



**US Army Corps
of Engineers®**

**12509-SPD
REGULATORY PROGRAM
PREPARING AND COORDINATING
ENVIRONMENTAL IMPACT
STATEMENTS**



**South Pacific
Division**

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1.0 Purpose.

The purpose of this standard operating procedure (SOP) is to provide guidance for preparing and coordinating Environmental Impact Statements (EISs) under the National Environmental Policy Act (NEPA) of 1969 for the Regulatory Program within the South Pacific Division (SPD). This SOP is expected to be used in conjunction with the Council on Environmental Quality (CEQ) regulations on implementing NEPA at 40 C.F.R. §1500 – § 1508, CEQ guidance, U.S. Army Corps of Engineers (Corps) Regulatory Program NEPA implementing procedures at 33 C.F.R. Part 325, Appendix B (“Appendix B”) and 33 C.F.R. Part 230.

This SOP establishes standard procedures to gain regional consistency and to assist Regulatory Project Managers (PM) in carrying out the Corps’ NEPA responsibilities for activities that require a Department of the Army (DA) permit decision and that involve the preparation of an EIS. It is not, however, all-encompassing guidance for every aspect of the NEPA process, including compliance with related laws and regulations, nor overly prescriptive such that it constrains district-level flexibility necessary to address circumstances unique to a specific region or case-specific issues that are likely to arise.

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2.0 Applicability.

This SOP applies to all districts having responsibility for preparing and coordinating EISs in support of Regulatory Program functions within the SPD area of responsibility (AOR), namely: Albuquerque District (SPA), Los Angeles District (SPL), Sacramento District (SPK) and San Francisco District (SPN) (herein referred to as “districts”).

3.0 References.

[National Environmental Policy Act of 1969, as amended \(42 U.S.C. 4321 et seq.\)](#)

[Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act of 1969, 40 C.F.R §1500 – §1508, 29 November 1978, Council on Environmental Quality](#)

[Regulatory Programs of the Corps of Engineers, Title 33: Navigation and Navigable Waters, 33 C.F.R. Parts 320 – 330, 332](#)

[CEQ Information Memorandum to Agencies Containing Answers to the 40 Most Asked Questions and Answers on NEPA Regulations, 46 *Federal Register* 18026-38, dated 23 March 1981](#)

[Regulatory Guidance Letter No. 81-02, NEPA-Corps EIS, Review of Another Agency’s EIS](#)

[CEQ Memorandum to Heads of Federal Agencies Regarding Guidance on NEPA Regulations, 48 *Federal Register* 34263, dated 23 July 1983](#)

[33 C.F.R. Part 230, Corps of Engineers, Department of Defense, Procedures for Implementing the National Environmental Policy Act, Final Rule, dated 3 February 1988](#)

[*Federal Register*, Vol. 52, No. 113, Implementation of NEPA – Council Recommendations, dated 12 June 1987](#)

[Regulatory Guidance Letter No. 88-11, NEPA Scope of Analysis; Mall Properties Inc. vs. Marsh](#)

[Regulatory Guidance Letter No. 88-13, NEPA Scope of Analysis and Alternatives](#)

[HQUSACE memorandum dated 17 December 1997, from the Director of Civil Works to Major Subordinate Commanders and District Commanders, Subject: Guidance on EIS Preparation, Corps Regulatory Program](#)

[U.S. Department of Justice, Guidance to Federal Agencies on Compiling the Administrative Record, dated January 1999](#)

[CEQ Memorandum to Deputy/Assistant Heads of Federal Agencies Regarding Identifying Non-Federal Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, dated 25 September 2000](#)

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[CEQ Memorandum for the Heads of Federal Agencies dated 30 January 2002, From James L. Connaughton, Chair, CEQ, Subject: Cooperating Agencies in Implementing the Procedural Requirements of the NEPA](#)

[CESPD-CM-O \(1145\) Memorandum dated 5 November 2002, Subject: Regulatory Program Environmental Impact Statement Review Process](#)

[Letter from Mr. Willie R. Taylor, Office of Environmental Policy and Compliance, Office of the Secretary, Department of the Interior to Mr. John Fury, U.S. Army Corps of Engineers, Office of Environmental Policy Re: DOI environmental review distribution requirements, dated 25 May 2005;](#)

[CECW-PB Memorandum dated 23 October 2006, Policy and Procedural Guidance for the Approval of Modifications and Alterations of Corps of Engineers Projects](#)

[CEMP-IS \(415\) Memorandum dated 24 January 2007](#)

[CECS Memorandum for Major Subordinate Commands, Districts, Centers and Labs dated 12 January 2007, Subject: Revision ER 5-1-11, U.S. Army Corps of Engineers \(USACE\) Business Process](#)

[CECC-ZA Memorandum for the Director of Civil Works, dated 9 July 2007, Subject: Legal Guidance on the NEPA SOA in Corps Permitting Actions](#)

[CECW-CO Memorandum for Major Subordinate Commands and District Commands dated 1 October 2008, Subject: Implementation Guidance for Section 2002 of the Water Resources Development Act of 2007 \(Regulatory Program Funds Contributed by Non-Federal Public Entities\)](#)

[Regulatory Guidance Letter No. 05-08, Environmental Impact Statements – Third Party Contracting](#)

[CECW-PB Memorandum dated 17 November 2008, Subject: Clarification Guidance on the Policy and Procedural Guidance for the Approval of Modifications and Alterations of Corps of Engineers Projects](#)

[CECW-CO Memorandum for Commanders, Major Subordinate Commands and District Commanders, dated 1 July 2009, Subject: Updated Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program](#)

[CEQ Memorandum dated 12 May 2010 for Heads of Federal Departments and Agencies, Subject: Emergencies and the National Environmental Policy Act](#)

[CECW-PB Memorandum for Major Subordinate Commands and District Commands dated 18](#)

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[June 2010, Subject: Implementation Guidance for Utilizing Section 214 of the Water Resources Development Act of 2000, as amended, to Accept Funding from Non-Federal Public Entities to Expedite the Evaluation of Permits pursuant to 33 U.S.C. 408.](#)

[CEQ Memorandum dated 14 January 2011 for Heads of Federal Departments and Agencies, Subject: Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impacts](#)

[Federal Register, Vol. 76, No. 10, Amended Environmental Impact Statement Filing System Guidance for Implementing 40 C.F.R. §1506.9 and §1506.10 of the Council on Environmental Quality's Regulations Implementing the National Environmental Policy Act, dated 14 January 2011](#)

[CEQ Memorandum dated 6 March 2012 for Heads of Federal Departments and Agencies, Subject: Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act](#)

[U.S. EPA Guide to Electronic Submittal of Environmental Impact Statements to EPA, dated 30 July 2012](#)

[Federal Register, Vol. 77, No. 165, Amended Environmental Impact Statement Filing System Guidance for Implementing 40 C.F.R. §1506.9 and §1506.10 of the Council on Environmental Quality's Regulations Implementing the National Environmental Policy Act, dated 24 August 2012](#)

4.0 Related Procedures.

[12500-SPD, South Pacific Division Regulatory Program Signature Authority.](#)

5.0 Definitions

Administrative Draft EIS (ADEIS): an internal, pre-deliberative draft document prepared by a third-party contractor that contains all information and analysis required for a draft EIS per CEQ NEPA implementing regulations, 40 C.F.R. Parts 1500 – 1508, and Corps NEPA implementing regulations, 33 C.F.R. Part 230 and 33 C.F.R. Part 325, Appendix B. The ADEIS is submitted to the Corps and cooperating agency(s) for internal review to ensure overall document completeness, technical accuracy and consistency with existing Corps policies prior to the filing, public release and distribution of the 'official' draft EIS.

Administrative Final EIS (AFEIS): an internal, pre-deliberative draft document prepared by a third-party contractor that addresses public comments provided on the draft EIS and contains all information and analysis required for a final EIS per CEQ NEPA implementing regulations, 40 C.F.R. Parts 1500 – 1508, and Corps NEPA implementing regulations, 33 C.F.R. Part 230 and 33 C.F.R. Part 325, Appendix B. The AFEIS is submitted to the Corps and cooperating agency(s) for internal review to ensure overall document completeness, technical accuracy, sufficiency of responses to comments and consistency with existing Corps policies prior to the filing, public release and distribution of the 'official' final EIS.

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Cumulative Impact: the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time (40 C.F.R. § 1508.7).

Direct Impact (or Effect): direct impacts are those effects that are caused by the action and occur at the same time and place (40 C.F.R. § 1508.8).

Effects: Effects (or impacts) includes ecological (such as the effects on natural resources and on the components, structures and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social or health, whether direct, indirect or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects (40 C.F.R. § 1508.8).

Federal Action: for purposes of the Corps Regulatory Program, the NEPA “Federal action” is the action taken by the Corps in either issuing or denying a permit pursuant to one of the Corps regulatory authorities: section 404 of the Clean Water Act, sections 9 and 10 of the Rivers and Harbors Act of 1899 and/or section 103 of the Marine Protection Research and Sanctuaries Act of 1972.

Federal Register: The Federal Register contains Federal agency regulations, proposed rules and public notices, executive orders, proclamations and other Presidential documents. The NARA Office of the Federal Register prepares the Federal Register for publication in partnership with the Government Printing Office (GPO). It is updated daily by 6 a.m. and is published Monday through Friday, except Federal holidays. The Federal Register is where notices from Federal agencies can be found regarding their NEPA actions.

Human Environment: is defined comprehensively to include the natural and physical environment and the relationship of people with that environment. This means that economic or social effects are not intended by themselves to require preparation of an EIS. When an EIS is prepared and economic or social and natural or physical environmental effects are interrelated, then the EIS will discuss all these effects on the human environment (40 C.F.R. § 1508.14).

Indirect Impact (or Effect): indirect impacts are those effects that are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect impacts may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems (40 C.F.R. § 1508.8).

Major Federal Action: an action with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of “significantly”. Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action (40 C.F.R. § 1508.18).

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Mitigation: avoiding the impact altogether by not taking a certain action or parts of an action; minimizing impacts by limiting the degree or magnitude of the action and its implementation; rectifying the impact by repairing, rehabilitating or restoring the affected environment; reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and compensating for the impact by replacing or providing substitute resources or environments (40 C.F.R. §1508.20).

No Action: The No Action alternative is one which results in no construction requiring a Corps permit. It may be brought by (1) the applicant electing to modify his proposal to eliminate work under the jurisdiction of the Corps or (2) by the denial of a permit (33 C.F.R. § 325, Appendix B).

Permit Action: as used herein means the evaluation of and decision on an application for a DA permit pursuant to sections 9 or 10 of the RHA of 1899, section 404 of the CWA or section 103 of the MPRSA or the modification, suspension or revocation of any DA permit (33 C.F.R. § 327.3(b)).

Practicable: available and capable of being done after taking into consideration cost, existing technology and logistics in light of the overall project purpose(s) (40 C.F.R. § 230.10(a)(2)).

Pre-final (“camera-ready”) Draft EIS: an internal, pre-deliberative draft document prepared by a third-party contractor in response to Corps and cooperating agency(s) comments on the ADEIS. The pre-final (“camera-ready”) DEIS addresses all Corps district, SPD and cooperating agency(s) review comments and is the final version of the DEIS the Corps will approve for reproduction (e.g., printing), filing with U.S. EPA Headquarters and public distribution for the mandated minimum 45-day public review period.

Pre-final (“camera-ready”) Final EIS: an internal, pre-deliberative draft document prepared by a third-party contractor in response to Corps and cooperating agency(s) comments on the AFEIS. The pre-final (“camera-ready”) FEIS addresses all Corps district, SPD and cooperating agency(s) review comments and is the final version of the FEIS the Corps will approve for reproduction (e.g., printing), filing with U.S. EPA Headquarters and public distribution for the required 30-day review (waiting) period.

Project Management Plan: A formal, approved living document used to define requirements and expected outcomes and guide project execution and control. Primary uses of the PMP are to facilitate communication among participants, assign responsibilities, define assumptions and document decisions to establish baseline plans for scope, cost, schedule and quality objectives against which performance can be measured, and to adjust these plans as actuals dictate. A PMP is developed by the project delivery team (ER 5-1-11, 1 November 2006).

Public Hearing: a public proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed DA permit action, or Federal project, and which affords the public an opportunity to present their views, opinions and information on such permit actions or Federal projects (33 C.F.R. § 327.3(a)).

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Reasonable: practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant (CEQ, 1981). Reasonable alternatives must be those that are feasible and such feasibility must focus on the accomplishment of the underlying purpose and need (of the applicant or the public) that would be satisfied by the proposed Federal action.

Scope: the range of actions, alternatives and impacts to be considered in an environmental impact statement (40 C.F.R. § 1508.25).

Scope of Analysis: used in the context of the Corps Regulatory program, scope of analysis refers to the spatial boundaries or geographic area and project features that will be encompassed by and considered in the NEPA analysis to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review (33 C.F.R. § 325, Appendix B, paragraph 7(b)).

Significantly: as used in NEPA this term requires consideration of both “context” and “intensity”. Context means the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. Intensity refers to the severity of impact (40 C.F.R. § 1508.27).

Third party contract: refers to the preparation of an EIS by a contractor paid for by the applicant, but who is selected and supervised directly by the district engineer or his/her designated representative (40 C.F.R. § 1506.5(c)).

Tiering: refers to the coverage of general matters in broader environmental impact statements with subsequent narrower statements or environmental analyses incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared (40 C.F.R. § 1508.28).

Vertical Team: Team that is composed of personnel from different command levels in the organization (ER 5-1-11, 1 November 2006).

Acronyms

404/10/103	See definition of “Permit Action” above
AOR	Area of responsibility
BA	Biological Assessment
CD	Compact disc
CEFMS	Corps of Engineers Financial Management System
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
CoP	Community of Practice
CW	Civil Works
CWA	Clean Water Act
DA	Department of the Army

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DE	District Engineer
DOI	Department of the Interior
EA	Environmental Assessment
EIS	Environmental Impact Statement
EO	Executive Order
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act of 1973
FOIA	Freedom of Information Act
FR	Federal Register
HQ	Headquarters
MFR	Memorandum for Record
MPRSA	Marine Protection, Research and Sanctuaries Act of 1972
NEPA	National Environmental Policy Act of 1969
NHPA	National Historic Preservation Act of 1966
NOA	Notice of Availability
NOAA	National Oceanic and Atmospheric Administration
NOI	Notice of Intent
OC	Office of Counsel
ORM2	OMBIL Regulatory Module
PAO	Public Affairs Office
PIR	Public Interest Review
PM	Project Manager
PMP	Project Management Plan
PN	Public Notice
RGL	Regulatory Guidance Letter
RHA	Rivers and Harbors Act of 1899
ROD	Record of Decision
SEA	Supplemental Environmental Assessment
SEIS	Supplemental Environmental Impact Statement
SIP	Standard Individual Permit
SOA	Scope of Analysis
SOP	Standard Operating Procedures
SOW	Scope of Work
SPA	Albuquerque District
SPD	South Pacific Division
SPK	Sacramento District
SPL	Los Angeles District
SPN	San Francisco District
SPN	Special Public Notice
USC	United States Code
USACE	U.S. Army Corps of Engineers
USFWS	U.S. Fish and Wildlife Service

Note: The terms “proposed action”, “proposed project” and “proposed activity” are used interchangeably in this SOP. However, Regulatory PMs should note that in some cases there is a substantive difference between the applicant’s proposed action (or proposed project) and the

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proposed activity requiring a DA permit, wherein the activity requiring a Corps permit may only constitute a portion of the overall proposed action (or proposed project).

6.0 Responsibilities.

District Engineer. The District Engineer (DE) is the Corps NEPA official responsible for compliance with NEPA for DA permits decisions rendered under the Corps' Regulatory Program. However, most activities pertaining to NEPA compliance, including the preparation of EISs, have been delegated by the DE to Regulatory Division personnel. Districts will follow applicable approved delegation of signature authority memoranda.

7.0 Procedures.

7.1 Early NEPA Coordination (Pre-Scoping) and DA Permit Application. CEQ underscores the importance of early NEPA planning in the context of an EIS and in doing so indicates, "...the scoping process can be used before an agency issues a notice of intent to seek useful information on a proposal." Related to this point, CEQ NEPA implementing regulations point out for actions proposed by a private or non-Federal entity, Federal agencies should begin the NEPA process for preparing an environmental assessment (EA) or EIS as early as possible (refer to 40 C.F.R. § 1501.2(d)(3)). Having a complete and originally signed DA permit application is an important step in the NEPA process since it informs the district of the nature of the proposed activity, its probable environmental impacts and forms the basis of the Corps' Federal action. Receipt of a signed application also documents the applicant possesses, or will possess, the requisite property rights to undertake the proposed activity(s) for which the preparation of an EIS may be necessary.

While there is a recognized benefit to pre-application consultations for certain proposed actions, a potential applicant does not always request or seek early coordination with the Corps and as a result, a DA permit application may be submitted to the district without any advance warning or knowledge. However, in most cases, a potential applicant who proposes an action that requires Corps authorization under section 404/10/103 will wait to submit a DA permit application until one or more pre-application consultation meetings have been held with the district to understand the regulatory requirements for processing the future permit application. Based on the complexity of an applicant's proposed action and at what point in the NEPA process a DA permit application is actually submitted to the Corps, the timing of when the district is able to determine an application is complete will most likely vary, but must be completed no later than the date the district releases the public draft EIS (DEIS) and the Notice of Availability (NOA) of the DEIS is published in the *Federal Register*.

7.1.1 Pre-application Guidance. Whenever a potential applicant indicates an intent to submit a DA permit application for work that may require the preparation of an EIS, the district will coordinate and communicate the environmental data and evaluation requirements necessary to comply with NEPA and other applicable Federal laws and regulations as well as make a public interest review determination. Based on 33 C.F.R. § 325.1(b) the effort devoted to this pre-application consultation should be commensurate with the likelihood of a permit application actually being submitted to the Corps. The pre-application consultation is often an on-going coordination process that may continue up through formal NEPA scoping (discussed further in

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Section 7.7) or beyond and will usually be the period in which the district gains enough information to define the Corps' NEPA scope of analysis (SOA), determine whether an EIS will be required and if so, gather sufficient project information to generate meaningful public comment.

7.1.2 DA Permit Application Completeness Determination. Districts will review the DA individual permit application and determine its completeness based on the requirements specified in 33 C.F.R. § 325.1(d) and 33 C.F.R. § 325.3(a). If upon the district's initial review the application is determined incomplete the district will request the necessary information for a complete application in accordance with 33 C.F.R. Part 325 and the 2009 national Regulatory Program standard operating procedures (SOP). Once all required information has been submitted and determined adequate for purposes of issuing a public notice (PN), the district will enter into the Operations and Maintenance Business Information Link (OMBIL) Regulatory Module (ORM2) database the date a complete application was received.

7.1.3 Issue Public Notice. Within 15 days of a complete application, the district will issue a PN as specified in 33 C.F.R. § 325.2(d). Generally, districts will not hold in abeyance the issuance of the PN to obtain information necessary to evaluate the permit application, including information needed to prepare an EIS. At a minimum, the PN will provide Federal, State, and local agencies, Tribal government entities (Indian tribes) and all other interested parties with sufficient project information to generate meaningful public comment on the applicant's proposed action (33 C.F.R. § 325.3). Depending on when in the NEPA process a complete application was received and the PN is issued, comments received from the public could inform the district's future decision-making related to one or more of the following elements: SOA, the significance of effects on the quality of the human environment, environmental issues to be considered in the EIS, the range of alternatives, the direct, indirect and cumulative impacts to Corps jurisdiction and other affected environmental resources, avoidance and minimization measures, compensatory mitigation for unavoidable impacts, the least environmentally damaging practicable alternative (LEDPA), the public interest review factors and ultimately, the DA permit decision. Additional detail on the processes for preparing and issuing PNs during the preparation of an EIS are discussed in procedures 7.7.2, 7.8.8, 7.9.8 and 7.10.2.

7.1.4 Identify Additional Information Necessary to Process the Permit Application. If necessary, following issuance of the PN the district may inform the applicant in writing of any additional information required to process the permit application and make a final permit decision. The notification may request the applicant provide additional information for the Corps to: 1) comply with NEPA and other applicable Federal laws and regulations, including the section 404(b)(1) Guidelines (if applicable), section 7 of the Endangered Species Act (ESA) and section 106 of the National Historic Preservation Act (NHPA); 2) establish the extent of the Corps' geographic jurisdiction through an approved or preliminary jurisdictional determination, if not already done; 3) identify the direct, indirect and cumulative impacts to water of the United States and other affected environmental resources, 4) characterize and evaluate the aquatic ecosystem functions and/or services that would be lost as a result of the proposed action and alternatives to the proposed action; 5) develop a compensatory mitigation plan for unavoidable losses, if appropriate, and 6) carry out the Corps' public interest review and determination. Districts will note in ORM2 the general nature (scope) of the request for additional information

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needed to evaluate the permit application, the date the notification was sent to the applicant and retain a copy of the written correspondence with the applicant in the administrative record.

7.2 Establish the Corps' NEPA Scope of Analysis. Districts must determine the scope of analysis (SOA) for its Federal action, which will guide inquiries under NEPA, including whether the proposed work would constitute a “major Federal action significantly affecting the quality of the human environment”. It is necessary to determine the SOA prior to making a determination on whether or not to prepare an EIS.

7.2.1 Define the Extent of Federal Control and Responsibility. The NEPA SOA for the Regulatory Program is addressed in 33 C.F.R. Part 325, Appendix B, paragraph 7(b) (“Appendix B”). Establishing the SOA is fundamental to the Corps properly carrying out its authorities under section 404/10/103. SOA is determined on a case-by-case basis and requires the district apply project-specific facts and circumstances since no two projects are exactly alike. Districts may need to consider court precedents and consult with district Office of Counsel (OC) in helping to determine the SOA. In general, the SOA is defined as the part or parts of the project, its alternatives and impacts (direct, indirect and cumulative) to be considered in evaluating a permit application. The geographic extent of this review and the level of analysis will vary with the amount of Federal “control and responsibility” over a project and the strength of the relationship between those impacts and the regulated portion of the activity. In establishing the SOA, Appendix B directs districts to consider four basic factors to determine the extent of Federal control and responsibility: 1) whether the regulated activity comprises ‘merely a link’ in a corridor type project; 2) whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity; 3) the extent to which the entire project will be within Corps jurisdiction; and 4) the extent of cumulative Federal control and responsibility.

- *Extent of Federal Control and Responsibility.* When gauging whether there is sufficient Federal control and responsibility to expand the Corps’ SOA, districts should consider the extent to which the regulated activity(s) comprise a substantial portion of the overall project. In addition, districts should consider those activities regulated or funded by other Federal agencies to estimate the level or extent of the cumulative Federal involvement. The basic precept is to determine whether the *cumulative* Federal involvement would “...[t]urn an essentially private action into a Federal action.” (33 C.F.R. § 325, Appendix B) (emphasis added). Therefore, environmental effects of the portions of the project beyond the Corps’ jurisdictional limits and authorities (where other Federal agencies would finance, assist, direct, regulate, approve or otherwise be required to take action under the Fish and Wildlife Coordination Act, NHPA, ESA and other environmental laws, regulations and executive orders (EOs)) could be included in the overall NEPA SOA (refer to 33 C.F.R. 325, Appendix B, paragraph 7(b)(iv)(A) and (B)).
- ✓ Direct, indirect and cumulative effects flowing from the permit action area should be considered in determining the SOA, with heavier weight given to those effects that are “proximately-related” to the Corps’ permit action (refer to *Mall Properties, Inc. vs. Marsh*, 672 F.Supp. 561 (D. Mass. 1987)). In other words, the effects of a proposed action should be strongly related to the purpose of the Clean Water Act (to restore and maintain the chemical, physical and biological integrity of the nation’s aquatic

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environment) and demonstrate a clear relationship between the impacts of the additional portions of the project and the Corps-regulated portion of the activity. Site-specific geographic features may also expand the SOA (refer to *Save our Sonoran. Inc., v. Flowers*, 408 F.3d 1113 (9th Cir. 2005) (jurisdictional waters ran throughout the property like capillaries through the tissue, thus expanding SOA); *White Tanks Concerned Citizens, Inc., v. Strock*, 563 F.3d 1033 (9th Cir. 2009)). It is not appropriate, however, for districts to consider the effects that are beyond the Corps' permit action area where those impacts would occur regardless of the Corps' decision on the permit. If there is Federal control and responsibility over both the permitted activity and the other activity(s) occurring in uplands, these activities are sufficiently interrelated to be included in the NEPA SOA pursuant to Appendix B (refer to CECC-ZA Memorandum, Subject: Legal Guidance on the NEPA SOA in Corps Permitting Actions, dated July 9, 2007). When it is established that cumulative Federal control and responsibility is sufficient to expand the NEPA SOA over the entire project due to other Federal agency involvement, districts should be mindful the Corps may or may not be the appropriate lead agency under NEPA. The determination of lead agency will be made in accordance with 40 C.F.R. § 1501.5.

7.2.2 Document the SOA. Districts will explain and document in the administrative record the relevant factors and case-specific information considered in establishing the SOA.

Documentation will consist of a memorandum for record (MFR) and may include maps or other information that help to depict the SOA. Once documented, the Regulatory PM in charge of the EIS will inform the applicant and cooperating agency(s) of the Corps' SOA. For additional guidance and clarification on the NEPA SOA in Corps permitting actions Regulatory PMs should refer to CECC-ZA Memorandum dated 1 July 2007, 33 C.F.R. Part 325, Appendix B and 40 C.F.R. § 1508.25.

7.3 Determine the Need to Prepare an EIS for Regulatory Actions and Define the Overall Scope of the EIS. While the vast majority of regulatory actions will not require an EIS, a small number of proposed activities within the Corps' area of responsibility will be determined to result in significant impacts that will necessitate the preparation of an EIS. Given the time and expense required to complete an EIS, Regulatory PMs must carefully consider whether there is a need to prepare an EIS for an applicant's proposed action. When determining whether an EIS is necessary, Regulatory PMs will consult with district OC to determine legal requirements. Regulatory PMs may encounter comments suggesting that an EIS be prepared for proposed projects that are large in scope or have high public visibility. In some instances, despite a relatively small NEPA SOA, the district may be pressured to prepare an EIS because certain individuals or agencies advocate for a more rigorous environmental analysis with an extensive public involvement process. These situations tend to arise when the Corps is the only agency with a Federal action and, consequently the only Federal nexus with the authority to require such a document be prepared. Some applicants or other interested parties may improperly request the Corps expand the NEPA SOA in order to include the environmental consequences of the larger action on adjoining uplands, such as adverse impacts to endangered species and/or historical properties, which would otherwise not be considered under the Corps Regulatory Program NEPA implementing regulations in Appendix B. Districts must be careful in evaluating the need to prepare an EIS under these circumstances and before making such decisions should have a clear understanding of the Corps NEPA SOA. District decisions are to be based on case-specific

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facts, and the desires or subjective interests of other parties should not influence what the facts support or the outcome of Corps decision-making; otherwise, district-level decisions could establish erroneous precedents that have unintended consequences affecting the administration of the Corps Regulatory Program.

7.3.1 Establish Whether the Proposed Activity(s) Results in a “Significant” Effect. After defining the SOA, districts will decide whether the impacts stemming from the proposed action within the Corps’ SOA would constitute a major Federal action “significantly affecting the quality of the human environment”. In doing so, districts must consider and carefully weigh all relevant factors, including those outlined in 40 C.F.R. § 1508.27. “Significantly”, as used in the context of NEPA, requires consideration of both “context” and “intensity” of impacts and should be made after consideration of all mitigation measures. Therefore, before jumping to an EIS districts should first consider all practicable mitigation measures to reduce adverse effects resulting from the proposed action and as part of the process, weigh the merits and determine the appropriateness of preparing an EA with a mitigated finding of no significant impact (FONSI) (refer to CEQ Memorandum to Heads of Federal Agencies, Subject: *Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impacts*, dated January 14, 2011). In some cases, the need to prepare an EIS is straightforward and can be determined shortly after the receipt of a complete DA permit application. In these situations, the district will prepare an MFR that documents the potential or anticipated significant impacts of the action. The MFR will explain succinctly the district’s rationale for preparing an EIS and reference the information relied upon in reaching the determination of “significance”. The district will then prepare and transmit a letter notifying the applicant preparation of an EIS will be necessary to process the DA permit application and render a Corps permit decision. To assist in and support a district’s decision whether to prepare an EIS, Regulatory PMs will:

- *Determine the “context” of impacts.* Districts will evaluate the significance of an applicant’s proposed action in various contexts based on case-specific circumstances and in doing so will consider the society as a whole (human, national), the affected region, affected interests and the locality. The “context” of impacts will vary depending on the location of the proposed project and may be influenced by the institutional (as acknowledged in laws and policies), technical (scientific importance) and/or public recognition placed on a given environmental resource. A resource may be locally significant even if it is not significant from a regional or national perspective.
- *Determine the “intensity” of impacts.* In assessing the severity of impacts resulting from a proposed action districts will consider CEQ’s ten criteria outlined in 40 C.F.R. § 1508.27. While CEQ does not prescribe thresholds for any of the criteria or dictate how many factors must be triggered to conclude the intensity of impacts would justify the preparation of an EIS, the 9th Circuit Court of Appeals has held that under appropriate circumstances a determination of “significance” for only one factor is enough to require an EIS (*National Parks & Conservation Association v. Babbitt*, 241 F.3d. 722 (9th Cir. 2001) and *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005)). In *National Parks & Conservation Association v. Babbitt*, the court found that a high degree of uncertainty and substantial controversy regarding the effects on the quality of the environment necessitated an EIS. Furthermore, in *Ocean Advocates v. U.S. Army Corps of Engineers*, the FONSI

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failed to discuss tenability or reasonableness of the applicant's self-serving claim the oil refinery extension would not increase oil tanker traffic. Therefore, as districts apply and evaluate case-specific circumstances in the context of NEPA "significance", Regulatory PMs must apply reasoned judgment when relying upon one or more of these "intensity" criteria in deciding whether to prepare an EIS. The CEQ's "intensity" criteria are as follows:

- ✓ Impacts that may be both beneficial and adverse—a significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial;
 - ✓ The degree to which the proposed action affects public health or safety;
 - ✓ Unique characteristics of the geographic area (e.g., proximity to historic or cultural resources, parklands, prime farmlands, wetlands, wild and scenic rivers or ecological critical areas);
 - ✓ The degree to which the effects on the quality of the human environment are likely to be highly controversial;
 - ✓ The degree to which the effects are highly uncertain or involve unique or unknown risks;
 - ✓ The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration;
 - ✓ Whether the action is related to other actions with individually insignificant impacts (significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts);
 - ✓ The degree to which the action may adversely affect districts, sites, highways, structures or objects listed in or eligible for listing in the National Register of Historic Places or many cause loss or destruction of significant scientific, cultural or historical resources;
 - ✓ The degree to which the action may adversely affect an endangered species or threatened species or its habitat that has been determined to be critical under the ESA of 1973; and
 - ✓ Whether the action threatens a violation of Federal, state or local law or requirements imposed for the protection of the environment
- *Decide Whether to Prepare an Environmental Assessment.* If after considering the context and intensity of impacts a determination of "significance" cannot be easily or immediately made, an EA may be prepared first to discern whether the proposed action will result in a FONSI. By doing so, the district will gain a more definitive and defensible decision on "significance". If an EA concludes in a FONSI (or mitigated FONSI), then no further NEPA action is required of the Corps and the district should process the permit application in accordance with procedures at 33 C.F.R. Part 325. If the EA concludes the applicant's proposed project will "significantly affect the quality of the human environment" and it is not possible to reach a mitigated FONSI, then the district will provide timely written notification to the applicant of the need to prepare an EIS.

7.3.2 Proposed Actions Under the Lead of Another Federal Agency. For proposed actions where another agency is designated the lead Federal agency under NEPA and that agency has decided to undertake the preparation of an EIS, the Corps retains broad discretion in the type of NEPA document required to support its DA permit decision, including the preparation of an EA. In general, just because another Federal agency concludes an EIS is needed for an applicant's proposed action does not automatically trigger the need for an EIS for all involved Federal agencies (refer to RGL 81-02). The type of NEPA analysis districts will undertake in support of

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a Corps permit decision when another agency is the lead preparer of the EIS should be based on the Corps' SOA and should be commensurate with the context and intensity of environmental impacts occurring within the Corps' defined SOA. Districts are expected to apply professional judgment and sound reasoning when determining whether an EIS is warranted for actions under the lead of another Federal agency (refer to procedure 7.5 and Attachment 9.8 for additional guidance on the Corps' role when another agency is the lead on an EIS and the district determines an EIS is needed for the Corps' Federal action). In cases where the district determines the regulated activity(s) within the Corps' SOA would meet the terms and conditions of one or more nationwide permits (NWP) and the district has determined it is inappropriate or unnecessary to assert its discretionary authority to evaluate the activity(s) under an individual permit, no further NEPA compliance for the Corps will be necessary for its Federal action (where the Corps' Federal action is defined as the issuance of the NWP verification letter(s)).

7.3.3 When to Prepare a Programmatic/Tiered EIS. Programmatic (or tiered) EISs are documents that present sufficient information regarding overall impacts of a proposed action so that the agency decision-maker can make a reasoned judgment on the merits of the action at the present state of planning or development and exclude from consideration issues already decided or not ripe for decision. Within the Corps Regulatory Program, programmatic EISs are rarely prepared, although there are cases of Regulatory-led programmatic (Tier 1) EISs in several Major Subordinate Commands within the Corps. Examples of proposed actions that might be evaluated by districts under a programmatic EIS are large-scale, multi-phased residential and commercial development master plans; recurring, long-term beach nourishment projects along a coastline; or other types of large-scale projects with lengthy or phased construction periods. On the rare occasion that a district would prepare a programmatic (Tier 1) EIS, the requirements of 40 C.F.R. § 1506.1(c) are likely to present potential legal and practical problems for processing a Corps permit decision. For this reason and Regulatory Program budgetary constraints, any decision to prepare a programmatic EIS must be reviewed and approved by Corps Headquarters, Regulatory (CECW-CO-R) before a commitment is entered into for the preparation of a programmatic EIS (refer to Attachment 9.8 for additional information on programmatic EISs).

7.3.4 Establish the Overall Scope of the EIS. In order to determine the breadth of the NEPA document, districts will apply CEQ's criteria for "scope"¹ to determine what actions, alternatives and impacts should be included and evaluated in the EIS (refer to 40 C.F.R. § 1508.25). In conjunction with the determination of the scope of Federal "control and responsibility", districts should identify relevant or significant environmental issues to be analyzed in the EIS, which will often give rise to study area boundaries for the evaluation of impacts for each relevant environmental resource under consideration (e.g., endangered species, wetlands, air quality, traffic, cultural resources, noise). These determinations of "scope" will be informed by data obtained through the formal NEPA scoping process (refer to 40 C.F.R. § 1501.7(a)(2)), existing studies and reports, and supplemental information furnished by the applicant.

- *Document the Purpose and Need.* In determining the "scope" of the EIS, districts must first define the NEPA project purpose and need since the underlying purpose and need will give rise to a range of alternatives to be considered in the EIS. Districts should seek to understand

¹ "Scope" as used here and in reference to 40 C.F.R. § 1508.25 is not synonymous with the term "scope of analysis" as defined by 33 C.F.R. § 325, Appendix B, paragraph 7(b). Refer to Section 5.0 "Definitions" for additional clarification.

the applicant's stated purpose and need for the proposed action and follow guidance prescribed in 33 C.F.R. § 320.4(q), as applicable, which discusses the importance of the Corps making an independent review of the need for projects proposed by private sector applicants to ensure the perspective of the overall public interest is appropriately considered. Appendix B also addresses the purpose and need in the context of NEPA, and directs districts to exercise independent judgment in defining the purpose and need for a proposed project from both the applicant's and the public's perspective (refer to Appendix B and 40 C.F.R. § 1502.13 for additional guidance).

After the purpose and need statement is documented, districts will consider the following elements in establishing the "scope" of the EIS:

Actions:

- *Connected Actions.* Connected actions mean that they are closely related and therefore should be discussed in the same EIS. Actions are connected if they:
 - ✓ Automatically trigger other actions which may require EISs;
 - ✓ Cannot or will not proceed unless other actions are taken previously or simultaneously; and
 - ✓ Are interdependent parts of a larger action and depend on the larger action for their justification (akin to "links in the same bit of chain").
- *Cumulative Actions.* Cumulative actions are those actions which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same EIS. To constitute "proposed actions" it must be shown not only that the applicant "has a goal to construct and that it is actively preparing to make a decision on means of accomplishing that goal" but also that "the effects can be meaningfully evaluated." (40 C.F.R. § 1508.23).
- *Similar Actions.* Similar actions are those that when viewed with other reasonably foreseeable or proposed agency actions have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.

Alternatives:

- *No Action alternative.* For purposes of the Corps Regulatory Program, the No Action alternative refers to the evaluation of an alternative in which the proposed action is not permitted or which results in no construction requiring a Corps permit. The No Action alternative may be brought about by the applicant modifying the proposed action to eliminate work under the Corps' geographic jurisdiction or the Corps' denial of the permit. The No Action alternative should describe the existing baseline conditions and include an examination of the future without-project environmental conditions if the No Action alternative were selected;
- *Other reasonable courses of actions.* Other build or action alternatives should be evaluated in the EIS. This may include consideration of off-site alternatives as well as design

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variations of on-site alternatives. It is sometimes necessary under NEPA to evaluate alternatives not available to the applicant or beyond the applicant's capability to implement in order to make an informed public interest decision, so long as such alternatives meet the project purpose and need. There is no minimum or maximum number of alternatives to be evaluated in an EIS. Districts should consider the project purpose, public scoping input and case-specific facts in defining the range and number of alternatives to be evaluated. Based on the project purpose, some proposed actions may severely limit or altogether preclude the formulation of off-site alternatives, such as major safety improvements to a highway. In some instances, an EIS can include only the applicant's proposed action and the No Action alternative (*Burlington et al v. Busey* (D.C. Cir. 1991)), although this situation is not common nor is it recommended for most Regulatory-led EISs; and

- *Mitigation measures* (not in the proposed action). CEQ refers to the types of mitigation measures and their effectiveness. Districts should consider all practicable measures that avoid or substantially reduce the environmental consequences of the proposed project. As mitigation is developed, districts should consult CEQ's January 14, 2011 guidance on mitigation and monitoring, which includes guidance on how to address these issues in agency NEPA documents.

Impacts: The purpose of an EIS is to identify, evaluate and publicly disclose the environmental effects of a major Federal action to help inform agency decision-making. Therefore, impacts to be considered and discussed in an EIS should be done so in proportion to their significance. The scope of an EIS should include all known or reasonably foreseeable impacts and devote an appropriate level of effort to the evaluation of effects (adverse and beneficial) based on the context and intensity of such impacts. Environmental impacts deemed negligible or not significant should not be given substantial treatment in the EIS. The three types of impacts to be considered in determining the overall scope of the EIS include:

- *Direct* – direct impacts are those effects that are caused by the action and occur at the same time and place
- *Indirect* – indirect impacts are those effects that are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect impacts may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems
- *Cumulative* – the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. As part of the cumulative impacts analysis, districts must identify area(s) in which the effects of the proposed action will be felt; the effects that are expected in the area(s) from the proposed action; past, present, and reasonably foreseeable future actions that have or that are expected to have impacts in the same area; the impacts or expected impacts from these other actions; and the overall impact(s) that can be expected if the individual impacts are allowed to accumulate (*Fritiofson v. Alexander*, 772 F.2d 1225,

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1245 (5th Cir. 1985)). However, when the Corps is contemplating a proposed action that is part of a larger plan, the district is not required to conduct an extensive analysis of the cumulative impacts of that larger plan so long as the larger plan and the proposed action are not so interrelated that the proposed action cannot be contemplated without the rest of the larger plan (refer to e.g., *Airport Neighbors Alliance v. United States*, 90 F.3d 426, 429-31 (10th Cir. 1996); *Sylvester v United States Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir. 1989) (project component can be separated from project for cumulative impacts analysis, where “each could exist without the other, although each would benefit from the other’s presence.”)). It is important districts remain mindful that the evaluation of cumulative impacts goes beyond what is actually proposed to anything reasonably foreseeable (40 C.F.R. § 1508.7). Therefore, the consideration is broader than it is for cumulative actions, and an action that is not considered significant when evaluating connected, similar, or cumulative actions, could be determined to be significant when considering anything reasonably foreseeable under cumulative impacts.

7.4 Coordination with Other District Business Lines when Initiating an EIS. In some cases, an applicant’s proposed action may alter, modify or otherwise affect a Corps-authorized project (e.g., Corps recreation areas, flood control or navigation project), an on-going Corps study (e.g., Civil Works Feasibility Study) or another Corps program (e.g., PL-84-99). As a result, other Corps approvals may be required, including real estate conveyances or permits for encroachments and easements onto Corps-owned lands and/or approvals under Section 14 of the Rivers and Harbors Act of 1899 (herein referred to as 33 U.S.C. 408).

7.4.1 Determine Whether Other Corps Business Lines Will Have a Role in the EIS. As soon as possible after the decision to prepare an EIS, the Regulatory PM in charge of the EIS should determine whether the proposed action may affect a Corps authorized project or an on-going Corps study by examining district databases and records, as well as consulting with other district business lines. The need for and extent of intra-district coordination may vary depending on the nature of the proposed activity, but in all cases should occur in a timely manner to ensure the early identification of all Corps permitting and approval requirements associated with the applicant’s proposed project. If an affirmative determination is made that other Corps approvals are required or other district business lines will be involved in the decision-making process, the Regulatory PM will seek input from those district business lines in identifying pertinent data and information needs or technical analyses that will be required of the applicant to comply with applicable Corps regulations, policies and guidance. Intra-district coordination may also be needed to leverage in-house expertise in identifying and evaluating environmental impacts.

7.4.2 Establish In-house Lead for EISs Involving More than One Corps Business Line. To determine the most appropriate Corps business line to assume the lead on the preparation of the EIS, districts should consider whether the section 404/10/103 permit evaluation and decision or the other Corps action (e.g., 33 U.S.C. 408 decision) has the greatest control over the Corps’ involvement relative to the overall proposed project. Regardless of the designated in-house lead, intra-district and vertical team communication is essential for EISs that involve both a Regulatory permit decision and other Corps approvals. District business lines, whether directly or indirectly involved with the preparation of an EIS, should work collaboratively to ensure, to the extent practicable, external coordination with the applicant and third-party contractor is comprehensive and consistent to minimize piecemealed responses and conflicting agency

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guidance. In other words, for proposed actions requiring more than one Corps approval, districts should provide consolidated feedback and strive to speak with one Corps voice whenever possible.

- *USACE Business Process.* Pursuant to ER 5-1-11 (USACE Business Process), districts should consider the need for preparing a project management plan (PMP) and designating an overall project manager for the preparation and coordination of the EIS. Roles and responsibilities, funding sources, schedules, project delivery team members and internal/external coordination protocol should be clearly identified and approved by district management in accordance with current district policies and SOPs.

7.4.3 In-house Project Delivery Team Funding. While not all internal district coordination related to the preparation of an EIS should be funded from General Regulatory Funds, Regulatory Divisions may be asked or required to fund one or more district business lines in cases where a specific request is made by the Regulatory Division for a detailed or extensive in-house technical review (e.g., cultural resources, geotechnical, hydrology and/or hydraulics). In-house district funding requests will be reviewed and handled on a case-by-case basis and in accordance with current district policies and local SOPs.

- *WRDA Section 214 Funding.* For projects and activities proposed by applicants that are non-Federal public entities requesting Corps approval under section 404/10/103 and/or 33 U.S.C. 408, supplemental funding options to expedite Corps permit decisions may exist for districts to consider pursuant to Section 214 of the Water Resources Development Act of 2000, as amended. Districts that elect to pursue such supplemental funding must do so in compliance with existing HQUSACE implementation guidance, district policies and local SOPs (refer to 3.0 References).

7.5 Determine Lead and Cooperating Agencies. Lead agency, joint lead agency and cooperating agency designations and responsibilities are addressed in 40 C.F.R. §1501.5, §1501.6 and Appendix B. The Corps will normally be the lead agency for Regulatory actions requiring an EIS, unless another agency with funding, permitting or approval authority has greater Federal control and responsibility over the action.

7.5.1 Corps as the Lead Agency. As the lead Federal agency, the Corps is responsible for managing and overseeing the entire EIS process, including areas that may pertain to the jurisdiction of other Federal agencies. Following the decision to prepare an EIS and before work begins on the EIS, districts should determine whether there is Federal, State, local agencies or Tribal government entities (Indian tribes) with special expertise or jurisdiction by law that should cooperate in the preparation of the EIS.

- *Inviting Cooperating Agencies to Participate in the EIS Process.* Districts will send a letter to each entity inviting their participation in the environmental review process as a cooperating agency. The written request should include a brief description of the applicant's proposed action, known environmental concerns that are expected to involve the agency(s) based on jurisdiction by law or special expertise, and specify a timeframe for providing a formal response back to the Corps (typically no more than 30 days) (refer to Attachment 9.3.1 for cooperating agency invitation letter template).

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- *Acceptance/Declination Letters.* CEQ NEPA implementing regulations state that an agency may reply to a request for cooperation that "...other program commitments preclude any involvement or degree of involvement requested in the action that is the subject of the EIS." If an entity invited to be a cooperating agency on an EIS declines, districts should include the written declination in the administrative record and then move forward in the NEPA process (40 C.F.R. § 1501.6(c)). Whenever invited Federal, State or local agencies and Tribal government entities (Indian tribes) have declined to become a cooperating agency, districts should still include these agencies in interagency coordination efforts and on distribution lists for review and comment on the public NEPA documents. Non-cooperating agencies, however, should not be permitted to review pre-decisional, administrative and non-public drafts of NEPA documents, as this is a privilege and duty reserved for cooperating agencies.
- *Defining and Documenting Cooperating Agency(s)' Roles.* Since a cooperating agency may be invited to review and assist with only a portion of the EIS, expectations and understandings related to the level of involvement by a cooperating agency should be clearly documented in writing between the Corps and the cooperating agency(s) to avoid misunderstandings later on. If not already outlined in the district's cooperating agency invitation letter(s), upon an agency's written acceptance to be a cooperating agency, the Regulatory PM will document by letter or, in some cases, memorandum of understanding (MOU) the respective responsibilities of each cooperating agency and ensure the mutual understanding of such responsibilities is completed during scoping and prior to the preparation of the DEIS. Districts should establish time limits, identify milestones, assign responsibilities for review, analysis and/or documentation to be performed by a cooperating agency (if applicable), as well as address other issues such as disclosure of confidential and pre-decisional information. The level and formality of documentation will vary from EIS to EIS and from cooperating agency to cooperating agency, and will depend on the scope of the overall EIS effort and the anticipated level of involvement of the cooperating agency in the EIS preparation. Districts must exercise discretion in whether to provide financial assistance to a cooperating agency, and in general, should decline requests for Corps funding as a condition of an agency's cooperation on an EIS, primarily due to Regulatory Program budgetary constraints. Funding requests from a cooperating agency will be coordinated with district OC and Resource Management Office (RMO) prior to the Regulatory PM making a final decision.
- *Disputes with Cooperating Agency(s).* Should a dispute arise, the district will work with the cooperating agency to resolve the issue. When a cooperating agency intends to adopt the Corps' EIS and make a decision based on it, the cooperating agency may need to issue supplemental NEPA documentation to address issues that are not resolved before the final EIS is published. However, to minimize the need for supplemental documentation and the potential for schedule delays, the Regulatory PM in charge of the EIS will exercise reasonable efforts to resolve a dispute with a cooperating agency in a timely manner and to the mutual satisfaction of both the district and the cooperating agency. Although it is not required that districts resolve outstanding issues prior to finalizing an EIS, when appropriate, either informal or formal dispute resolution options should be implemented to address interagency conflict (refer to Attachment 9.8 for additional information on conflict management and dispute resolution). A cooperating agency may adopt an EIS without re-

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circulating it when, after independent review of the EIS, the cooperating agency concludes that its comments and suggestions have been satisfied (40 C.F.R. § 1506.3). Failure to resolve the concerns of a cooperating agency before the EIS is finalized precludes the cooperating agency from adopting the EIS without re-circulating and potentially supplementing the EIS.

7.5.2 Corps as a Cooperating Agency. As a general rule, districts will accept another lead Federal agency's request for cooperating agency participation in the development of an EIS when the proposed action, or a portion thereof, would necessitate a DA permit. Based on CEQ NEPA implementing regulations, an agency with "jurisdiction by law" must accept designation as a cooperating agency if requested (40 C.F.R. § 1501.6). The level of the Corps' involvement will be based on the extent requested by the lead agency and should be commensurate with the scope and intensity of impacts to waters of the United States, including the type of permit action the Corps intends to process (e.g., SIP, LOP, NWP, RGP). When the district is a cooperating agency on another agency's EIS, the Regulatory PM should actively participate in the NEPA process to the extent funding and workload allows, providing input to the lead agency on the Corps' jurisdiction, authorities and applicable Regulatory Program requirements such that the EIS may be suitable for adoption by the Corps, if needed. In light of the added time and resources involved with the preparation of supplemental NEPA documentation, the district will engage in early and continued dialogue with the lead agency regarding Corps requirements to avoid major pitfalls (refer to Attachment 9.8 for additional guidance on procedures for adopting another agency's EIS when the district is a cooperating agency and has determined an EIS is necessary for the Corps' Federal action).

- *Cooperating Under NEPA/Section 404 of the CWA Merger (or Integration) Agreements.* Many districts have developed and executed memoranda of understanding with other Federal and State agencies, primarily in the arena of surface transportation projects, to gain efficiencies with the preparation, processing and adoption of EISs when the Corps is not the lead Federal agency but will need to make a permit decision that also requires an EIS. This SOP neither addresses nor incorporates the specific procedures outlined in these agreements, but directs districts involved in EISs where a merger process is in place to follow the procedures in this SOP to the extent applicable.

7.5.3 Cooperating with State and Local Agencies in Preparing Joint Environmental Documents. Districts will, to the degree possible, cooperate with State and local agencies to reduce duplication between NEPA and State and/or local environmental requirements. In doing so, districts will cooperate to the fullest extent possible to establish and implement joint planning processes, joint environmental research and studies, joint public hearings, and joint NEPA documents when state laws or local ordinances have environmental impact requirements in addition to, but not in conflict with, those in NEPA. The objective of such cooperation is to fulfill and comply with all applicable Federal laws and regulations as well as state or local environmental requirements in a single combined document. Additional guidance in eliminating duplication with state and local environmental procedures is prescribed in CEQ's NEPA implementing regulations at 40 C.F.R. §1506.2.

- *Combined NEPA/State or Local Environmental Documents.* A non-federal public agency may be the project proponent (applicant) for an activity that requires a DA permit and the

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preparation of an EIS or may have a duty under state or local law to fund, approve or permit a project proposed by a third party in which that project also requires DA authorization and the preparation of an EIS. Examples of such agencies may include state departments of transportation, city planning departments or local municipal planning organizations, county flood control districts, county transportation agencies, state water supply and conservation agencies and port authorities. In these situations, if the non-federal public agency has an independent obligation under state or local law to conduct an environmental evaluation for its proposed action, or for its funding or permitting of a third party's proposed action, districts should work with that public agency to the extent possible to prepare a combined NEPA/state/local environmental document to reduce duplication. For example, in California these combined documents are prepared in accordance with NEPA and the state's equivalent to NEPA, known as the California Environmental Quality Act (CEQA). The NEPA/CEQA document is typically prepared as a single consolidated document that addresses Federal and state environmental laws and implementing regulations. The document is released as a joint Environmental Impact Statement/Environmental Impact Report (EIS/EIR).

- ✓ **Role of the State/Local Entity in Combined Environmental Documents.** Generally, the non-federal public agency will have a prominent participatory role in the preparation and processing of the combined environmental document in terms of carrying out the procedural and substantive requirements mandated under state or local law and how those requirements are integrated into a combined NEPA/State/local environmental document. Regardless of the degree of State or local agency involvement, when districts cooperate on the development of a joint environmental document the Corps' independent NEPA and regulatory responsibilities must be preserved, particularly in relation to establishing the project purpose and taking a hard, objective look at alternatives, the environmental effects and the public interest.

7.6 Develop the Scope of Work, Procure Third-Party Contractor, Establish Roles and Responsibilities and Develop the EIS Schedule.

7.6.1 Define the Scope of Work and Procure A Third-Party Contractor. Appendix B indicates the DE may prepare an EIS, or may obtain information to prepare an EIS, either with his/her own staff or by contract, whereby the contractor reports directly to the Corps. Based on current Regulatory Program guidance, the primary method for preparing an EIS will be through the use of third-party contracting. The Corps and the applicant have responsibilities in the selection and procurement of a third-party contractor. While CEQ's NEPA implementing regulations stipulate that a contractor be selected solely by the lead agency, districts will not become involved in the specifics of non-federal contracting procedures. In selecting a contractor, districts will follow the guidance set forth in RGL No. 05-08, *Environmental Impact Statements – Third Party Contracting*, 40 C.F.R. §1506.5, 33 C.F.R. Part 325, Appendix B, paragraph 8(f) and CEQ's July 23, 1983 memorandum to heads of federal agencies on guidance regarding NEPA regulations (refer to Attachment 9.8 for additional guidance on third-party contracting).

- *Identify Information Required for the EIS and Qualifications of the Third-Party Contractor.* Districts will specify the data and information requirements for the EIS, including, but not limited to: literature searches and reviews, surveys, resource inventories, functional or condition assessments, environmental analyses and modeling. As part of this process,

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districts will identify the necessary qualifications of the third-party contractor and any special expertise required to carry out the environmental evaluation. Districts will approve the scope of work (SOW) for preparing the EIS as well as approve the third-party contractor prior to the contract award and before work commences on the EIS.

- *Confidentiality, Conflict of Interest and Financial Disclosure Statements.* The third-party contractor must execute a disclosure statement prepared by the Corps, specifying that they have no financial or other interest in the outcome of the project. Preparation of an EIS by a third-party contractor who would suffer financial losses if, for example, a particular build alternative were selected, could erode the public's trust and lead to a perception of bias. Therefore, it is essential to maintain the public's faith in the integrity of the EIS process, and avoidance of any conflict of interest (including a perception of conflict) in the preparation of an EIS is an important means of achieving this goal. For all EISs prepared under a third-party contract, the Regulatory PM in charge of the EIS will coordinate with district OC as to the appropriate disclosure form(s) and their legal soundness. The disclosure form(s) must be signed by the contractor and the original submitted to the Corps prior to work commencing on the EIS (refer to Attachments 9.2.1, 9.2.2 and 9.2.3 for examples).

7.6.2 Define Roles and Responsibilities in the EIS Preparation. Districts have a responsibility to ensure the applicant and third-party contractor adhere to their respective roles and responsibilities in preparing and coordinating the EIS. To facilitate this, districts will prepare and sign a "Statement of Responsibilities" (SOR) that codifies the parties' understanding of individual roles and responsibilities related to the NEPA process. The SOR will be signed prior to work commencing on the DEIS (refer to Attachment 9.3.2 for a SOR template and 9.3.3 for a detailed checklist/guide to each party's roles and responsibilities).

- *The Applicant's Role.* The applicant is responsible for furnishing all necessary information to the Corps to prepare and coordinate the EIS, including the procurement and funding of a third-party contractor who will collect information, perform technical studies and write the NEPA document. Generally, the applicant will be asked to review specific chapters of the administrative draft and final EISs, to comment on any proposed mitigation and to make sure the articulation of the applicant's need, project purpose and proposed action is accurate (e.g., Chapter 1 (*Purpose & Need*) and Chapter 2 (*Alternatives*)). The extent to which the district coordinates advance copies of additional chapters of the administrative draft and final EISs or other in-preparation EIS work products with the applicant will be at the discretion of the Regulatory PM. However, regardless of what draft documents are shared with the applicant, the district will ensure the applicant does not alter or unduly influence the data, interpretations and application of the data or any outcome—the Corps remains in control of the content of the EIS at all times.
- *The Third-Party Contractor's Role.* The third-party contractor works under the direction and control of the Corps, although the applicant funds the third-party contractor's work in accordance with the agreed upon SOW. The third-party contractor is responsible for searching, compiling and reviewing relevant literature, technical publications and previous environmental studies or reports of findings; conducting fieldwork and preparing technical studies in support of the EIS; assisting the Corps with public meetings/hearings; and preparing the NEPA documents, including reproduction, distribution/public posting and

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mailings (as applicable). The third-party contractor should submit all draft materials and findings directly to the Corps without first filtering the information through others, including the applicant.

- *The Corps' Role.* The district is responsible for ensuring the information provided by the third-party contractor is consistent with Corps policy and the NEPA statutory requirement to take a hard, objective look at the public interest and environmental factors. It is incumbent upon the Regulatory PM in charge of the EIS to direct any necessary changes to the work of the third-party contractor to make sure the work products are acceptable and to ensure any conclusions drawn from the interpretation of the data comport with Corps regulations and policies. The district must also independently review any data or materials generated or provided by the applicant that are incorporated into the EIS (directly or by reference) and/or relied upon in agency decision-making, including the Corps' record of decision (ROD) and permit decision(s). The most important point relating to the Corps' role in the preparation of an EIS is that the district must provide sufficient oversight, control and independent review of the NEPA document(s). There is no impropriety for the district to rely upon a state agency or an applicant's analysis as long as the district has independently evaluated and verified the data provided by the applicant in accordance with 40 C.F.R. § 1506.5(a). Although in many cases it may not be desirable from the Corps' perspective in terms of avoiding a perceived conflict of interest (financial or otherwise), participation by the applicant in the preparation of an EIS is not prohibited by any regulation. However, in most cases, it is anticipated the applicant's participation in the EIS process will be largely limited to providing information via the funding of a third-party contractor, and that decision-making will be retained by the Corps. When the applicant provides information to the district in support of the EIS, the Regulatory PM will document in the administrative record that an independent review of the applicant-furnished information has been conducted and the district accepts the information as being unbiased, accurate and factually correct.
- ✓ **Develop Communication Protocol.** Prior to the preparation of the EIS, districts should consider the need for establishing a communication protocol between all parties to facilitate the EIS management, avoid misunderstandings, and ensure effective Corps oversight. The flow of information and communication should be directly between the district and the third-party contractor. Exceptions to the latter may arise, such as fiscal issues where direct communication between the applicant and the third-party contractor is appropriate and necessary (e.g., payments for task orders completed and services rendered).

7.6.3 **Establish and Manage the EIS Schedule.** The Regulatory PM in charge of the EIS will establish the scope of the EIS effort and develop a preliminary schedule with discrete milestones based on all relevant factors provided for in 40 C.F.R. § 1501.8(b)(1). The EIS schedule should be developed in consultation with and input from the third-party contractor. At a minimum, the EIS schedule must include mandatory public review periods, internal Corps review and coordination processes, required timelines for carrying out or complying with other statutes, such as ESA and NHPA and conducting necessary technical studies and analyses. The schedule should also address any known seasonal constraints or windows for performing certain types of fieldwork, such as federally threatened and endangered species protocol surveys or other studies that may necessitate the collection of multi-year survey data. Typically, the timeline for

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completing an EIS is measured from the date of issuance of the Notice of Intent (NOI) to the date of issuance of the ROD. The timeline for preparing an EIS and issuing a ROD will vary from project to project due to case-specific circumstances, but in general should take no more than two to three years to complete (refer to Attachments 9.1.1, 9.1.2 and 9.8 for additional information on EIS schedules).

- *Schedule Delays.* If milestone dates are not met, the Regulatory PM in charge of the EIS will notify the applicant and explain the reason for delay. Common reasons for delays that districts may encounter could include new issues arising after scoping, disputes with cooperating agencies, competing priorities and workload issues for Regulatory PMs, new alternatives being identified after scoping, identification of new assessment methods and resolution of legal issues.

7.7 NEPA Scoping. Scoping is an early and open process for determining the breadth of issues to be examined in an EIS and for identifying the significant issues that may need to be addressed. It provides the Corps the opportunity to focus in on those direct, indirect and cumulative effects that may be “significant” (refer to 40 C.F.R. § 1501.7). There is no official time limit for scoping, although the formal process generally encompasses 30 to 60 days. However, CEQ guidance indicates scoping ends when issues and alternatives to be addressed in an EIS have been clearly defined, which could occur up through the final stages of preparing the draft EIS. Public concerns on issues, studies needed, alternatives to be examined, procedures, and the Corps’ planning and decision-making schedule will be addressed during scoping. Districts should give meaningful consideration to public and agency input gained during the scoping process and recognize such information may elicit changes or require the district to re-examine earlier determinations related to the SOA, cooperating agency status, range of alternatives, etc. In addressing scoping information, districts may be required to re-scope, reassess or revisit preliminary assumptions, including the SOW. Doing so, however, should not be viewed as a failure, but rather consistent with the spirit and intent of NEPA.

7.7.1 Prepare and Publish the Notice of Intent. The notice of intent (NOI) to issue an EIS is the first formal step in the EIS process. As soon as practicable after a decision is made to prepare an EIS, the scoping process for the draft EIS (DEIS) should be announced in a NOI. The NOI will specify the applicant’s proposed project, reasonable alternatives to the proposed action, any significant issues to be analyzed in depth in the DEIS (if known), any relevant supplementary information (e.g., background, scope of the action, cooperating agencies, estimated timeframe for the availability of the DEIS), Corps contact information for obtaining further information, and the deadline for submitting written scoping comments. The NOI should also provide information about any public scoping meetings that are intended to be held by the Corps, including the date, time, location, or an acknowledgment that details on a public scoping meeting will be forthcoming in a separate announcement. If no public scoping meeting will be held, the NOI should indicate so. The NOI must be approved and then published in the *Federal Register* in accordance with 40 C.F.R. § 1507.3(e) and 33 C.F.R. § 230, Appendix C. For publication of the NOI, districts should adhere to the following procedures:

- *Billing Code.* A six-digit billing code must be typed at the top of the first page on all three copies of the notice. The billing code for all U.S. Army Corps of Engineers *Federal Register* notices is 3720-58; however, the Regulatory PM in charge of the EIS should consult with the

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Army Federal Register Liaison Officer or Corps Headquarters (HQUSACE), Regulatory Federal Register Liaison for verifying the current billing code or changes thereto. *Federal Register* publications are billed to the Corps based upon column length and require a cross-charge PR&C be prepared under the resource code "ACEPRINT". Generally, the cross-charge PR&C will be prepared by the district's ACE-IT print specialist or other designee. The Regulatory PM in charge of the EIS may be asked to verify or confirm the publication charges in advance of payment. Generally speaking, publishing anything in the *Federal Register* is considered a "print order," which must be paid for concurrent with the effort to publish the notice. This is consistent with ACE-IT's *ServiceTrak* procedures for ordering print services. The Regulatory PM should consult with ACE-IT and district administrative support staff before and during the preparation of the NOI to make sure the necessary Corps of Engineers Financial Management System (CEFMS) steps are created and approved to support the eventual billing.

- *NOI Preparation, Coordination and Signature.* Prior to signature, districts will coordinate an advance draft copy of the NOI with the Army Federal Register Liaison Officer or Corps Headquarters, Regulatory Federal Register Liaison for review (refer to Attachment 9.9 for individual names and contact information for coordination of the NOI with Army and HQUSACE officials). Following the incorporation of any recommended edits from the Army Federal Register Liaison Officer or the Corps Headquarters, Regulatory Federal Register Liaison, the NOI will be signed by the individual or GS-level identified within the district's delegation of signature authority memorandum. The NOI signature block will include the signer's typed name, rank and position title for military officials or name and position title for civilian officials. An official signing the NOI cannot sign "as acting" or "for" if another name is shown in the signature block. All three copies sent forward must be originals signed in ink. A Xerox copy of the signature is not allowed (refer to Attachment 9.4.1 for a NOI template).
- *NOI Transmittal.* Once the NOI is signed, a brief transmittal letter enclosing the three (3) originally signed copies of the NOI plus a compact disc (CD) with a Microsoft Word file (electronic copy) of the NOI will be mailed to the attention of the Army Federal Register Liaison Officer, U.S. Army Records Management and Declassification Agency or U.S. Army Corps of Engineers, Directorate of Civil Works, Regulatory Community of Practice. Districts may send the NOI to either individual since both share the *Federal Register* liaison responsibilities for the Corps (refer to Attachment 9.4.2 for a NOI transmittal letter example and Attachment 9.9 for contact and mailing information of agency officials).

7.7.2 Prepare District-Level Public Notice Regarding NOI. Concurrent with the publication of the NOI in the *Federal Register*, or as close as possible to the publication date, the district will prepare a PN inviting public participation in the scoping process. The purpose of the district-level NOI PN is to inform the public, local communities, stakeholders, agencies and adjoining property owners of the start of formal NEPA scoping since many individuals do not access or monitor the *Federal Register* where they would otherwise learn about an agency's intent to prepare an EIS and request for scoping comments. The content of the PN should be similar to that of the NOI. Districts should be mindful this PN and request for scoping comments is not the notice used by an agency to elevate under the 404(q) procedures since at the conclusion of this PN comment period the Corps will not proceed to a final action on the permit application (if one

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has been received). Therefore, to reduce agency and public confusion, the PN regarding the NOI will include an explanation that a subsequent PN will be forthcoming with the distribution of the DEIS. This latter PN will solicit public comment on the DEIS and the applicant's preferred alternative (if known) to assist the district with its eventual decision whether to issue a Corps permit (refer to procedure 7.8.8).

- *Post and Circulate the NOI PN.* The Regulatory PM in charge of the EIS will ensure the PN is posted to the district's website and is made available to appropriate Federal, State, and local agencies, Tribal government entities (Indian tribes) and all interested parties in accordance with the district's Regulatory Division public noticing procedures. The PN will be provided to all adjoining property owners in accordance with district PN notification procedures (e.g., postcards, mailings of hard copies of the entire PN, etc.).

7.7.3 Hold Public Scoping Meeting(s). In most cases, the district will hold one or more public scoping meetings, although it is not mandatory that the Corps hold any. The public scoping meeting is not a "public hearing" as defined by 33 C.F.R. Part 327. The purpose of the public scoping meeting is to provide the public an opportunity to identify issues of concern, recommend potential alternatives to be evaluated, and provide information which could be relevant to Corps decisions. The format for a NEPA scoping meeting may include, but is not limited to: an informal "open house" style meeting that may include a poster session; a workshop, organized meeting, presentation or panel discussion, possibly facilitated by a third party with opportunities for back-and-forth dialogue between the Corps and the public; a formally structured meeting with a professional facilitator and court reporter that allows for public testimony and comment, but with no direct response or feedback from the Corps officials; or any combination of the aforementioned. There are advantages and disadvantages to various meeting formats, so districts should weigh the pros and cons on a case-by-case basis when deciding what format is most suitable for a given project (refer to Attachment 9.8 for additional guidance on public meeting formats and Attachments 9.6.1, 9.6.2 and 9.6.3 for information on organizing public meetings).

- *Presiding Officer at the Public Scoping Meeting(s).* The Corps representative presiding over the meeting(s) may vary depending on the anticipated level of controversy and/or the format of the meeting(s) (i.e., formal versus informal). In most situations, the Regulatory PM in charge of the EIS will preside, although in some cases the Regulatory Section, Branch or Division Chief may preside over the scoping meeting(s). Alternatively, and less often, the DE or his/her deputy may preside, particularly when proposed actions with effects of national concern are involved. The Regulatory PM in charge of the EIS should prepare the opening remarks and associated presentation materials, with assistance from the third-party contractor and PAO, as necessary, for the individual who presides over the meeting. Any presentation materials developed and/or delivered by the applicant and/or third-party contractor(s) will be reviewed and approved by the Regulatory PM in advance of the scoping meeting(s). In the case of a joint environmental document and meeting, the Regulatory PM will coordinate with his/her counterpart at the state or local agency to develop presentation materials that address Corps and the state or local agency's needs.
 - ✓ Although uncommon, a scoping meeting may be held, but no members of the public will show up. In such situations, the district representatives will remain at the meeting site for a reasonable period of time following the published start time before gathering up

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meeting materials, disconnecting equipment and departing the meeting location. A brief report will document a scoping meeting was scheduled, but no members of the public attended.

7.7.4 Scoping Report. Following the conclusion of the formal scoping process, a scoping report should be prepared by the third-party contractor, normally within 30 days from the close of scoping. The scoping report is used to document significant issues to be evaluated in the EIS and dismiss those that are not significant (refer to 40 C.F.R. § 1501.7(a)(2)). The scoping report should summarize the meeting discussions, substantive issues raised and all other public input obtained through the scoping coordination efforts. When applicable, the report should include all written and verbal testimony (transcripts) offered into the record by the meeting participants. Scoping comments may also be received from the public and various agencies in direct response to the NOI and/or the NOI PN through letters and emails as well as public meeting comment cards mailed after the public meeting(s). During the public scoping period, districts may also elect to hold individual meetings with cooperating agencies and/or non-cooperating agencies, including, but not limited to Federal, State and local agencies, non-governmental organizations, community groups, and Tribal government entities (Indian tribes) with special expertise to solicit input on the development of the EIS. These meetings are considered part of “scoping” and therefore written documentation of the meetings should be included in the project’s administrative record.

7.8 Draft EIS Preparation, Coordination, Review and Filing.

7.8.1 Prepare the Draft EIS. The Regulatory PM in charge of the EIS will actively participate in the document preparation, coordination meetings and internal reviews. The district will advise the applicant and the third-party contractor of the information requirements and periodically meet with the applicant and the third-party contractor to provide the Corps’ views regarding the adequacy of the data that are being developed and the acceptability of the overall direction of the environmental analysis. The Regulatory PM will independently review all documents prepared by the third-party contractor prior to their public release, as required by 40 C.F.R. § 1506.5(a). When appropriate, the district should consider engaging other district business lines, Engineer Research and Development Center (ERDC), Institute for Water Resources (IWR) and subject matter experts, including outside technical resources, to assist with internal reviews of specific portions of the EIS to ensure state-of-the-art tools/methodologies have been used and the data, analyses and findings are scientifically sound.

- *Format and Content of the Draft EIS.* There are a number of basic elements that must be addressed in an EIS. Districts should refer to Appendix B, paragraph 9(a) and 40 C.F.R. §§ 1502.10 – 1502.18 regarding the organization and content of a draft EIS and utilize Attachment 9.5 as a general guideline. The detailed contents of an EIS will vary depending on the nature of the proposed action, project-specific baseline conditions and the effects to be evaluated. For example, seismic concerns may be an important topic addressed in an EIS for a linear transportation project that involves tunneling through an area susceptible to earthquakes, whereas the same topic may have no bearing or consideration in an EIS prepared for a residential development located in a seismically inactive area. If the applicant’s preferred alternative is known at the time of the DEIS, it should be identified as such in the document.

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- ✓ Integrating NEPA and Section 404(b)(1) Alternatives Analyses. Districts will make all reasonable efforts to ensure the NEPA alternatives analysis is thorough and robust enough to provide the information needed for the evaluation of alternatives under the section 404(b)(1) Guidelines (“Guidelines”) and the public interest review. The goal of integrating the NEPA alternatives analysis and the section 404(b)(1) alternatives analysis is to gain efficiencies, facilitate agency decision-making and avoid unnecessary duplication. If this integration does not occur, then districts may be compelled to supplement the NEPA document with additional information to separately demonstrate compliance with the Guidelines. In some cases it may be necessary to analyze alternatives beyond the applicant’s capability in order to make an informed public interest decision (i.e., to evaluate one or more alternatives that are not “practicable”). When it is necessary to understand what opportunities will be lost to the public if the permit is denied, such alternatives should be included in the category of “deny the permit” (refer to Attachment 9.1.2 for a general depiction of the NEPA/404 integration and Attachment 9.8 for additional guidance).

7.8.2 Compliance with Other Environmental Laws and Regulations. Districts will document in the administrative record all required determinations of “effect” under applicable Federal laws and regulations and, when necessary, initiate informal or formal consultation with appropriate agency(s). The third-party contractor will typically assist the district in the preparation of technical documents (e.g., Biological Assessment) and/or in conducting surveys necessary to support any required consultation(s) with another agency (e.g., archeological reconnaissance and phase I surveys). The status of the Corps’ consideration of and compliance with all applicable Federal environmental laws, regulations and EOs should be addressed and appropriately documented in the DEIS. A list of the most common laws, regulations and EOs triggered by a major Federal action under the lead of the Corps is provided in Attachment 9.8.

7.8.3 District-Level and Cooperating Agency(s) Review and Coordination of the Administrative Draft EIS (ADEIS). Leading up to the release of the public DEIS, the third-party contractor will, at the direction of the Corps, prepare an ADEIS for Corps and cooperating agency(s) review. The Regulatory PM should provide for a reasonable period of time to conduct an internal review of the ADEIS, generally 30 calendar days. The ADEIS (in hard copy, CD or via an internet link/ftp site) should be furnished to cooperating agency(s), Regulatory Division management, district Office of Counsel and other district business lines, as appropriate, for review and comment.

- *Address and Incorporate District and Cooperating Agency(s) Comments on the ADEIS.* Under the direction of the Corps, review comments provided on the ADEIS will be addressed and incorporated by the third-party contractor or otherwise resolved prior to submittal of a revised ADEIS to the South Pacific Division (SPD) and HQ, if a programmatic EIS. The Regulatory PM in charge of the EIS should work with the third-party contractor to implement a process or method to track and ensure district-level and cooperating agency(s) review comments are addressed. Examples of such methods may include, but are not limited to, the development of a comment/response matrix and/or the production of a redline/strikeout copy of the revised document. The Regulatory PM will budget for a reasonable amount of time for the third-party contractor to respond to and incorporate internal review comments.

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Usually, two weeks is considered adequate, but more time may be necessary depending on the nature and scope of the internal review comments.

7.8.4 Review of the ADEIS by SPD HQ. Following any revisions to the ADEIS necessitated by the district-level and cooperating agency(s) review comments, a revised (i.e., second version) ADEIS will be prepared by the third-party contractor. The Regulatory PM in charge of the EIS must provide two (2) copies of the revised (i.e., second version) ADEIS to CESPDPDS-O in accordance with CESPDP-CM-O (1145) Memorandum dated November 5, 2002 and 33 C.F.R. § 230.17. This review is intended to ensure the EIS is consistent with current policy prior to public release. SPD will forward comments to the district's Regulatory PM in charge of the EIS within 15 working days from receipt of the revised ADEIS document.

- *Address and Incorporate SPD Comments.* The Regulatory PM in charge of the EIS will work with the third-party contractor to incorporate SPD comments and produce a pre-final ("camera-ready") DEIS. The method for verifying that SPD comments and all other internal Corps comments are satisfactorily addressed will be left to the discretion of the Regulatory PM in charge of the EIS and SPD.

7.8.5 Prepare Pre-Final ("camera-ready") DEIS. Following the incorporation of SPD review comments on the revised (i.e., second version) ADEIS, the third-party contractor will prepare a pre-final ("camera-ready") DEIS. Upon the district's review and approval of the pre-final ("camera-ready") DEIS, the third-party contractor will produce a PDF version (no greater than 50 MB; and if larger, then the document must be divided into chapters or subchapters) and hard copies (e.g., CDs or paper), as needed, in preparation for the official e-filing with EPA Headquarters and public circulation of the DEIS. Based on the district's preferred approach for circulation and distribution of the DEIS, the third-party contractor may also be required to establish an internet link/ftp site for the public posting of the NEPA document.

7.8.6 File DEIS with Headquarters (HQ) EPA. The DEIS must be filed with HQ EPA no earlier than it is transmitted to commenting agencies and made available to the public. This will assure the DEIS is received by all interested parties by the time EPA's NOA appears in the *Federal Register*. Districts must file the DEIS electronically with HQ EPA utilizing EPA's *e-NEPA* tool. This process eliminates the need to mail hard copies or CDs of EISs to HQ EPA, but does not obviate the district's responsibility to publicly distribute the EIS. For filing the DEIS with HQ EPA, districts must follow the general procedures in EPA's *e-NEPA* written instructions on how to register, prepare documents for electronic submission and perform the actual submittal (refer to 3.0 References, U.S. EPA *Guide to Electronic Submittal of EISs to EPA*, dated July 30, 2012) or any superseding guidance that may be issued by EPA. Only Federal agencies are granted the authority to electronically file an EIS; third-party contractors and other non-Federal entities are currently prohibited from doing so.

7.8.7 Publish the Notice of Availability (NOA) of the DEIS. The NOA is a formal document published in the *Federal Register* that informs the public, interested parties and other governmental organizations of the availability of the DEIS for review and comment. The NOA should specify the review period and include contact information for obtaining further information as well as the deadline for submitting written comments. Districts will consider longer review periods for projects that are highly complex, controversial and/or involve

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exceptionally voluminous documentation. Additional guidance on inviting comments and public involvement in the DEIS process is found at 40 C.F.R. § 1503.1 and § 1506.6, respectively.

- *HQ EPA Publication of the NOA in the Federal Register.* HQ EPA prepares and publishes the NOA based on the submitted (electronically filed) DEIS. Generally, the NOA published by HQ EPA is a brief paragraph describing the DEIS. Unless the proposed action has effects of national concern, there is no need for districts to prepare and publish a separate NOA in the *Federal Register* (40 C.F.R. § 1506.6(b)(2)). For the majority of EISs prepared by the Corps Regulatory Program, the NOA published by HQ EPA along with the district-level PN for the DEIS NOA will suffice (refer to procedure 7.8.8 below). HQ EPA's publications are posted every Friday in the *Federal Register* and require that all necessary paperwork be submitted by the lead Federal agency to HQ EPA, Office of Federal Activities Monday through Friday the week prior to the desired Friday publication date. HQ EPA must have the DEIS filed with its Office of Federal Activities before it will publish the NOA in the *Federal Register*.
- *Corps Publication of the NOA in the Federal Register.* When the effects of an applicant's proposed project are of national concern and the district deems it necessary for the Corps to publish its own NOA in the *Federal Register*—in addition to the abbreviated NOA published by HQ EPA—the following procedures should be followed:
 - ✓ Billing Code. Refer to procedures in paragraph 7.7.1.
 - ✓ NOA Preparation, Coordination and Signature. Refer to procedures in paragraph 7.7.1
 - ✓ Coordination with HQ EPA. The Regulatory PM in charge of the EIS is encouraged to contact HQ EPA in advance of finalizing and mailing the NOA to HQUSACE in order to coordinate the filing of the DEIS and timing of the publication of HQ EPA's NOA in the *Federal Register* with the Corps' filing of its NOA. To contact HQ EPA districts should refer to Attachment 9.9.
 - ✓ NOA Transmittal. Refer to procedures in paragraph 7.7.1

7.8.8 Prepare District-Level Public Notice Regarding DEIS NOA. Concurrent with the publication of the NOA in the *Federal Register*, or as close as possible to the publication date, the district will prepare a PN that notifies members of the public of the availability of the DEIS and how or where a copy of the DEIS may be viewed or obtained. This PN will advise all interested parties of the applicant's proposed action and request comments and information necessary to evaluate the probable impact on the public interest.

- *Post and Circulate the DEIS NOA PN.* The Regulatory PM in charge of the EIS will ensure the PN and a PDF of the DEIS is posted to the district's website (or provide a link to an ftp site on the district's website where the DEIS may be viewed and downloaded) and is distributed to appropriate Federal, State and local agencies, Tribal government entities (Indian tribes) and interested parties in accordance with the district's Regulatory Division public noticing procedures. Districts will provide the PN to all adjoining property owners in accordance with district PN notification procedures (e.g., postcards, mailings of hard copies

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of the entire PN, etc.). One copy of the PN along with a copy of the DEIS will also be provided to CESPDPDS-O.

- ✓ 404(q) Elevations – 3(a) “May Affect” Letter. The DEIS NOA PN will invite public comment on the DEIS and procedurally fulfill the Corps’ formal notification requirements to agencies under 40 C.F.R. § 1504 and the 1992 Memoranda of Agreement for 404(q) elevations. In response to the DEIS NOA PN and DEIS, EPA, U.S. Fish and Wildlife Service (USFWS) or NOAA/Fisheries (NMFS) may notify the Corps that the proposed project may result in substantial and unacceptable impacts to aquatic resources of national importance (ARNI) (refer to Part IV – *Elevation of Individual Permit Decisions*, 3(a) “May Affect” letter). For this reason, districts will make clear in the DEIS NOA PN that upon the completion of the public involvement and subsequent to the Final EIS and ROD the Corps intends to render a permit decision on the applicant’s preferred alternative. The DEIS NOA PN will cite to the appropriate regulatory authorities under which the DA permit application will be reviewed and processed.

7.8.9 Provide Electronic Copy of DEIS to HQUSACE and Distribute the DEIS for Public Review. In accordance with Appendix B, at the same time the DEIS is electronically filed with HQ EPA, one electronic copy (e.g., CD) of the DEIS will be sent to: U.S. Army Corps of Engineers, Directorate of Civil Works, Regulatory Community of Practice (refer to Attachment 9.9 for mailing address). Additionally, at the same time the DEIS is electronically filed with HQ EPA, the district will circulate the entire DEIS, except for certain appendices as provided in 40 C.F.R. § 1502.18(d). The official minimum 45-day review period commences with EPA’s publication of the NOA in the *Federal Register*. In addition to Federal agencies with special expertise and jurisdiction by law, districts should request comments from appropriate State and local agencies which are authorized to develop and enforce environmental standards; Tribal governments (Indian tribes), when the effects may be on a reservation or a reservation is affected; the applicant; adjoining property owners; and other parties, individuals or organizations who may be interested or affected by the proposed action. For cases when individually mailed copies of the DEIS (hard copy or CD) are required, the district should prepare and enclose a cover letter requesting review and comments on the document. The cover letter should include the Corps’ contact information and the date by which comments are due to the Corps. In addition to the general public, stakeholders, local agencies and non-governmental organizations, the DEIS will be distributed or made available to the following entities:

- *U.S. Environmental Protection Agency, Regional Office.* At least two copies of the DEIS will be sent to the appropriate EPA regional office for review and comment. Districts should coordinate directly with EPA regional staff regarding the preferred format of the documents. The applicable EPA regional office that will receive the DEIS will depend on the location of the proposed project.
- ✓ EPA Region IX (CA, NV, AZ) – For EISs prepared for proposed actions located in Region IX’s area of responsibility, districts should send two (2) copies to: U.S. Environmental Protection Agency, Region 9, Mail Code WTR-8, Wetlands Regulatory Office, 75 Hawthorne Street, San Francisco, CA 94105-390 and U.S. Environmental Protection Agency Region 9, Mail Code CED-2, Environmental Review Office, 75 Hawthorne Street, San Francisco, CA 94105-390

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- ✓ EPA Region VI (NM) – For EISs prepared for proposed actions located in Region VI’s area of responsibility, districts should send two (2) copies to: U.S. Environmental Protection Agency, Region 6, 1445 Ross Aienne, Suite 1200, Dallas, TX 75202.
- ✓ EPA Region VIII (CO, UT) – For EISs prepared for proposed actions located in Region VIII’s area of responsibility, districts should send two (2) copies to: U.S. Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, CO 80201-1129
- *Department of the Interior.* At the request of the Director of the Office of Environmental Policy and Compliance, one electronic copy (i.e., CD) should be mailed to: Department of the Interior, Director, Office of Environmental Policy and Compliance (MS-2462), 1849 C Street NW, Washington, D.C. 20240. If the DEIS is available on the internet and the website/URL is provided to DOI, then only the one electronic copy (i.e., CD) is necessary for submittal to DOI; otherwise, 18 electronic copies of the DEIS must be provided to DOI to disseminate to their reviewing bureaus.
- *South Pacific Division, U.S. Army Corps of Engineers.* One copy (CD format) of the DEIS will be sent to: U.S. Army Corps of Engineers, South Pacific Division, Attention: CESPD-PDS-O, 1455 Market Street, San Francisco, CA 94103-1399.
- *Cooperating Agencies.* The Regulatory PM in charge of the EIS will coordinate with each cooperating agency as to the preferred format and number of DEISs and will furnish copies accordingly.

Agency	Total # of Copies of DEIS	
	Hard Copy (paper)	Electronic (e.g., CD)
EPA Headquarters	--	Electronically filed via e-NEPA
Corps Headquarters	--	1
Department of Interior	--	18*
Cooperating Agency(s)	TBD*	TBD**
EPA Regional Office		
- Environmental Review Office	1	1
- Wetlands Regulatory Office	1	1
South Pacific Division	--	1
* 18 CDs to be provided unless the DEIS is available for viewing and downloading on-line and then only one CD needs to be submitted to DOI along with the web link/URL site.		
** To be determined on a project-by-project basis and in consultation with individual cooperating agencies.		

7.8.10 Hold DEIS Public Hearing/Meeting. Holding a public hearing or meeting during the public review and comment period is advised, but is not required. If a public *hearing* is to be held pursuant to 33 C.F.R. § 327 for a permit application requiring an EIS, the alternatives analyzed in the DEIS should be considered at the public hearing. The Regulatory PM should

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make the EIS available to the public at least 15 days in advance of the hearing date. If a hearing request is received from another agency having jurisdiction as provided in 40 C.F.R. § 1506.6(c)(2), then the district should coordinate a joint hearing with that agency whenever appropriate to enable the cooperating agency or co-lead agency the opportunity to fulfill its public hearing requirements. If a public *meeting* is planned in-lieu of a formal hearing, the Regulatory PM should consult with Regulatory Division management and the district's PAO to determine the most appropriate format and venue for the meeting.

- *Hearing/Meeting Preparation.* The Regulatory PM in charge of the EIS is responsible for preparing the opening remarks for the presiding officer and the presentation materials (e.g., slides, handouts). It is appropriate and acceptable for the applicant, a co-lead agency (e.g., Tribal government), cooperating agency(s) and/or the State or local co-lead agency (if applicable) to make an opening statement or brief presentation addressing their roles and responsibilities related to the proposed action. Any presentation materials developed or delivered by the applicant and/or third-party contractor(s) will be reviewed and approved by the Regulatory PM in advance of the public hearing/meeting. Generally, if the applicant participates in the public meeting or hearing, his/her role is limited to providing a brief presentation of the proposed action (refer to Attachments 9.5.1, 9.5.2 and 9.5.3 for additional guidance on public meetings and hearings).
- ✓ All stakeholders and affected parties who choose to be a part of the NEPA process should have equal access to the information presented during a public hearing (or meeting) as well as be given a reasonable means to communicate testimony, statements and opinions to the Corps for inclusion in the public record. Based on the demographics of the participants expected to attend the public hearing/meeting, districts will assess the need for an interpreter to be present at the hearing/meeting. If an interpreter is determined appropriate, the third-party contractor will be responsible for making all necessary arrangements, including contractual requirements and payments.
- *General Conduct of Hearing or Meeting.* For a formal public *hearing*, the presiding officer will make an opening statement explaining the purpose of the hearing and the general procedures to be followed during the hearing. Any person will be allowed to submit oral or written statements so long as the testimony adheres to the established public hearing guidelines. The cross-examination of witnesses at public hearings will not be allowed. All hearings will be reported verbatim (i.e., use of a stenographer/court reporter) and the transcript along with all evidence introduced during the hearing will be made available for public inspection. For a public *meeting*, the structure of the Corps' involvement will vary depending on the format of the meeting. For example, with an open house-style meeting or poster session, the district may elect to have the third-party contractor and several Corps representatives familiar with the applicant's proposed project located at key positions or stations throughout the meeting room to address questions from individual members of the public. The meeting room may be staged to organize posters or tables with information by topic (e.g., NEPA process/schedule, alternatives under consideration, biological resources, traffic impacts, noise impacts, aquatic resources and so forth). If a more formal meeting is held, the Corps' presiding officer may first make opening remarks to the entire group, explain the environmental review process as well as provide a brief description of the proposed project or request the applicant discuss his/her proposed project, followed by an

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opportunity for questions and answers. Sometimes a more formal meeting will be facilitated by a professional consultant who has public meeting experience and familiarity with the Corps as well as NEPA.

- *Filing of Transcript in the Administrative Record.* The transcript, public comments (oral and written) and all evidence introduced at the public hearing/meeting will be made part of the project's administrative record. The transcript and all evidence submitted at the public hearing will be considered by the Regulatory PM when preparing the final EIS and advising the NEPA responsible official in final agency decision-making.

7.9 Final EIS Preparation, Coordination, Review and Filing. Following circulation of the DEIS and in consideration of public comments received, a final EIS (FEIS) is prepared. The FEIS must identify the applicant's preferred alternative and evaluate all reasonable alternatives considered. Identifying the proposed action as the "applicant's preferred alternative" is important in terms of upholding the Regulatory Program goal to provide fair and reasonable permit decisions without bias since the Corps is neither a project proponent nor a project opponent. Specifically, Appendix B directs districts to identify in the FEIS the applicant's final proposed action as the "applicant's preferred alternative". The FEIS will also discuss substantive comments received on the DEIS and responses thereto, summarize public involvement, and describe the mitigation measures that are to be incorporated into the final proposed action. The FEIS will document the district's compliance with all applicable environmental laws, including ESA and NHPA, regulations and EOs, or provide reasonable assurance that the requirements can be met. The Regulatory PM in charge of the EIS will make every reasonable effort to resolve interagency disagreements before processing the FEIS. If significant issues remain unresolved, the FEIS will identify those issues and the consultations and other efforts made to resolve them.

7.9.1 Response to Comments on the Draft EIS. This is one of the most important parts of the FEIS because it demonstrates whether the agency fully considered all relevant information before reaching a final decision. The FEIS should provide complete substantive responses in a measured and respectful tone that demonstrates a reasoned analysis by the Corps. While the results of the NEPA analysis and public input do not in and of themselves dictate or mandate a particular agency decision, all substantive comments received from the public should be meaningfully and holistically considered by the district. This is paramount to ensuring the agency decision-maker has properly considered the public interest and environmental consequences (adverse as well as beneficial impacts) of the proposed action when making a final decision. The Corps' responses to comments, as documented in the FEIS, are essential to facilitating decision-making, promoting responsive government action and strengthening the administrative record.

Comments on the DEIS should be submitted directly to the Corps. Districts may consider providing a written acknowledgement of receipt to commentors who submitted individual comments or letters on the DEIS (e.g., email, postcard or generic template letter), although this is not required by regulation or policy. All substantive comments received on the DEIS (or summaries where the public comment was exceptionally voluminous) should be attached to the FEIS whether or not the comment is thought to merit individual discussion in the text of the FEIS. Districts will identify the substantive comments that require response in the FEIS and provide them to the applicant and third-party contractor for evaluation and response. The

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applicant may elect to contact or attempt to resolve issues raised by commentors, however, the applicant is not required to do so.

Not all comments received on the DEIS will require changes or revisions to the FEIS, although certain substantive comments may raise significant issues regarding the EIS and necessitate one of several actions occur, including: 1) modify alternatives including the proposed action; 2) develop and evaluate alternatives not previously given serious consideration; or 3) supplement, improve or modify the analysis. On one extreme, public comment may raise an issue or identify an alternative which is not a variation of the applicant's proposal or of any alternative discussed in the DEIS, and is a reasonable alternative that "...warrants serious agency response", meaning, the issuance of a supplement to the DEIS is necessary to discuss the new alternative (refer to CEQ's Forty Most Asked Questions and Answers). In most instances, however, the responses to comments will be confined to making factual corrections or explaining why the comments do not warrant further response (refer to 40 C.F.R. § 1503.4 and Attachment 9.8 for additional information). In all cases, the Regulatory PM will be responsible for ensuring the applicant and third-party contractor's draft responses are adequate prior to inclusion in the administrative draft FEIS and pre-final ("camera-ready") FEIS.

- *Organizing and Documenting Responses to Public Comments.* Transparency is paramount to effective public involvement during the NEPA and DA permit application evaluation processes. For this reason, the Regulatory PM will work with the third-party contractor to ensure a method or tool is implemented to document and organize all public comments received on the DEIS and to track how comments are responded to and addressed by the Corps in the FEIS. Districts should consider processes to catalogue public comments and provide a link on district websites for public viewing of comments and comment letters received.

7.9.2 Prepare the Administrative Final EIS. Leading up to the filing and circulation of the FEIS, the third-party contractor will, at the direction of the district, prepare an administrative draft FEIS (AFEIS) for Corps and cooperating agency(s) review. The AFEIS will incorporate factual corrections and other revisions or additions based on comments received on the DEIS and responses to all substantive comments received. In most cases, the district will work with the third-party contractor in addressing the public comments received with input from the applicant, as needed (refer to procedure 7.9.1 above).

7.9.3 District-Level and Cooperating Agency(s) Review and Coordination of the AFEIS. The Regulatory PM in charge of the EIS will provide for a reasonable period of time to conduct an internal review of the AFEIS, usually 30 days. The AFEIS (in hard copy, CD, PDF or via an internet link/ftp site) should be furnished to cooperating agency(s), Regulatory Division management, district OC and other district business lines, as appropriate, for review and comment.

- *Address and Incorporate District and Cooperating Agency(s) Comments on the AFEIS.* Under the direction of the Corps, review comments provided on the AFEIS will be addressed and incorporated by the third-party contractor or otherwise resolved prior to submittal of a revised (i.e., second version) AFEIS to SPD. The Regulatory PM in charge of the EIS should work with the third-party contractor to implement a method to track how district-level and

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cooperating agency review comments are addressed by the third-party contractor. Examples of such methods or tools may include, but are not limited to, the development of a comment/response matrix or the production of a redline/strikeout copy of the revised document. Similar to the ADEIS, the Regulatory PM will budget for a reasonable amount of time for the third-party contractor to respond to internal review comments. The district will work with the third-party contractor, cooperating agency(s) and other Corps business lines, as appropriate, to ensure all comments have been sufficiently addressed and any issues have been satisfactorily resolved. As noted in Section 7.5 (disputes with cooperating agencies), failure to resolve concerns of cooperating agencies prior to finalizing the EIS will likely result in the need for supplemental NEPA documentation.

7.9.4 SPD Review of the AFEIS. The Regulatory PM in charge of the EIS must provide two copies of the revised (i.e., second version) AFEIS to CESPDPDS-O in accordance with CESPDP-CM-O (1145) Memorandum dated 5 November 2002 and 33 C.F.R. § 230.17. SPD will forward comments to the Regulatory PM in charge of the EIS within 15 working days from receipt of the document.

- *Address and Incorporate SPD Comments.* The Regulatory PM in charge of the EIS will work with the third-party contractor to incorporate SPD comments and produce a pre-final (“camera-ready”) FEIS. The method for verifying that SPD comments are satisfactorily addressed will be left to the discretion of the Regulatory PM in charge of the EIS and SPD, but will insure that the SPD reviewers agree division comments have been adequately addressed.

7.9.5 Prepare the Pre-Final (“camera-ready”) FEIS. Following the incorporation of SPD review comments on the AFEIS, the third-party contractor will prepare a pre-final (“camera-ready”) FEIS. Upon the Corps’ review and approval of the pre-final (“camera-ready”) FEIS, the third-party contractor will produce a PDF version (no greater than 50 MB; if larger, then the document must be divided into chapters or subchapters) and hard copies (e.g., CDs or paper), as needed, in preparation for the public circulation of the ‘official’ FEIS. Based on the district’s preferred approach for circulation and distribution of the FEIS, the third-party contractor may also be required to establish an internet link/ftp site for the public posting of the NEPA document.

7.9.6 File FEIS with HQ EPA. The entire document with a new cover sheet must be electronically filed as the final statement with HQ EPA no earlier than it is also transmitted to commenting agencies and made available to the public (refer to 40 C.F.R. § 1506.9). This will assure that the FEIS is received by all interested parties by the time EPA’s NOA appears in the *Federal Register*. Districts will follow the same procedures outlined in procedure 7.8.6 above for electronically filing the FEIS with HQ EPA.

7.9.7 Publish Notice of Availability of FEIS. The NOA for the FEIS informs the public, interested parties and other governmental organizations of the availability of the FEIS for a 30-day review (waiting) period. CEQ NEPA implementing regulations indicate “... an agency may request comments on a final EIS before the decision is finally made” [40 C.F.R. § 1503.1(b)]. The NOA published by HQ EPA should specify the close of the review period and include the contact information of the Regulatory PM in charge of the EIS for obtaining further information.

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For publication of the NOA, districts will follow the procedures set forth in procedure 7.8.7 above.

7.9.8 Prepare District-Level Public Notice Regarding FEIS NOA. Concurrent with the publication of the NOA of the FEIS in the *Federal Register*, or as close as possible to the publication date, the district will prepare a PN notifying members of the public, including all those who commented on the DEIS, the FEIS is available for a 30-day review (waiting) period. Based on CEQ NEPA implementing regulations, the Corps retains discretion to request comments on the FEIS, as warranted (refer to 40 C.F.R. § 1503.1(b)). As with the district-level PNs for the NOI and NOA of the DEIS, this FEIS NOA PN is intended to provide notification of the availability of the FEIS to members of the public who may not otherwise be aware that a FEIS has been issued. As well, this PN will notify agencies, stakeholders and members of the public of the district's pending DA permit decision.

- *Post and Circulate the FEIS NOA PN.* The Regulatory PM will ensure the PN and a PDF of the FEIS is posted to the district's website (or provide a link to an ftp site on the district's website where the FEIS may be viewed and downloaded) and distribute the PN to appropriate Federal, State and local agencies, Tribal government entities (Indian tribes), adjoining property owners, and other interested parties in accordance with the district's Regulatory Division public noticing procedures. Districts will provide the PN to all adjoining property owners in accordance with district PN notification procedures (e.g., postcards, mailings of hard copies of the entire PN, etc.). In addition, one copy of the PN along with a copy of the FEIS will be provided to CESPDPDS-O.
- ✓ 404(q) Elevation – 3(b) “Will Affect” Letter. The FEIS NOA PN will also fulfill the Corps' formal notification requirements to agencies under the 1992 Memoranda of Agreement for 404(q) elevations. In response to the FEIS NOA PN, if issues were raised during the DEIS in a 3(a) “may affect” letter and remain unresolved, then EPA, USFWS or NMFS may issue a 3(b) “will affect” letter stating the proposed project will have substantial and unacceptable impacts to an ARNI. For this reason, districts will make clear in the FEIS NOA PN that following the completion of the ROD the Corps plans to render a permit decision on the applicant's preferred alternative and will specify the authorities under which the DA permit application will be reviewed and processed.

7.9.9 Provide Electronic Copy of FEIS to HQUSACE and Distribute the FEIS for Public Review. In accordance with Appendix B, at the same time the FEIS is electronically filed with HQ EPA, one electronic copy (e.g., CD) of the FEIS will be sent to: U.S. Army Corps of Engineers, Directorate of Civil Works, Regulatory Community of Practice (refer to Attachment 9.9 for individual names and contact information for coordination of the FEIS with HQUSACE officials). Additionally, the FEIS should be transmitted to those individuals, organizations or agencies that provided comments on the DEIS or requested a copy of the FEIS. In the case of lengthy documents, the district may provide alternative circulation processes in accordance with 40 C.F.R. §1502.19. The district may opt to post the FEIS to its website or provide a link to an ftp site for agencies and members of the public to download and review. The official 30-day review (waiting) period commences with EPA's publication of the NOA in the *Federal Register*. Once electronically filed with HQ EPA, the FEIS should be available for public review at publicly accessible institutions such as local government offices, public libraries and schools, as

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appropriate. If the Corps elects to make the FEIS available on the internet, the Regulatory PM in charge of the EIS needs to include the internet link in the FEIS NOA PN. Districts should follow similar procedures outlined in procedure 7.8.9 for circulating the FEIS.

Agency	Total # of Copies of FEIS	
	Hard Copy (paper)	Electronic (e.g., PDF/CD)
EPA Headquarters	--	Electronically filed via e-NEPA
Corps Headquarters	--	1
Department of Interior	--	9*
Cooperating Agency(s)	TBD*	TBD**
EPA Regional Office		
- Environmental Review Office	1	1
- Wetlands Regulatory Office	1	1
South Pacific Division	--	1
* 9 CDs to be provided unless the FEIS is available for viewing and downloading on-line and then only one CD needs to be submitted to DOI along with the web link/URL site.		
** To be determined on a project-by-project basis and in consultation with individual cooperating agencies as to the preferred format and number of FEISs.		

7.9.10 Consider and Address Comments Received on the Final EIS. Districts will consider all comments on the FEIS and address substantive issues in the ROD, as appropriate.

7.10 Record of Decision.

7.10.1 Prepare the Record of Decision. CEQ requires that each agency prepare a concise public ROD. For Regulatory Program EISs the ROD constitutes the statement of findings and combined decision document. A ROD must be prepared in accordance with 40 C.F.R. § 1505.2 for the signature of the Corps NEPA responsible official and should explain what the decision is, the reasons for the project decision, identify all alternatives considered by the Corps in reaching its permit decision, the district’s views on the probable effect of the proposed work on the public interest, summarize any mitigation measures that will be incorporated into the project and document compliance with applicable Federal laws and regulations (refer to Attachment 9.7 for a ROD template and Attachment 9.8 for additional guidance on RODs. See also CEQ’s January 14, 2011 guidance on mitigation and monitoring, which includes guidance on matters relating to commitments made in RODs and how to address these issues in agency decision-documents).

- *Consider and Address Substantive Public Comments Received on the FEIS.* The district should consider any substantive comments received on the FEIS as it prepares its ROD. The purpose of the FEIS is to present the decision-maker with an evaluation of the environmental consequences (and benefits) of the proposed action and its alternatives before a final decision is made.
- *Identify the Environmentally Preferable Alternative.* The ROD must identify the “environmentally preferable” alternative, which in the context of 40 C.F.R. § 1505.2(b)

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refers to the alternative that will promote the national environmental policy as expressed in NEPA Section 101. Ordinarily, this means the alternative that causes the least damage to the biological and physical environment; it also means the alternative which best protects, preserves and enhances historic, cultural and natural resources. It may or may not be the LEDPA.

- *Identify the LEDPA, Determine Compliance with the 404(b)(1) Guidelines and Document the District's Public Interest Review Determination.* Within the ROD, districts will identify the LEDPA, determine and document compliance with the Guidelines and issue the public interest review determination, including a discussion on all relevant public interest review factors considered in the decision. Normally, districts will ensure the NEPA alternatives analysis is rigorous and thorough enough to demonstrate compliance with the Guidelines without the need for supplemental analysis or a separate section 404(b)(1) alternatives analysis.
- *Document Compliance with Other Applicable Laws, Regulations and Executive Orders.* The final status of the district's compliance with applicable Federal laws, regulations and EOs should be documented in the ROD. Generally, if formal consultation with USFWS or NOAA Fisheries under section 7 of the ESA was required, the final biological opinion should be completed and referenced to in the ROD. Similarly, if consultation with SHPO and ACHP under section 106 of the NHPA resulted in the development of a Programmatic Agreement (PA) or a Memorandum of Agreement (MOA), such documentation should be executed amongst the parties prior to the signing of the ROD and referenced accordingly.

7.10.2 Issue and Distribute the ROD. The Corps' NEPA responsible official must complete and sign the ROD no sooner than 30 days after publication of the NOA of the FEIS in the *Federal Register* or 90 days after publication of a notice for the draft EIS, whichever is later. The ROD must be dated and included in the project's administrative record prior to final action on the DA permit application. Until the ROD has been signed, no approvals, such as issuance of a standard individual permit, will be given, except for administrative activities taken by the applicant to secure further project funding and other activities consistent with 40 C.F.R. § 1506.1. According to CEQ, RODs are considered a type of "environmental document" and therefore, should be made available to the public as required by 40 C.F.R. § 1506.6(b). However, since CEQ notes there is no specific requirement for publication of the ROD itself, either in the *Federal Register* or elsewhere, as soon as practical after the ROD is signed the district will post the signed ROD to its website in accordance with local district procedures and issue a Special PN (SPN) informing members of the public the ROD is available for viewing. Alternatively, but less desirable, the district may rely upon its monthly published listing of permits issued or denied during the previous month for notifying the public of the availability of the ROD. This list typically includes the public notice number, name of the applicant, a brief description of the activity involved, relevant environmental documents and the statement of findings or ROD (which are available upon written request (refer to 33 C.F.R. § 325.2(a)(8)). For individuals who have specifically requested a copy of the ROD, the district should direct such individuals to the district's website or provide a hard copy of the ROD for those without computer access.

- *ROD for Projects Involving Approval of Modifications and Alterations of Corps Projects.* According to current HQUSACE implementation guidance, for applicants requesting Corps

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approval of a ‘major’ modification or alteration to a Corps-authorized project that requires HQUSACE approval under 33 U.S.C. 408 and where there is a need for a section 404 and/or section 10 permit and an EIS, districts will draft the ROD, but it will not be signed until the Corps has completed its Section 408 analysis and HQUSACE has issued section 408 approval. The Corps’ ROD and the 408 request will be processed as concurrently as possible to reduce the delay between the section 408 decision and the ROD. After the 408 request is approved and the ROD is signed, districts may issue any needed section 404 and/or section 10 permits (refer to 3.0 References for additional implementation guidance on Federal actions that require approval under 33 U.S.C. 408).

7.10.3 Post-ROD Supplemental NEPA Documentation. Following issuance of the Corps’ ROD and DA permit decision, situations may arise in which project modifications occur which were not considered in the FEIS or new information or changed conditions may be discovered. Substantial changes in the proposed action that are relevant to the environmental consequences or significant new information or changed conditions relevant to the environmental consequences that have a bearing on the proposed action or its impacts should be examined in a supplemental NEPA document (refer to 40 C.F.R § 1502.9(c)). A supplemental analysis or supplemental EA may be prepared for any new information made available subsequent to the publication of the FEIS, so long as the new information does not reveal in itself, a “significant” impact on the quality of the human environment. If it were “significant”, then the district would need to prepare and circulate a supplemental EIS (*Northern Idaho Community Action Network v. U.S. Dept. of Transportation*, 545 F.3d 1147 (9th Cir. 2008). See also Attachment 9.8, Question #36). When the district considers supplementation and concludes that it is not required, the reasons for this conclusion should be documented in writing and retained in the project files.

8.0 Records and Measurements.

8.1 Records.

8.1.1 Administrative Record. The administrative record, sometimes called the “AR”, documents the agency’s decision-making process and the basis for the agency’s decision. Districts will take care to retain project files, both electronic and paper, that comprise the administrative record. This is particularly important during times of transition, such as staff turnover or office moves. During the NEPA process, references to the administrative record generally refer to project files, both electronic and hard copy. When there is a court challenge related to the NEPA document or the associated DA permit decision, district OC will review the project files to determine which records are relevant to the issues raised in the lawsuit. The agency will then lodge an official agency administrative record with the court responding to the specific allegations of the lawsuit. Challenges to a NEPA document and/or a DA permit decision are determined based on the administrative record filed with the court. However solid the agency’s reasoning may be, unless documented in writing it will not be part of the administrative record. When concerns are raised during internal reviews or by the public, it is important to document appropriate responses in writing.

This SOP specifies certain documents that must be included in the administrative record, but there may be a number of other documents, publications, letters, memoranda and communications not explicitly identified herein that are relevant to agency decision-making,

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including the public interest review determination, that should be retained. Regulatory PMs should consult with district OC when in doubt and refer to U.S. Department of Justice’s guidance to Federal agencies on compiling the administrative record (refer to 3.0 References, DOJ guidance to Federal agencies on compiling the administrative record).

It should be emphasized that there are many reasons to maintain project files. The possibility of future litigation is just one of them. Maintaining files during the sometimes lengthy environmental review process insures that institutional knowledge is not lost over time or through the movement of personnel. It is also necessary for the agency to comply with official records retention policy, which is an important element of transparency in agency decision-making.

8.1.2 Final EISs. Filed EISs are retained in the EPA Office of Federal Activities for a period of two years and are made available to office staff only. After two years the EISs are sent to the National Records Center. After a total of twenty years the EISs are transferred to the National Archives Records Administration. Regulatory PMs in charge of an EIS will make sure a copy of the FEIS for which a DA permit decision was based upon is included in the Corps official administrative record and is retained in accordance with current district record filing and retention procedures. While normally, only final documents need to be kept and all preliminary, administrative draft and public draft documents should be eliminated from the official administrative record once a final document is issued, districts may need to retain draft or preliminary documents in the administrative record for purposes of documenting how comments received were addressed. Furthermore, since Federal agencies are not required to republish everything from the draft in the final EIS, there may be some situations where districts will need to keep both draft and final EISs (e.g. when the final EIS is an abbreviated EIS, and the draft EIS is part of the final EIS). In such cases, draft or preliminary versions can be retained electronically (e.g., CDs) to reduce bulk in the project file.

8.1.3 All documents listed above will be filed in the corresponding project files in accordance with ES-QMS140, “Records Management.

Type	Description	Responsible Office	Location	Record Media	Retention	Disposition
R	Final EIS	District/Field offices	Project file folders in filing cabinets within SPD districts and in ORM v.2 database	P	Indefinite or life of project’s official administrative record/file	Send to records holding

9.0 Attachments.

Attachment 9.1: General NEPA Steps, Processes and Integration Procedures

[9.1.1—Major NEPA Milestones, EIS Process Checklist and General Timeline](#)
[9.1.2 – NEPA and section 404 of the CWA “Integration”](#)

Attachment 9.2: Third-Party Disclosure/Conflict of Interest (Templates)

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[9.2.1 – Financial Disclosure/Conflict of Interest Form \(Firm/Corporation/Company\)](#)

[9.2.2 – Financial Disclosure/Conflict of Interest Form \(Individual/Employee\)](#)

[9.2.3 – Financial Disclosure/Conflict of Interest Form \(optional short version\)](#)

Attachment 9.3: Roles and Responsibilities

[9.3.1 – Cooperating Agency Invitation Letter \(Template\)](#)

[9.3.2 – Statement of Responsibilities \(Template\)](#)

[9.3.3 – Checklist/Guide to Roles and Responsibilities in the Preparation of Coordination of EISs](#)

Attachment 9.4: Notice of Intent

[9.4.1 – NOI \(Template\)](#)

[9.4.2 – NOI Transmittal Letter \(Template\)](#)

Attachment 9.5: [EIS Outline/Table of Contents \(Template\)](#)

Attachment 9.6: Public Hearing Information and Recommendations

[9.6.1 – Public Meeting/Hearing Checklist](#)

[9.6.2 – Public Meeting/Hearing Comment Card](#)

[9.6.3 – Public Meeting/Hearing Sign-in Sheet](#)

Attachment 9.7: [Record of Decision \(Template\)](#)

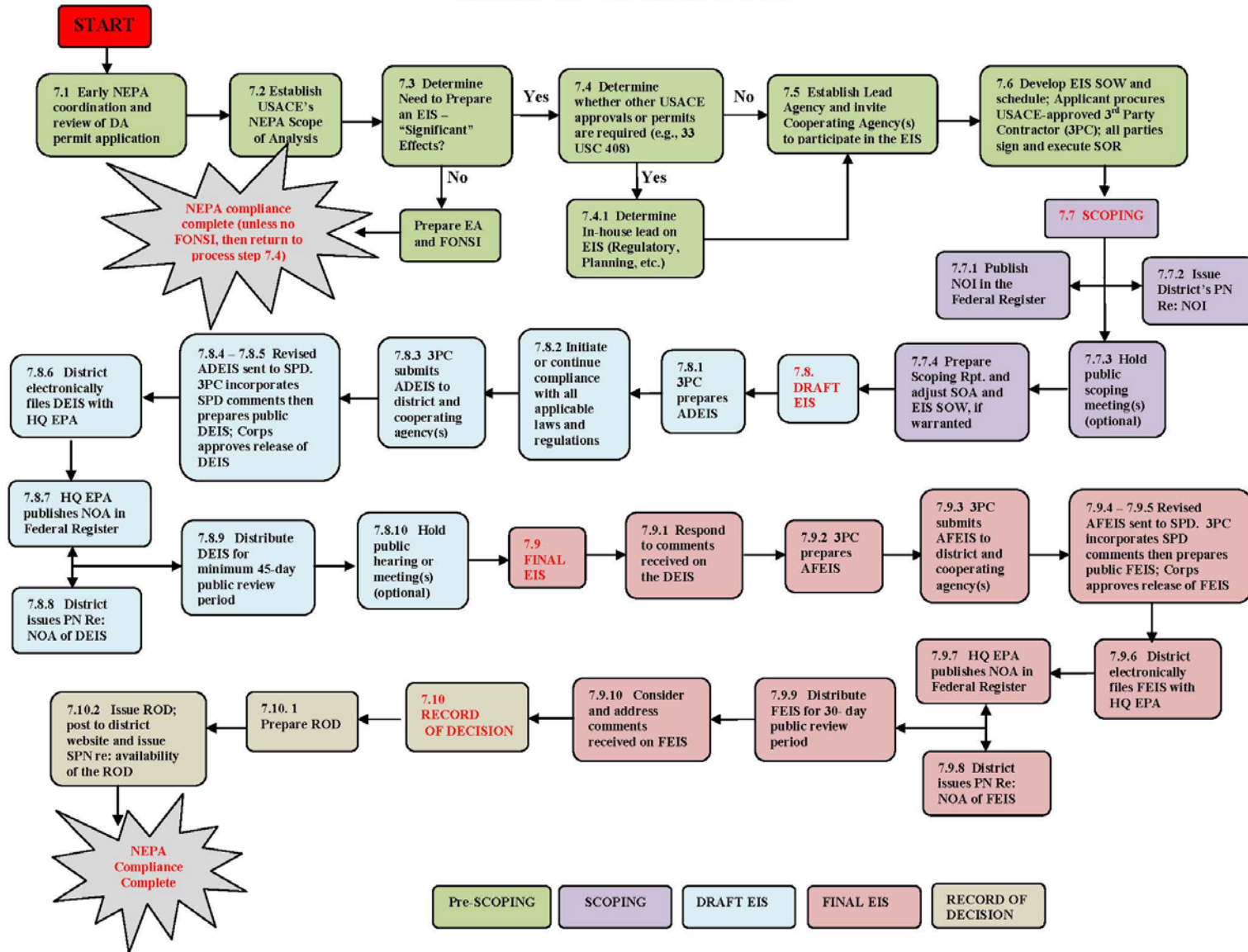
Attachment 9.8: [Frequently Asked Questions](#)

Attachment 9.9: [Individual Names and Contact Information of Agency Officials for Coordination of EISs and Associated Federal Register Notices](#)

10.0 Flow Chart.

10.1 EIS Process Overview

Flowchart 10.0 – EIS Process Overview



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