribal governments; environmental groups; civic and community organizations; business and labor groups; and independent experts from the scientific, technical, and academic communities (from DOE’s “Effective Public Participation under the National Environmental Policy Act,” 1998, www.eh.doe.gov/nepa, under Guidance). The term “stakeholder” is interchangeable in the context of this guidance.

Substantive comment – A comment that is relevant to the EIS scope, analysis, or process.

Summary comment – A summary prepared by DOE capturing the essence of similar comments on a given topic; not to be confused with a summary or paraphrase of an individual comment.

Supplemental material – Material that does not contain a comment per se (e.g., business card, technical report), but which a commentor submitted with a comment document.

Theme – A topic or issue addressed in many comment documents; can be an area of concern, controversy, or misunderstanding. A summary of a theme should reflect the range of ideas and perspectives presented in the comments.

2.0 General Principles for the Comment-Response Process

Keep an underlying goal of the comment-response process in mind: help DOE improve the EIS to support better-informed decisions.

As early as possible, brief managers on major themes in the comments and obtain guidance and agreement on proposed responses.

Involve policy experts, subject matter experts, and NEPA specialists as needed throughout the comment-response process, and keep them informed of progress.

Revisit comment identification and categories as responses and the final EIS develop.

- Read an entire comment document for overall intent and perspective before identifying individual comments.
- Initially identify comments, categories, and the general nature of responses at the same time.
- Reevaluate as new information becomes available or aspects of the EIS change.

Apply the sliding-scale concept.

- Tailor the approach for responses to the circumstances of the EIS.
- Respond to comments commensurate with their content - a brief response to a focused brief comment; a more comprehensive response to a detailed, well-supported comment.
- Use information management tools to make the process more efficient.

Respect all comments, ignore none.

- Provide a response to each comment.
- Write responses, not defenses. Keep language neutral, not argumentative.
- Give equal weight to oral and written comments.
- Acknowledge comments that are out of scope, and explain why they are. If prudent, respond anyway to answer a question or to set the record straight.
- Explain the comment-response format so that all commentors can find responses to their and others' comments.

Integrate the comment-response process with other aspects of final EIS preparation. Use the process of responding to comments to focus final EIS preparation and ensure consistency.

3.0 Identifying Comments

Led by the NEPA Document Manager, a small group of experienced NEPA practitioners and subject matter experts from the EIS preparation team should develop the overall approach to tracking, determining, and categorizing comments, including:

- How to code each comment document and comment
- Whether to enter comments into a database
- What to do with attachments and supplemental material
- Whether to “split” or “lump”
- What to do with unclear comments
- Which comments are out of scope.

3.1 Tracking Comment Documents

Develop a system to accurately record receipt of each comment document.

Tracking both comment documents and their individual comments is important to maintaining an accurate, adequate administrative record for the EIS and ensuring consideration of all comments received. Where there are only a few comment documents, a list made by using word processing software or a simple spreadsheet may suffice for tracking, whereas a computer database or custom software may be preferred for an EIS with many comment documents.

- Log-in comment documents (e.g., letters, hearing transcripts, e-mail, faxes, postcards, petitions, voice mail messages that have been transcribed), and list attachments and supplemental material in the log.
- Give each comment document (and eventually each comment) a unique code to make it easier to track through the process. It may be useful to track groups of comment documents separately (e.g., letters; duplicate e-mails, faxes, and postcards; and petitions) to help find the submissions.

To illustrate, the code for a comment document might be a sequential number assigned as each comment document is logged (e.g., 001, 002, . . .) or a letter indicating the type of comment document followed by a sequential number (e.g., “E” for e-mail plus a number, as in E-001, E-002, . . .).

Electronically scan or photocopy each comment document on receipt, unless submitted in electronic form. Maintain originals for the administrative record.

Based on expectations, develop a general plan for this part of the process (e.g., how many copies, what goes to whom) before the public comment period for a draft EIS begins.

Plan to scan or copy all comment documents received, including supplemental material (with exceptions, such as a published book).

Use information management software to advantage.

- Scan comment documents as a way to facilitate distribution among reviewers and sorting and tracking comments. Scanning is particularly helpful when there is a large volume of comment documents or the EIS preparation team is geographically dispersed.
- Select software that both reproduces the graphic format of the original comment document and allows searching and copying text. Searching and copying text from an electronic file facilitates finding key terms and placing comments into a database or other software.
- Once the text of a comment document is in a database, the database can be used, among many things, to sort comment documents or comments (by section, page, or line of the draft or by topic), check for consistency among responses and between responses and other parts of the final EIS, track DOE commitments made in responses, and generate statistics, lists, and reports. This can be very useful in avoiding inconsistencies when new language or a new approach to a response is decided on late in final EIS preparation that affects many responses or the main body of the EIS.
- Web-based databases allow users from any location with access to the Internet and proper permissions to view and participate in the comment-response process.

Distribute comment documents to the document preparation team as soon as possible (i.e., immediately after logging and scanning or copying) so they can begin to consider the nature of comments received.

Track all late comments.

Address late comments to the extent practicable. Consideration of comments submitted shortly after the close of the comment period need not unduly interrupt the pace of work.

One approach is to review late comments to determine if they contain material that is substantively different from comments received during the comment period. Provide new responses only to substantively new comments, and otherwise reference existing responses.

3.2 Determining What Constitutes a Comment

First, **review each comment document in its entirety** to gain an understanding of the overall intent and perspective of the commentor.

Sometimes determining what constitutes a comment is a balancing act between “splitting” a comment document so finely as to risk losing sight of the commentor’s broader meaning (and perhaps overwhelming the comment-response process with an unnecessarily large number of narrow comments) and “lumping” so much into a single comment that it overlooks the commentor’s subtly distinct points.

Next, **identify the distinct comments in the comment document that require a response**, propose a general comment category for each comment (e.g., purpose and need, air impacts), propose the general nature of the response to be developed (e.g., policy or technical), and designate a member of the EIS preparation team to prepare a draft response.

Identifying comments can be challenging. Although some documents will contain a single comment, more often a document will contain several and the commentor may not have labeled them clearly. Comments that require a detailed response may be interspersed among comments that do not (e.g., opinions, information not relevant to the EIS scope). Similar comments on a single topic may be found in one or more non-contiguous paragraphs. Comments on several topics may be contained within a single paragraph, and a single comment may be repeated in several places.

Then, read several other comment documents to **see how the first effort at proposing “what constitutes a comment” and comment categories could be applied** across a variety of comment documents. It can be very time-consuming and difficult to redo an incompletely thought-out first attempt at identifying comments.

Use transcripts of comments from public hearings as the best source for oral comments. A meeting transcript provides a complete and accurate record. Otherwise, use the next best record, such as notes made during the meeting.

Contact the commentor if necessary to be sure that DOE understands the comment. Ask clarifying questions or in some circumstances request additional information.

Emphasize during any such discussion that the purpose is for DOE to better understand a comment. Establish any conditions on the receipt of new comments prior to the discussion (e.g., if the discussion is held during the public comment period, new comments are appropriate; if held after the close of the public comment period, make clear that new comments will be considered only to the extent practicable). It might be appropriate to discuss potential responses with the commentor in some circumstances,

such as in discussions with agencies that have jurisdiction or special expertise. Document the discussion.

If there is uncertainty regarding the meaning of their comments, consult with commentors, especially those who are experts, in the process of considering and preparing responses to comments on the draft EIS.

From DOE's "Effective Public Participation under the National Environmental Policy Act," August 1998, www.eh.doe.gov/nepa, under Guidance.

Review attachments to comment documents (e.g., newspaper articles) to determine if they contain information relevant to the EIS. Base the depth of review of an attachment on the degree of specific relevance to the EIS, which the NEPA Document Manager must determine case-by-case. If the relevance is not clear, ask the commentor for an explanation, particularly if the commentor has provided an extensive volume of material or list of references.

3.3 Categorizing Comments

Begin considering categories for comments when first determining what constitutes a comment, as indicated in Section 3.2 above. Reevaluate the category list and adjust the categorization of individual comments as needed during the comment-response process.

Normally use the EIS outline as the basis to categorize (or "bin" or "sort") comments. Add additional topics as necessary – e.g., to accommodate broad comments, comments not specific to the proposed action (such as comments about the NEPA process), or comments that appear out of scope.

As early as possible, bring comments to the attention of the right persons – comments with policy issues to cognizant managers, those with technical substance to the appropriate technical experts on the EIS preparation team, those relevant to a particular cooperating agency to that agency for consideration, and those that pertain to legal issues to General Counsel.

Note any proprietary or private information that was identified by the commentor, and look for any **security-related information** whether or not identified as such by the commentor. Initiate any needed consultations within DOE to identify applicable restrictions on using or disseminating such information.

In some cases, categorize a comment under more than one category of comments if the “comment” cannot be divided further or if a single category cannot be created that allows response to all elements of the comment.

Sometimes a comment document cannot be divided into separate comments without distorting its meaning (i.e., the comment document contains comments that are sufficiently interwoven that dividing the comment document would lose some of the overall meaning). Taken as a whole, however, the comment document may be relevant to more than one comment category (e.g., it may relate to more than one EIS section).

For example, a comment document addressing transportation accident analysis might relate to the health impacts and air quality sections, a supporting appendix, and the description of one or more alternatives. In such a case, more than one category might be appropriate or a new category might be created that encompasses the interrelated topics.

Questions to Consider When Reviewing a Comment

- ☞ Does the comment raise a topic that the NEPA Document Manager should forward immediately to managers – might it be cause for changing the EIS in a substantial way (e.g., adding an alternative, which could lead to issuing a supplement to the draft EIS)?
- ☞ Does the comment raise a topic that should be forwarded to a subject matter expert for detailed review?
- ☞ Does the comment document contain proprietary, security-related, or private information requiring consultation with DOE’s Office of General Counsel, Office of Security, or Chief Information Officer?
- ☞ Does the comment raise a topic that should be forwarded to a cooperating agency for review?
- ☞ Can the comment help improve the quality or clarity of analysis or the accuracy and completeness of the final EIS?
- ☞ Does the comment indicate a better way to define or describe the proposed action or alternatives?
- ☞ Does the comment suggest how to make the EIS more understandable?
- ☞ Does the comment make a general remark that would not require a substantive response?
- ☞ Does the comment raise a topic that is outside the scope of the EIS?

4.0 Considering Comments and Preparing Responses

Consider comments and responses in concert with planning other aspects of the final EIS (Section 5.0).

In accordance with 40 CFR 1503.4, assess and consider comments both individually and collectively and respond by one or more of the means listed below:

- Modify alternatives including the proposed action.
- Develop and evaluate alternatives not previously given serious consideration by the agency.
- Supplement, improve, or modify analyses.
- Make factual corrections.
- Explain why a comment does not warrant further agency response, citing the sources, authorities, or reasons that support that position and, if appropriate, indicate those circumstances that would trigger agency reappraisal or further response.

4.1 Developing Agreed-Upon Approach to Responses

In the early stages of considering comments and how to respond, identify major themes expressed in public comments. That is, look at the comments collectively (40 CFR 1503.4(a)), and see if there are frequently recurring topics (issues).

Comments repeated in multiple comment documents reflect broad interest in the topic and may indicate controversy or misunderstanding on the part of the commentors. These comments may point to the need to provide a summary comment and consolidated response. (See discussion of approach below.) They also may indicate the need for DOE to take a harder look at a particular issue and perhaps provide more background information or additional impacts analysis in the final EIS.

Conduct a briefing (by the EIS preparation team, led by the NEPA Document Manager) to gain senior management guidance and agreement on proposed responses.

Make managers (in cognizant programs, General Counsel, and Environment, Safety and Health) aware as early as possible of areas of public concern, controversy, uncertainties, the possible need for new or changed alternatives, and other programmatic or policy issues before making changes in the EIS or preparing responses to comments. Enlist managers' assistance in assuring that the EIS would be consistent with other agency documents, including NEPA documents, that have set forth agency policy, or in explaining any differences that would occur.

A Well-written Response:

- ☞ Is respectful in tone, factual, and informative.
- ☞ Provides a level of detail appropriate to the comment (a detailed response for a detailed comment, a broader response for a general comment).
- ☞ Addresses all substantive elements of the comment.
- ☞ Summarizes revisions to the EIS that resulted from the comment and specifically identifies modified sections of the EIS.
- ☞ Is straightforward and promotes better understanding of DOE's proposal and its potential impacts.

Design an approach to developing responses to comments that will help ensure consistency, accuracy, completeness, and appropriate tone in all responses. Aim to focus readers' attentions on the most prevalent issues raised by commentors or those comments that resulted in the most significant changes to the EIS. Present the major themes in a way that does not diminish consideration of individual comments or comments on other topics.

Possible approaches:

Use responses to well-developed, thorough comments as a foundation for responses to similar but less-detailed comments.

Some comment documents elaborate on issues that are mentioned only briefly in many other comment documents and thereby require a more comprehensive DOE response. Detailed comments generally come from organizations or individuals with expertise or substantial knowledge related to the issue.

A detailed response is appropriate where a commentor has fully explained the basis for a conclusion, and the detailed response can be referenced or serve as the foundation for responses to other comments that only provide the conclusion.

Exercise caution, however, when referencing or applying a "cut-and-paste" approach – ensure that the response to which a commentor is directed is fully responsive to the comment at hand; if not, provide additional response after the reference. (It is acceptable to reference a response that contains more detail than a comment would

require on its own.) Also, avoid directing the reader to a response that refers to yet another response (i.e., avoid creating a chain of partial responses).

Prepare a summary comment and a consolidated response to similar comments, particularly for those presenting major themes.

Using the output of the categorization process to identify comments related to the same EIS section or topic, summarize such similar comments and address them as a group with a single response. Be sure to include in the summary comment all ideas the various commentors presented on the section or topic, including any differences of opinion. Also be sure that the general response addresses all these ideas.

To guide response preparation, provide EIS preparers detailed background information (e.g., descriptions of and details on relevant DOE policies and programs or technical considerations). This information can help EIS preparers express agency policy and ensure consistency throughout the EIS. This is especially useful when there are a large number of comments and several people are involved in preparing responses.

Consider adding the background information to relevant sections of the final EIS. The background information can help communicate aspects of the purpose and need, relation between DOE activities and legislative requirements or administration policy, DOE intentions regarding the preparation of future NEPA documents, and other matters related to the EIS.

An example of this approach is found in Section S.4 of the Summary of the *Final EIS for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada* (DOE EIS-0250, February 2002), selections from which are provided in Attachment 3.

4.2 Addressing Duplicate Comments and Comments on Scope and Analysis

Respond to a comment's substance without regard to how many commentors express a similar view.

DOE must consider and respond to all comments, whether one person or one hundred submitted a particular comment. Receipt of a small or large number of comments expressing a particular idea, preference, or opinion does not make the expressed view less or more valid.

For example, a large number of commentors objecting to an alternative cannot vote the alternative out of the EIS. If it is a reasonable alternative, even if unpopular, the agency has an obligation to evaluate it in the EIS (40 CFR 1502.14). On the other hand, a single

commentor can identify a reasonable alternative that DOE has overlooked and cause DOE to add it to the EIS.

It is important to recognize that the consideration of public comment is not a vote-counting process in which the outcome is determined by the majority opinion. Relative depth of feeling and interest among the public can serve to provide a general context for decision-making. However, it is the appropriateness, specificity, and factual accuracy of comment content that serves to provide the basis for modifications to planning documents and decisions. Further, because respondents are self-selected, they do not constitute a random or representative public sample. The National Environmental Policy Act (NEPA) encourages all interested parties to submit comment as often as they wish regardless of age, citizenship, or eligibility to vote. Respondents may therefore include businesses, people from other countries, children, and people who submit multiple responses. . . . Every substantive comment and suggestion has value, whether expressed by one respondent or many . . .

From: "Content Analysis Process," Appendix A to CEQ's report on "Comments Received on the NEPA Task Force." December 20, 2002.
Available at <http://ceq.eh.doe.gov/ntf/comments/comments.html>.

Ask many questions to determine how to respond to a comment proposing a new alternative for analysis. As CEQ discusses in its guidance on its regulations ("Forty Most Asked Questions," Question 29b, provided in Attachment 1), it may be appropriate to dismiss the alternative as unreasonable, possible to address the alternative in the final EIS, or necessary to include the alternative in a revised, supplemental, or new draft EIS.

Is the proposed new alternative reasonable from a technical, economic, and common sense perspective?

Define the parameters that make an alternative reasonable with regard to purpose and need for the proposed action. This will aid the reader in understanding the boundaries between reasonable and unreasonable for the EIS under consideration.

If the proposed alternative is not reasonable, respond by explaining why not. (If appropriate and helpful to the explanation, indicate circumstances under which the proposed alternative would be reasonable.)

If the proposed new alternative is reasonable, follow one of the three situations below that most closely applies:

Is it a minor modification of an alternative analyzed in the draft EIS?

If yes, either add analysis of the environmental impacts of it to the final EIS or explain in the response and show in the final EIS that the analysis that was presented in the draft EIS includes (or bounds) the impacts of the modification that was proposed. In the latter case, consider whether the impacts of the modification to the alternative need to be made more explicit in the final EIS.

Is it another alternative within the range of reasonable alternatives analyzed in the draft EIS?

If yes, develop and analyze the environmental impacts of it in the final EIS or explain in the response and present in the final EIS information on how impacts from the new alternative would differ from those analyzed.

Is it outside the range of alternatives analyzed in the draft EIS?

If yes, it is likely that the alternative cannot be addressed only in the final EIS but must be addressed in a revised, supplemental, or new draft EIS to allow for public comment on it. In this case, evaluate to what extent the range of reasonable alternatives in the draft EIS is adequate and whether the purpose and need has been properly stated to assure that all reasonable alternatives are considered in the revised, supplemental, or new draft EIS. A proposed new alternative site is likely to require a revised, supplemental, or new draft EIS. A proposed new technology alternative at any given site is not.

Apply the sliding scale when considering and responding to comments that disagree with a draft EIS analysis. Such comments may advocate the use of different data, assumptions, computational methods, or regulatory standards.

The CEQ regulations state that, “The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency’s response to the issues raised,” (40 CFR 1502.9(b)). In guidance on its regulations (“Forty Most Asked Questions,” Question 29a, provided in Attachment 1), CEQ does not address “responsible opposing view” but does distinguish between the nature of responses needed for comments that simply state that the EIS methodology is inadequate and those that are specific in their criticism.

CEQ indicates that, for a simple statement, “little if anything need be added in response;” for example, if a comment said that an analysis was inadequate but the agency had

included a discussion of that analysis in the EIS, the agency only needs to explain briefly why no additional response is needed. On the other hand, CEQ indicates that if a commentor says that an analysis is inadequate because a certain computational technique was not used or that an analysis is inadequately explained, the agency needs to respond in more detail.

Consider various approaches to a comment criticizing DOE's impact analysis:

If the commentor only states a conclusion without any reason or supporting information (e.g., "DOE picked the wrong model") or did not notice where in the draft EIS DOE had described its assumptions or methodology, **respond briefly**, acknowledging the difference of opinion or telling where the information is in the draft and final EIS.

If the commentor is more specific in disagreeing with DOE's analytical approach or correctly notes that DOE did not describe its approach sufficiently for a reader to be able to duplicate the results, **respond by explaining fully** the basis for the agency's approach and providing the necessary details.

In certain cases, it may be prudent and useful to present the results of using the commentor's data, assumptions, or methodology in the final EIS along with the analysis DOE presented in the draft EIS. For example, there may be cases where a commentor has strong technical underpinnings to the criticism of DOE's analysis or is otherwise a widely recognized technical expert or regulatory authority, or where there is substantial uncertainty regarding how to assess impacts, a comparison of analytical results will show whether the different approach could change understanding of potential environmental impacts of the alternatives. For example, in the *Tank Waste Remediation System, Hanford Site, Richland, Washington, Final EIS* (DOE/EIS-0189), DOE presented in addition to its original approach an exposure scenario and analytical approach (specific to sweat lodges for Native Americans) that DOE regarded as overly conservative.

4.3 Describing Response Approach

Explain how DOE determined the relevance of a comment's attachment (Section 3.2, sixth bullet) and, as appropriate, how it influenced the preparation of the final EIS.

Briefly summarize EIS changes. If changes were made to the EIS as a result of a comment, only summarize briefly the changes in the response to the comment and then refer the reader to the EIS location(s) where changes occurred (i.e., do not repeat verbatim the new, modified EIS text in the response).

Respond to out-of-scope comments by explaining *why* the comment does not fall within the scope of the EIS. In addition, sometimes it is prudent to respond directly to an out-of-scope comment, e.g., to answer a simple question or to set the record straight.

Acknowledge comments that do not merit a substantive reply (e.g., a comment that expresses philosophy, values, or support or opposition to the action), for example, by stating, “Thank you for your comment. It has been noted and will be included in the administrative record for this EIS.”

“ . . . if the agency decides that no substantive response to a comment is necessary, it must explain briefly why . . . ” from **Question 29a, “Forty Most-Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations.”**

Document whether any requests to extend the comment period were received, and if not granted, why not. Consider such requests promptly as they are received.

Acknowledge information gained in discussion with a commentor, generally very briefly. For example, in the response state, “After conferring with the commentor, DOE understands the comment to mean” If clarification of a comment could not be obtained, the response should indicate “DOE understands the comment to mean” before providing the response. (See Section 3.2, ninth bullet.)

Revisit the initial comment identification, categorization, and response to comments as new information becomes available or aspects of the EIS change.

Practical Tips for Responding to Comments

 **Quoting a Comment** – Whenever a comment’s exact words are used, put quotation marks around them. Restate a comment, however, to avoid quoting misspellings or errors in grammar. If the commentor uses incorrect terminology, preface the comment with “DOE believes the commentor is referring to . . .”

Summarizing (or Paraphrasing) a Comment

- Summarize a comment in a response only when necessary (perhaps to orient the reader to complex issues in a comment), not routinely.
- Summarize the comment accurately.
- Interpret a comment in light of the perspective and themes of the whole comment document, but do not read meaning into the comment that is not evident.
- Use a commentor’s own words to express feelings. If the commentor says: “I am afraid,” a summary of the comment could begin with “The commentor is afraid . . .” However, do not interpret a commentor’s feelings. If a commentor says: “My grandchildren will suffer for the mistakes we make today,” do not interpret the statement as fear or worry.

 **Tone Tips** – The tone of the following words should be carefully considered if used in comment summaries or responses to comments:

- **Alleged, Argued, Asserted, Claimed:** Avoid these terms in describing comments as the terms may have a negative connotation.
- **Concerned:** Avoid this concept unless the commentor states: “I am concerned that . . .” If so, say that “The commentor expressed concern that . . .”
- **Expressed:** This is a good word to describe an opinion, feeling, belief, concern, or fear.
- **Implied:** Avoid this concept and word as you risk reading something into a comment that was not meant.
- **Noted:** Avoid using this in characterization of a commentor’s statement unless DOE agrees with the statement. Something that is “noted” should be factual.
- **Stated:** Simply means that someone said something outright.
- **Suggested:** Use this word when describing a comment that used terms such as “should” and “ought.”

Adapted from “Comment Response Process Plan and Guidance Manual for the Department of Energy Idaho High-Level Waste and Facilities Disposition Draft Environmental Impact Statement,” EIS-SPL-522, January 24, 2000, Appendix A.

5.0 Documenting Responses: Presentation in the Final EIS

Plan how the responses to comments will be presented in the final EIS and other aspects of final EIS preparation in concert with consideration of comments and preparation of the responses (Section 4.0).

5.1 Changing the EIS

Be open to ideas that could improve the final EIS, both to support better-informed decisions and to better inform the public.

The CEQ regulations and guidance address the types of changes that agencies might make in response to comments. There are few limits on this process other than the scope of the EIS. A change can involve something major (e.g., modifying an alternative or potential impact) or something simple (e.g., correcting a misstatement of fact). Usually changes are incorporated in the final EIS and the NEPA process moves to completion, but occasionally a comment can raise an issue that leads to preparation of a revised, supplemental, or new draft EIS.

When changes do not significantly affect the substance of the draft EIS (that is, are limited to factual corrections or explanations as to why comments do not warrant agency response), an agency may write the changes on errata sheets instead of rewriting the draft EIS. The draft EIS, errata sheets, and comments and responses would comprise the final EIS that is filed with the Environmental Protection Agency (with a new cover sheet), but only the errata sheets and comments and responses would need to be circulated. (40 CFR 1503.4(c).)

The need for a lengthy response to a comment often indicates the need to change the EIS (e.g., to incorporate the explanation that the response is providing).

5.2 Summarizing the Comment-Response Process

Describe the comment-response process to help readers understand how the agency dealt with their comments and to provide perspective on stakeholder interest and issues. Include this description **in the comment-response section of the EIS and key aspects of it in the final EIS Summary and in the introductory chapter**. Although the organization of the description will vary among EISs, include such topics as:

- An overview of the public participation process (length of the comment period and whether there were any extensions; participation in public hearings; the number and

Clarifications to Provide in Summarizing the Comment-Response Process

- ☞ What is the meaning of “comment,” “comment document,” and “commentor”? Consider using the definitions in this guidance.
- ☞ If a commentor submits, for example, one comment document early in the public review period and one at the end of the period, is that individual or organization counted as one commentor or two? In most cases, it will be most straightforward to count the commentor once, with two submissions.
- ☞ Are comment documents counted twice if they are submitted in writing and also spoken on the record at a public meeting? Does DOE respond to such comments twice? If the comments are identical or nearly so, one cross-referenced response could be presented in the EIS but counted twice as both an oral and as a written comment.
- ☞ If it was unclear whether a commentor represented her/himself or an organization, was the comment document indexed with organizations or individuals? It often is best to list the comment document with individuals, but provide a cross-reference to the organization.

- format of comment documents received during the comment period, and after, if appropriate; and the source of comments, e.g., government agencies, individuals).
- Areas of controversy in issues raised by commentors.
 - Indices to help readers find comments by individual, organization, or topic.
 - A summary of changes made to the EIS in response to comments.

Avoid potential confusion in the discussion of the comment-response process.

It is good practice to define terms and use terms consistently; the explanation of terms provided in this guidance (Section 1.3) may be helpful. There is no prescribed way to tabulate the number of commentors, comment documents, and comments, as each EIS will differ in the nature of comments received. Treat the substance of oral and written comments equally, however.

When presenting the number of commentors:

- Explain that the purpose is to illustrate the level of public interest in the proposed action, not to present votes by commentors. In many cases, rounding the number of commentors is sufficient.
- Acknowledge the possibility of double-counting because, for example, some commentors submit a written copy of their oral remarks at a public meeting.

- Explain that there is no process to verify signatures on a petition and no restriction on one person sending multiple faxes, e-mail messages, or postcards. Also, identify factors beyond DOE’s control, such as the legibility of names on a petition.

Explain in appropriate detail whenever no EIS changes were made in response to comments. Particularly for comments on matters in which there is broad public interest or comments that reflect controversy or uncertainty about environmental impacts, ensure that the EIS shows that DOE has taken a “hard look,” even though it did not change the EIS.

5.3 Indicating EIS Changes

Normally, indicate in the margins of the final EIS (e.g., by vertical bars) where changes were made. The nature of changes also may be indicated (e.g., a code indicating whether the change is in response to a comment or undertaken at DOE’s discretion, whether the change is technical or editorial). This helps readers find new information and links responses-to-comments to changes made in the document.

Ensure consistency. Make sure responses are consistent with each other and appropriately reflected in the text of the final EIS. Make sure that any EIS changes are consistent with responses.

5.4 Comment-Response Formats

Presenting Comment Documents

Reproduce all comment documents received on an EIS in the final EIS (unless the response has been exceptionally voluminous), whether or not the comments therein are thought to merit individual discussion by the agency in the final EIS. Include names and addresses or other identifying information that a commentor provided in the comment document, unless the commentor requests that certain information be withheld.

However, if the response to comments is exceptionally voluminous, provide summaries of comments (40 CFR 1503.4(b)), or if identical or very similar comment documents are received in high volume (e.g., multiple faxes, e-mails, or postcards), reprint one as a sample comment document. (Keep all comment documents in their entirety in the Administrative Record.)

Reproduce comment documents from cooperating agencies first. Cooperating agencies normally contribute to EIS preparation, but also may provide comments during the public comment period.

Consider presenting together comment documents from similar groups of stakeholders, e.g., Federal agencies, states, local governments, tribes, public interest groups, commercial entities, and individuals. Alphabetize names within the groups, which makes it easy for readers to find commentors in which they are interested. Consider separate comment document indices if there are a great number of fax, e-mail, postcard, or petition commentors.

If the number of commentors is large, **provide a mechanism to simplify a search for commentors**. Readers should be able to determine who made a particular comment. Commentors should be able to find responses to their own and others' comments. (See the discussion of unique identifiers in Section 3.1, first bullet.) It may be useful to include a topic index organized by comment categories if the number of comments is large. For letters or petitions with multiple signatories, attribute the comment document to each person who signed it.

In cases where a comment document is not reproduced in the final EIS, be sure to include in the final EIS information on the commentors that is provided with a comment document. For multiple fax, e-mail, and postcard comment documents, provide the names of all commentors alphabetically to facilitate readers finding their own and others' names. If an e-mail address is given, but not a name, provide the e-mail address. If possible, also provide the geographic location of each commentor (e.g., city and state).

Presenting Responses to Comments

Present any DOE summary of themes at the beginning of a comment-response section, in the final EIS Summary, and in an introductory chapter of the final EIS.

Follow each summary comment with a fully-developed response, including references to related sections of the final EIS and description of any changes made.

In indicating the location of changes, refer to locations in the final (not the draft) EIS. In most cases, it will be easiest to refer to section designations, rather than page or line numbers as these latter features change more frequently in EIS preparation. If the draft EIS printed line numbers on each page (a feature that can facilitate commenting), however, it may be most useful to commentors and other readers to continue that practice in the final EIS and to refer to changes by page and line number in the final EIS.

Ensure that each comment submitted on a draft EIS is responded to (individually or by reference to a response to a summary comment). Summarize the changes made to the EIS as a result of the comment and specifically indicate the location of the changes, or explain why there were no changes.

- Responding **individually** can be done in several ways, but the following is usually successful:

In the margins of the reproduction of a comment document, print the code for each comment alongside the comment, which has been delineated by side-bars or brackets.

Use a comment's code to identify the response to it and either print the response adjacent to it on a page opposite the reprinted comment document or print all responses to one comment document after the reprint of the comment document.

When a response applies to more than one comment, normally give the complete response the first time the comment appears in the comment-response section, and refer to it as appropriate for subsequent comments.

The advantages of responding individually are that it is easy for readers to review DOE's responses to each comment submitted and easy for DOE to implement. The disadvantages are that it can be difficult to find all comments on a topic without a topic index and responses either may be repeated many times (which is inefficient) or there may be extensive referencing to the same response (which is inconvenient for the reader). Also, it is difficult to assure consistency among the responses when individual responses are provided to a large number of similar comments.

- When preparing a **summary comment** and then responding to it, reference all comment documents and comments on which the summary is based.

The advantages of preparing a summary comment and consolidated response are that it facilitates consistency and helps readers find comments and responses by topic and is efficient to produce. The disadvantage is that great care must be taken so that the summary comment matches the substance and tone of all comments covered.

Examples of EIS presentations are found in Attachment 3.

Attachment 1. Council on Environmental Quality Regulations and Guidance Relevant to the Comment-Response Process

Sections of CEQ regulations and guidance relevant to the comment-response process for a draft EIS are reproduced below. The complete regulations and guidance are available on the DOE NEPA Web site (www.eh.doe.gov/nepa).

A. Excerpts from CEQ Regulations

Following are excerpts from the CEQ "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act" (40 CFR Parts 1500-1508).

Part 1500-PURPOSE, POLICY, AND MANDATE

Section 1500.1 Purpose.

. . .

- (b) Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. . . .

. . .

Section 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

. . .

- (l) Requiring comments to be as specific as possible (§ 1503.3).
- (m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

. . .

Part 1502-ENVIRONMENTAL IMPACT STATEMENT

Section 1502.9 Draft, final, and supplemental statements.

. . .

- (b) Final environmental impact statements shall respond to comments as required in Part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

. . .

Section 1502.12 Summarr.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary will normally not exceed 15 pages.

Part 1503-COMMENTING Section

1503.1 Inviting comments.

- (a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:
 - (1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.
 - (2) Request the comments of:
 - (i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;
 - (ii) Indian tribes, when the effects may be on a reservation; and
 - (iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A-95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

- (3) Request comments from the applicant, if any.
- (4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.
- (b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under § 1506.10.

Attachment 1

Section 1503.2 Dutr to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in § 1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

Section 1503.3 Specificitr of comments.

- (a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.
- (b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.
- (c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or entitlements.
- (d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

Section 1503.4 Response to comments.

- (a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:
 - (1) Modify alternatives including the proposed action.
 - (2) Develop and evaluate alternatives not previously given serious consideration by the agency.

- (3) Supplement, improve, or modify its analyses.
- (4) Make factual corrections.
- (5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

- (b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.
- (c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§1502.19). The entire document with a new cover sheet shall be filed as the final statement (§1506.9).

Part 1505-NEPA AND AGENCY DECISIONMAKING

Section 1505.1 Agencr decisionmaking procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

- ...
- (c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.
 - (d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.
- ...

Part 1506-OTHER REQUIREMENTS OF NEPA

Section 1506.6 Public involvement.

Agencies shall:

- (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

- (b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.
- (1) In all cases the agency shall mail notice to those who have requested it on an individual action.
 - (2) In the case of an action with effects of national concern notice shall include publication in the Federal Register and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the 102 Monitor. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.
 - (3) In the case of an action with effects primarily of local concern the notice may include:
 - (i) Notice to State and areawide clearinghouses pursuant to OMB Circular A- 95 (Revised).
 - (ii) Notice to Indian tribes when effects may occur on reservations.
 - (iii) Following the affected State's public notice procedures for comparable actions.
 - (iv) Publication in local newspapers (in papers of general circulation rather than legal papers).
 - (v) Notice through other local media.
 - (vi) Notice to potentially interested community organizations including small business associations.
 - (vii) Publication in newsletters that may be expected to reach potentially interested persons.
 - (viii) Direct mailing to owners and occupants of nearby or affected property.
 - (ix) Posting of notice on and off site in the area where the action is to be located.
- (c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:
- (1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.
 - (2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).
- (d) Solicit appropriate information from the public.
- (e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.
- (f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

Part 1508-TERMINOLOGY AND INDEX

Section 1508.15 Jurisdiction by law.

"Jurisdiction by law" means agency authority to approve, veto, or finance all or part of the proposal.

Section 1508.26 Special expertise.

"Special expertise" means statutory responsibility, agency mission, or related program experience.

B. Excerpts from CEQ Guidance

CEQ guidance relevant to the comment-response process is contained in "Forty Most-Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" (46 FR 18026; March 23, 1981). The relevant passages are answers to questions 14d, 25a, 25b, 29a, and 29b. These are excerpted below; emphasis is in original.

14. Rights and Responsibilities of Lead and Cooperating Agencies

14d. How is the lead agency to treat the comments of another agency with jurisdiction by law or special expertise which has failed or refused to cooperate or participate in scoping or EIS preparation?

A. A lead agency has the responsibility to respond to all substantive comments raising significant issues regarding a draft EIS. Section 1503.4. However, cooperating agencies are generally under an obligation to raise issues or otherwise participate in the EIS process during scoping and EIS preparation if they reasonably can do so. In practical terms, if a cooperating agency fails to cooperate at the outset, such as during scoping, it will find that its comments at a later stage will not be as persuasive to the lead agency.

25. Appendices and Incorporation by Reference

25a. When is it appropriate to use appendices instead of including information in the body of an EIS?

A. . . . The final statement must also contain the agency's responses to comments on the draft EIS. These responses will be primarily in the form of changes in the document itself, but specific answers to each significant comment should also be included. These specific responses may be placed in an appendix. If the comments are especially voluminous, summaries of the comments and responses will suffice. (See Question 29 regarding the level of detail required for responses to comments.)

25b. How does an appendix differ from incorporation by reference?

A. First, if at all possible, the appendix accompanies the EIS, whereas the material which is incorporated by reference does not accompany the EIS. Thus the appendix should contain information that reviewers will be likely to want to examine. The appendix should include material that pertains to preparation of a particular EIS. Research papers directly relevant to the proposal, lists of affected species, discussion of the methodology of models used in the analysis of impacts, extremely detailed responses to comments, or other information, would be placed in the appendix

29. Responses to Comments

29a. What response must an agency provide to a comment on a draft EIS which states that the EIS's methodology is inadequate or inadequately explained? For example, what level of detail must an agency include in its response to a simple postcard comment making such an allegation?

A. Appropriate responses to comments are described in Section 1503.4. Normally the responses should result in changes in the text of the EIS, not simply a separate answer at the back of the document. But, in addition, the agency must state what its response was, and if the agency decides that no substantive response to a comment is necessary, it must explain briefly why.

An agency is not under an obligation to issue a lengthy reiteration of its methodology for any portion of an EIS if the only comment addressing the methodology is a simple complaint that the EIS methodology is inadequate. But agencies must respond to comments, however brief, which are specific in their criticism of agency methodology. For example, if a commentator on an EIS said that an agency's air quality dispersion analysis or methodology was inadequate, and the agency had included a discussion of that analysis in the EIS, little if anything need be added in response to such a comment. However, if the commentator said that the dispersion analysis was inadequate because of its use of a certain computational technique, or that a dispersion analysis was inadequately explained because computational techniques were not included or referenced, then the agency would have to respond in a substantive and meaningful way to such a comment.

If a number of comments are identical or very similar, agencies may group the comments and prepare a single answer for each group. Comments may be summarized if they are especially voluminous. The comments or summaries must be attached to the EIS regardless of whether the agency believes they merit individual discussion in the body of the final EIS.

29b. How must an agency respond to a comment on a draft EIS that raises a new alternative not previously considered in the draft EIS?

A. This question might arise in several possible situations. First, a commentor on a draft EIS may indicate that there is a possible alternative which, in the agency's view, is not a reasonable alternative. Section 1502.14(a). If that is the case, the agency must explain why the comment does not warrant further agency response, citing authorities or reasons that support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response. Section 1503.4(a). For example, a commentor on a draft EIS on a coal fired power plant may suggest the alternative of using synthetic fuel. The agency may reject the alternative with a brief discussion (with authorities) of the unavailability of synthetic fuel within the time frame necessary to meet the need and purpose of the proposed facility.

A second possibility is that an agency may receive a comment indicating that a particular alternative, while reasonable, should be modified somewhat, for example, to achieve certain mitigation benefits, or for other reasons. If the modification is reasonable, the agency should include a discussion of it in the final EIS. For example, a commentor on a draft EIS on a proposal for a pumped storage power facility might suggest that the applicant's proposed alternative should be enhanced by the addition of certain reasonable mitigation measures, including the purchase and setaside of a wildlife preserve to substitute for the tract to be destroyed by the project. The modified alternative including the additional mitigation measures should be discussed by the agency in the final EIS.

A third slightly different possibility is that a comment on a draft EIS will raise an alternative which is a minor variation of one of the alternatives discussed in the draft EIS, but this variation was not given any consideration by the agency. In such a case, the agency should develop and evaluate the new alternative, if it is reasonable, in the final EIS. If it is qualitatively within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed. For example, a commentor on a draft EIS to designate a wilderness area within a National Forest might reasonably identify a specific tract of the forest, and urge

that it be considered for designation. If the draft EIS considered designation of a range of alternative tracts which encompassed forest area of similar quality and quantity, no supplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that specific alternative in the final EIS.

As another example, an EIS on an urban housing project may analyze the alternatives of constructing 2,000, 4,000, or 6,000 units. A commentor on the draft EIS might urge the consideration of constructing 5,000 units utilizing a different configuration of buildings. This alternative is within the spectrum of alternatives already considered, and, therefore, could be addressed in the final EIS.

A fourth possibility is that a commentor points out an alternative which 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. In such a case, the agency must issue a supplement to the draft EIS that discusses this new alternative. For example, a commentor on a draft EIS on a nuclear power plant might suggest that a reasonable alternative for meeting the projected need for power would be through peak load management and energy conservation programs. If the permitting agency has failed to consider that approach in the Draft EIS, and the approach cannot be dismissed by the agency as unreasonable, a supplement to the Draft EIS, which discusses that alternative, must be prepared. (If necessary, the same supplement should also discuss substantial changes in the proposed action or significant new circumstances or information, as required by Section 1502.9(c)(1) of the Council's regulations.)

If the new alternative was not raised by the commentor during scoping, but could have been, commentors may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the agency. However, if the new alternative is discovered or developed later, and it could not reasonably have been raised during the scoping process, then the agency must address it in a supplemental draft EIS. The agency is, in any case, ultimately responsible for preparing an adequate EIS that considers all alternatives.

Attachment 2. DOE Regulations and Guidance Relevant to the Comment-Response Process

Following are excerpts from DOE's NEPA regulations and NEPA guidance, including Mini-guidance articles from DOE's Lessons Learned Quarterly Report, relevant to the comment-response process.

A. Excerpts from DOE NEPA Regulations

Following are excerpts from "DOE NEPA Implementing Procedures" (10 CFR Part 1021).

Section 210 DOE decisionmaking.

...

- (c) During the decisionmaking process for each DOE proposal, DOE shall consider the relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of its consideration of the proposal (40 CFR 1505.1(d)) and shall include such documents, comments, and responses as part of the administrative record (40 CFR 1505.1(c)).

...

Section 213 Rulemaking.

...

- (c) DOE shall include any relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments as part of the administrative record (40 CFR 1505.1(c)).

...

Section 214 Adjudicatory proceedings.

...

- (c) DOE shall include any relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of the administrative record (40 CFR 1505.1(c)).

Section 313 Public review of environmental impact statements.

...

- (c) DOE shall prepare a final EIS following the public comment period and hearings on the draft EIS. The final EIS shall respond to oral and written comments received during public review of the draft EIS, as provided at 40 CFR 1503.4. In addition to the requirements at 40 CFR 1502.9(b), a DOE final EIS may include any Statement of Findings required by 10 CFR part 1022, "Compliance with Floodplain and Wetland Environmental Review Requirements," or a Statement of Findings may be issued separately.

B. Excerpts from DOE NEPA Guidance

The Office of NEPA Policy and Compliance has issued several guidance documents related to the comment-response process. Relevant passages are excerpted below. Complete documents are available on DOE's NEPA Web site (www.eh.doe.gov/nepa) under Guidance.

(1) Environmental Impact Statement Summary, September 1998

...

B. Required Contents of a Summary

Section 1502.12 of the CEQ NEPA Regulations continues by identifying three elements that must be emphasized in an EIS summary (emphasis added): "The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives)."

...

- **Areas of Controversy:** The summary must identify controversy about the analysis. Describing controversial issues can be important in the event of later litigation over the EIS. By acknowledging controversy, the Department can help demonstrate that it considered all relevant information, including views contrary to the Department's position.

...

The summary of a final EIS should describe comments and controversies (if any) regarding the draft EIS. Similar comments may be grouped and discussed in general terms. Provide DOE's general responses to comments and identify major differences between the draft and final EIS.

(2) Effective Public Participation Under the National Environmental Policy Act, Second Edition, August 1998

3. GENERAL PUBLIC PARTICIPATION ACTIVITIES

Responding to Public Comments

- Understand that commenters are expressing sincere concerns, not trying to make your life difficult.
- Be timely in responding to public comments. A slow response sends the message that public input is not important and that DOE does not care.
- Deal fairly with independent experts. Recognize that people outside of DOE may be highly competent and can contribute valuable perspectives.
- Provide clear, definite responses to substantive comments. Differentiate between philosophical and factual differences. Explain why one approach or option was selected over others.

...

6. THE FINAL ENVIRONMENTAL IMPACT STATEMENT REGULATORY REQUIREMENTS

Required public participation activities related to the final EIS include:

- considering and responding to public comments on the draft EIS

...

DOE must assess and consider both oral and written comments received on the draft EIS during the public comment period and must respond to these comments in

the final EIS. Possible responses are to: (1) modify alternatives; (2) develop and evaluate alternatives not previously considered; (3) supplement, improve, or modify analyses; (4) make factual corrections; and (5) explain why the comment does not warrant further response (10 CFR 1021.313(c); 40 CFR 1503.4(a)). DOE must discuss at appropriate points in the final EIS any responsible opposing view that was not adequately discussed in the draft statement and must indicate the agency's response to the issues raised (40 CFR 1502.9(b)).

...

DOE must make the final EIS, the comments received, and any referenced support documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda when a memorandum transmits a Federal agency's comments on the environmental impact of the proposed action (40 CFR 1506.6(f)).

...

RECOMMENDATIONS

- If there is uncertainty regarding the meaning of their comments, consult with commenters, especially those who are experts, in the process of considering and preparing responses to comments on the draft EIS.
- Provide clear, definite responses to substantive comments on the draft EIS. Differentiate between philosophical and factual differences. When there is a difference of opinion, explain the selection of one opinion over others.

(3) Recommendations for the Preparation of Environmental Assessments and Environmental Impact Statements, Mar 1993 (under revision)

Avoid tone and nuance that are not objective.

Explanation: Do not subtly play down alternatives that DOE does not prefer when responding to public comments and in discussing responsible opposing views. Provide professional, authoritative, and dispassionate responses, not casual or flip responses.

Addressing Public Comments on a Final EIS

Q: How should DOE address public comments received on a final EIS?

A: Comments DOE receives on a final EIS before the Record of Decision has been issued should be reviewed to first determine whether the comments present "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." If it is clear that the comments do present such information, then a supplemental EIS is required [40 CFR 1502.9(c) and 10 CFR 1021.314(a)]. If it is unclear whether the comments present such information, then a Supplement Analysis must be prepared [10 CFR 1021.314(c)].

If it is clear that the comments do not require a supplemental EIS, or such a determination is made based on a Supplement Analysis, then DOE may

issue a Record of Decision. The Department's approach has been to address such comments in the Record of Decision. This need not be an exhaustive treatment, but should include the conclusion that none of the comments necessitate the preparation of a supplemental EIS. Comments that are not adequately covered in the final EIS should be addressed; otherwise, DOE may refer the commenter to the appropriate section in the final EIS.

Comments on a final EIS that DOE receives after a Record of Decision has been issued should be considered in light of the regulatory requirements cited above, and responded to as appropriate in the normal course of business. [Also see 10 CFR 1021.315(d) DOE may revise a ROD at any time.]

LL

September 1995

Attachment 3. Examples from Comment-Response Sections of EISs

A. Overview, Instructions, and Index

This description of the structure of a comment-response section and part of a table directing readers to a commentor's comments are from the Final Environmental Impact Statement for the Production of Tritium in a Commercial Light Water Reactor (DOE/EIS-0288, March 1999).

Overview of Public Comment Process

This chapter of the Comment Response Document describes the public comment process for the Draft Environmental Impact Statement for the Production of Tritium in a Commercial Light Water Reactor and the procedures used to respond to those comments. Section 1.1 describes the means through which comments were acquired, summarized, and numbered. Section 1.2 discusses the public hearing format that was used to solicit comments from the public. Section 1.3 describes the organization of this document, including how the comments were categorized, addressed, and documented. Section 1.4 also provides guidance on the use of this document. Section 1.5 discusses the major comments received on the environmental impact statement. Section 1.6 includes a discussion of the major changes to the environmental impact statement that resulted from the public comment process. This chapter includes indexes of all comments received during the 60-day public comment period and the December 14, 1998, public meeting.

Instructions to Readers

1.4 HOW TO USE THIS COMMENT RESPONSE DOCUMENT

This section will assist the reader in finding individual comments and the corresponding responses from DOE and TVA. The commentor begins by locating his or her name or organization in Table 1-5 or Table 1-6, respectively. Table 1-5 is an index of all commentors. Table 1-6 is an index of organizations and public officials. Both of these tables list the page number in Chapter 2 on which their comments appear. To locate other comments that address the same comment summary-response code, the commentor should use Table 1-7. This table lists the comment summary-response codes, the page in Chapter 3 on which the comment is addressed, and the other comment numbers addressed by each comment summary-response code.

For example, if Susan Gordon (commentor 137) wants to find her comments, she should go to Table 1-5 to find her name and the corresponding page in Chapter 2 on which her document appears. On page 2-101, Ms. Gordon would find her scanned document has been "side-barred" (published with vertical lines in the outer margin to identify individual comments) and her first comment has been coded for comment summary-response 08.02. Table 1-5 also provides Ms. Gordon with the number of comments identified, the comment summary-response code assigned to each comment, and the page number in Chapter 3 on which the corresponding comment summary and response are found. After obtaining the comment summary-response code from either the scanned document on page 2-101 or Table 1-5, Ms. Gordon would then turn to Chapter 3 to read DOE's response to her comment. Ms. Gordon could use Table 1-7 to locate other comments expressing similar concerns. For this example, comment summary-response code 08.02 on page 3-34 also addresses the following comments: 36-1, 41-4, 58-2, 103-3, 132-2, 136-3, 137-1, 211-3, 217-3, 252-3, 507-2, 707-7, 720-2, 800-9, and 803-3. These comments are listed numerically by commentor (first number followed by the dash) in Chapter 2.

Index of Comments by Commentor

Name of Commentor	Document or Statement Summary on Chapter 2 page Number	Comment Number	Comment Summary Response Code	Comment Summary and Response on Chapter 3 page Number
Gordon, Susan Washington, DC	2-101	137-1	08.02	3-34
		137-2	01.01	3-1
		137-3	05.16	3-20
		137-4	02.01	3-8
		137-5	02.02	3-8
		137-6	01.04	3-2
		137-7	23.13	3-89
		137-8	19.09	3-79
		137-9	17.09	3-70
		137-10	13.08	3-50

B. Location Guide

This location guide that answers "How Can I Find My Comment and DOE's Response?" is from the Surplus Plutonium Disposition Final Environmental Impact Statement (DOE/EIS-0283, November 1999).

HOW CAN I FIND MY COMMENT AND DOE's RESPONSE?

Note Comment documents were assigned to a State based on the address of the commentor, a telephone area code, or the public hearing location.

For comments by members of Congress and Federal agencies:

Refer to Tables 1-3 and 1-10 for the SPD Draft EIS and the Supplement, respectively. These tables are organized alphabetically and grouped by State.

For comments by private organizations from foreign countries:

Refer to Table 1-11 for the Supplement. The table is organized alphabetically and grouped by country.

For comments by State and local officials and agencies and private organizations:

Refer to Tables 1-4 and 1-12 for the SPD Draft EIS and the Supplement, respectively. These tables are organized alphabetically by organization and grouped by State.

For comments by individuals:

Refer to Tables 1-S and 1-13 for the SPD Draft EIS and the Supplement, respectively. These tables are organized alphabetically by the individual's last name and grouped by State.

For comments on multiple-signatory documents:

Refer to Tables 1-6 and 1-14 for the SPD Draft EIS and the Supplement, respectively. These tables are organized with individuals and organizations integrated alphabetically and grouped by State. A multiplesignatory document is one that has been signed by at least two individuals with different last names, and et al. is reflected in the image document heading.

For comments made at public hearings:

Refer to Tables 1-7 and 1-1S for the SPD Draft EIS and the Supplement, respectively. If you submitted a completed registration form, you can find your name under the appropriate hearing location. If you orally presented your views, then those views were summarized and are presented in this document. Similar views appear only once. These tables are organized by hearing location, with individuals and organizations integrated alphabetically.

For comments submitted as part of a campaign:

Refer to Table 1-8. This table sets forth the campaign subject and is organized alphabetically, integrating individuals and organizations. Every effort was made to decipher signatures, and those portions that were legible are included in the table. Unreadable names are accounted for under an "illegible" heading within the table. If you provided an additional, unique comment on a campaign document, that campaign document was treated as a separate comment and can be located in Tables 1-4 or 1-S. Signatories of the Statement of Nongovernmental Organizations on Plutonium Disposition submitted on the Supplement can be found attached to that statement.

C. Summary Comments

These examples of summary comments are from the Summary of Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada (DOE/EIS-0250, February 2002).

S.4 Issues Raised by the Public

S.4.1 Issues Raised in Public Scoping

DOE solicited written comments and held 15 public scoping meetings across the country between August 29 and October 24, 1995, to enable interested parties to present comments on the scope of this EIS.

During the public scoping process, a number of commenters asked that the EIS discuss the history of the Yucca Mountain site characterization program and requirements of the NWPA, address DOE's responsibility to begin accepting waste in 1998, describe the potential decisions that the EIS would support, and examine activities other than construction, operation and monitoring, and closure of a repository at Yucca Mountain. Other comments raised during public scoping addressed the consistency of the proposed repository with existing land uses, effects of earthquakes and volcanism, health and safety impacts, long-term impacts, and sabotage. In response to the public's input, DOE included discussions and analyses of these issues in the EIS. DOE also received comments noting that the Nation will have more than 70,000 MTHM of spent nuclear fuel and high-level radioactive waste, although the NWPA directs that the maximum amount allowed for repository disposal is 70,000 MTHM of these materials until a second repository is in operation. Commenters encouraged DOE to evaluate the disposal of the entire anticipated inventory of spent nuclear fuel and high-level radioactive waste and other waste types that might also require permanent isolation. For this reason, the EIS analyzes cumulative environmental impacts that could occur from the disposal at Yucca Mountain of the country's total projected inventory of spent nuclear fuel and high-level radioactive waste, as well as Greater-Than-Class-C and Special-Performance-Assessment-Required wastes. In response to other public scoping comments, DOE added an additional transportation corridor and route in Nevada to the analysis.

Many other public scoping comments presented views and concerns not related to the scope or content of the Proposed Action. Examples of these comments include statements in general support of or opposition to a repository at Yucca Mountain, geologic repositories in general, and nuclear power; lack of public confidence in the Yucca Mountain program; perceived inequities and political aspects of the siting process by which Congress selected Yucca Mountain for further study; the constitutional basis for waste disposal in Nevada; legal issues involving Native American land claims and treaty rights; and unrelated DOE activities. DOE considered and recorded these concerns, but has not included analyses of these issues in the EIS.

S.4.2 Issues Raised on the Draft EIS and the Supplement to the Draft EIS

During the public comment process for the Draft EIS and the Supplement to the Draft EIS, commenters raised a variety of key issues. DOE identified issues as "key" based on factors such as:

- The extent to which an issue concerned fundamental aspects of the Proposed Action
- The nature of the comments as characterized by the commenter
- The extent to which DOE modified the EIS in response to the issue
- The number of comments received on a particular issue

The Comment-Response Document contains the comments received on the Draft EIS and on the Supplement to the Draft EIS and the DOE responses to those comments. The following summaries illustrate some of the key issues and DOE's responses.

- Nuclear Waste Policy Act - Why is Yucca Mountain the only site that DOE is studying?

The Nuclear Waste Policy Act of 1982 provided for a process for selecting sites for technical study as potential geologic repository locations. In accordance with this process, DOE identified nine candidate sites, the Secretary of Energy nominated five of the nine sites for further consideration, and DOE issued environmental assessments for the five sites. DOE recommended three of the five sites, of which Yucca Mountain was one, for possible study as candidate repository sites. In 1987, Congress amended the Nuclear Waste Policy Act of 1982, directing the Secretary of Energy to perform site characterization activities only at the Yucca Mountain site, and, if the site was found suitable, to make a determination whether to recommend that the President approve the site for development of a repository.

...

- Risk perception and stigma - Why didn't DOE analyze the impacts associated with the negative perceptions attached to a potential repository at Yucca Mountain?

During scoping for the EIS, DOE received comments saying the EIS should analyze perception-based and stigma-related impacts. Perception-based impacts would not necessarily depend on the actual physical impacts or risks from repository operations or transportation. Further, people do not consistently act in accordance with negative perceptions, and thus the connection between public perception of risk and future behavior would be uncertain or speculative at best. For these reasons, DOE determined that including analyses of perception-based and stigma-related impacts in the Draft EIS would not provide meaningful information.

Nevertheless, in light of the comments received on the Draft EIS, DOE commissioned an examination of relevant studies and literature on perceived risk and stigmatization of communities to determine whether the state of the science in predicting future behavior, based on perceptions, had advanced sufficiently to allow DOE to quantify the impact of public risk perception on economic development or property values. Based on this examination, DOE has concluded that:

1. While in some instances risk perceptions could result in adverse impacts on portions of a local economy, there are no reliable methods whereby such impacts could be predicted with any degree of certainty,
2. Much of the uncertainty is irreducible, and
3. Based on a qualitative analysis, adverse impacts from perceptions of risk would be unlikely or relatively small.

While stigmatization of southern Nevada can be envisioned under some scenarios, it is not inevitable or numerically predictable. Any such stigmatization would likely be an aftereffect of unpredictable future events, such as serious accidents, which are not anticipated to occur. As a consequence, DOE did not attempt to quantify any potential for impacts from risk perceptions or stigma in this Final EIS.

...

- Approach to environmental justice transportation analysis - DOE's two-staged assessment process masks significant impacts to minorities and low-income populations, and its failure to identify either specific locations or specific characteristics of affected communities demonstrates the inadequacy of the analysis.

The approach to environmental justice analysis in this EIS is consistent with the Council on Environmental Quality guidance. The goal of this approach is to identify whether any high and adverse impacts would fall disproportionately on minority and low-income populations. The approach first analyzes the potential impacts on the general population as a basis for comparison. Second, based on available information, the approach assesses whether there are unique exposure

pathways, sensitivities, or cultural practices that would result in high and adverse impacts on minority and low-income populations. If high and adverse impacts on a minority or low-income population would not appreciably exceed the same type of impacts on the general population, no disproportionately high and adverse impacts would be expected.

In response to comments, DOE has reevaluated available information to determine whether the Draft EIS overlooked any unique exposure pathways or unique resource uses that could create opportunities for disproportionately high and adverse impacts to minority and low-income populations. Although DOE identified additional unique pathways and resources, none revealed a potential for disproportionately high and adverse impacts.

DOE also updated and refined information germane to its environmental justice analysis. Based on the additional information and resulting analysis, DOE has concluded that disproportionately high and adverse impacts from the construction and operation of a rail line or intermodal transfer station would be unlikely.

- Disruptive natural phenomena – Commenters stated that earthquakes and volcanoes will cause releases of radioactive waste.

DOE has analyzed the potential public health and safety impacts that could arise from natural events such as earthquakes and volcanic activity. The disruptive natures of earthquakes and volcanic activity differ materially, both in terms of probabilities (likelihood of occurrence) and the possible disruptive nature of the events themselves. Volcanism over the long-term life of the repository, with eruptions and magma flow, would be highly unlikely, while seismic activity and its consequent ground motion would be more likely to occur.

While the occurrence of events cannot be predicted exactly, risks can be estimated statistically. Computer simulations allow DOE to estimate risks from natural events. Thus, the EIS contains an analysis of the probabilities and effects of such events on radionuclide release, and the resultant potential human health impacts to the public.

Although DOE would design repository structures to withstand the ground movement associated with severe earthquakes, it estimated the impacts that could result from a "beyond-design-basis" seismic event that would result in the collapse of the Waste Handling Building and consequent damage to spent nuclear fuel assemblies. DOE determined the resulting impacts associated with this scenario would be small (primarily due to the physical form of the assemblies, reduced releases due to the building rubble, and distance to the nearest population). The underground engineered barriers would be far less susceptible to damage.

DOE also estimated the impacts of volcanic eruptions that could result in the release of volcanic ash and entrained waste into the atmosphere. DOE estimated the potential impacts on the nearest population, conservatively assuming (tending to overestimate) the direction and speed of wind transport of an ash plume, and determined that the potential for public health and safety impacts would be very small. DOE also determined that magma flows would have minimal impacts on the long-term performance of the repository.

Attachment 4. Flow Chart of the Comment-Response Process

This process is under the leadership of the DOE NEPA Document Manager

